

Missouri Attorney General's Opinions - 1947

Opinion	Date	Topic	Summary
<a href="#">1-47</a>	Jan 6	COUNTY COURTS. COUNTY CLERKS.	County clerk may not take acknowledgments of various types of conveyances of real estate but may take all oaths or affirmations as are required by law or that may be incident to the exercise of the powers and duties of his office or incident to the powers and proceedings of the county court in which he is clerk.
<a href="#">1-47</a>	Mar 24	SCHOOLS. SCHOOL DISTRICT DIRECTORS. QUALIFICATIONS.	Annexation of portion of one school district to another; construction of requirement that director of school district be resident taxpayer of district.
<a href="#">1-47</a>	May 23	SCHOOLS.	When two school districts are annexed the subsisting school district is entitled to all moneys belonging to the annexed school districts.
1-47	July 18	Hon. George P. Adams	WITHDRAWN
<a href="#">1-47</a>	Aug 23	SPECIAL BENEFIT ASSESSMENT ROAD DISTRICT. COUNTY COURT.	County court cannot compel commissioners of special benefit assessment road district to repair or maintain a particular road.
<a href="#">1-47</a>	Sept 16	SHERIFF’S FEES.	Authority of the sheriff to bill county court for expenses of guarding insane persons.
<a href="#">3-47</a>	Jan 21	TAXATION. SALES TAX.	Retail sales of tangible personal property to cost-plus-fixed-fee contractors for the Federal Government or its agencies are taxable under the Sales Tax Act.
<a href="#">3-47</a>	Jan 22	MAGISTRATE COURT.	County Court has authority to permit the Magistrate to use the Circuit Court room at such times as it is not in use by the Circuit Court.
<a href="#">3-47</a>	Feb 24	RECORDER OF DEEDS.	Three questions concerning fees for issuing verified copies of discharges in counties of the third class under House Bill No. 772.
<a href="#">3-47</a>	Mar 27	COUNTY FARM ORGANIZATION. COUNTY AGENT. COUNTY COURT.	(1) Under Sec. 6, H.B. 112, 62nd G.A., Laws 1943, p. 319, it is mandatory that county farm agent’s office or headquarters be located at county seat. (2) Location of office at county seat consisting merely of a stenographer and continuation of bulk of agricultural agent’s work at a place other than county seat not compliance with requirements of said Sec. 6. (3) County court authorized to allot funds for county agent even though his office or headquarters not kept at county seat.
<a href="#">4-47</a>	Feb 18	COUNTY.	Construing House Bill 893, passed by the 63rd General Assembly.

		SALARY. CIRCUIT CLERKS.	
<a href="#">4-47</a>	June 5	SCHOOL FUND DISTRIBUTION.	County and Township school funds merged into one fund after liquidation.
<a href="#">4-47</a>	July 28	RECORDER OF DEEDS.	Fees collected by Recorder of Deeds of Jasper County for acknowledging affidavit on application for license to marry must be accounted for, as provided by House Bill No. 897, Laws of Missouri, 1945.
<a href="#">4-47</a>	Oct 21	MAGISTRATE COURTS.	Magistrate jurors selected by Board of Jury Commissioners in counties wherein petit jurors are selected by such Board of Jury Commissioners.
<a href="#">5-47</a>	Jan 24	SCHOOL FUNDS, COUNTY & TOWNSHIP. MAGISTRATE FUNDS.	When a small balance remains after reinvestment of township and county school funds, this balance to be carried on books until legislation provides for disposal. Magistrate fines distributed to schools of the county.
<a href="#">5-47</a>	July 16	ELECTIONS. BONDS. TAXATION ROADS AND BRIDGES.	County may levy full amount permitted by Sec. 11(b), Art. X of Constitution for county purposes. County may call special election to make unlimited tax levy for bridge purposes, for not to exceed four years, by two-thirds vote at such election. County may become indebted and issue bonds up to 10% of assessed valuation of county inclusive of existing indebtedness for bridge purposes.
<a href="#">5-47</a>	Aug 11	COURT REPORTERS.	Allowed amount actually expended in maintaining privately owned automobile while traveling in exercise of official duties.
<a href="#">6-47</a>	Feb 18	LOAN AND INVESTMENT CORPORATIONS— MANUFACTURING AND BUSINESS CORPORATIONS.	A corporation organized under Art. VIII, Chap. 33, R.S. Mo. 1939, as a Loan and Investment Company may not by amendment of its Articles of Incorporation change the purposes of its incorporation to those of a manufacturing and business corporation.
<a href="#">9-47</a>	May 14	COUNTY CLERK. FEES. COUNTY COLLECTOR. DRAINAGE DISTRICT.	County clerk must charge statutory fee for oath and certificate to affidavit of county collector to the return of drainage tax books of circuit court drainage district.
<a href="#">9-47</a>	July 18	RECORDER OF DEEDS.	Recorder of Deeds can collect fees for listing names of veterans and issuing certified copies of discharges although no estimate was made in the budget.
<a href="#">10-47</a>	Jan 6	CONTACT LENSES. STATE BOARD OF OPTOMETRY.	One who examines the eye to determine whether contact lenses should be used to correct defects or abnormal conditions, or who takes an impression mold of the eyeball, or who fits a contact lens to the eye, must be an optometrist, possessing a certificate of registration



			from State Board of Optometry, or a physician or surgeon, licensed to practice in this state.
<a href="#">10-47</a>	Jan 11	JURORS. MAGISTRATE COURT.	Sheriff should summon jurors to serve in magistrate court from body of county, such jurors to have same qualifications as jurors chosen for regular petit jury, and to be paid as provided in Sec. 13419, R. S. Mo. 1939, from costs collected in cause in which jurors serve.
<a href="#">10-47</a>	Jan 22	SCHOOL FUND. CONSERVATION.	Fines for violation of the Criminal Laws, including the violation of the Fish and Game or Conservation Laws and Regulations, should be paid to the county school fund; the magistrate is not under a duty of forwarding the same to the Department of Revenue; the same does not go to the credit of the Conservation Commission.
<a href="#">10-47</a>	July 9	PROBATE JUDGES.	Under the provisions of Article 2, Chapter 51, R. S. Mo. 1939, a "finding" must be made before the Probate Court can make an order.
<a href="#">10-47</a>	Nov 5	BOARD OF OPTOMETRY.	Empowered under Section 47, Laws of Mo., 1945, page 1445, to change their fiscal year to begin on July 1.
<a href="#">10-47</a>	Dec 22	TAXATION. TAX SALE.	Amount bid upon and paid for land that does not exist, at delinquent tax sale, may be repaid, with interest, to the purchaser by the county court.
11-47	July 11	Hon. Llyn Bradford	WITHDRAWN
<a href="#">11-47</a>	Oct 23	OFFICERS. MUNICIPALITIES.	City officials do not violate Section 4483, R.S. 1939, by leasing land to the University of Missouri, for experimental purposes, for a nominal consideration.
<a href="#">12-47</a>	Feb 4	ROADS AND BRIDGES. TAXATION. ELECTION.	Taxes levied for road and bridges purposes, authorized by first sentence of Section 12 (a), Article X of the Constitution are distributed four-fifths to the special road district from which the tax arose, and one-fifth to the county. Taxes levied under the second sentence of said section are all placed to the credit of the road district authorizing the levy. Elections authorizing the levy of not more than 35¢ additional road tax may be held on the day of a general or special election, provided the election is held within 20 days from the filing of the petition for the election.
<a href="#">12-47</a>	Feb 11	OFFICERS. SALARIES AND FEES.	Sheriff cannot be paid mileage for travel beyond the State for the purpose of returning a prisoner who has waived extradition.
12-47	Mar 24	Hon. Herbert S. Brown	WITHDRAWN
<a href="#">12-47</a>	Apr 1	TAXATION. CONSTITUTIONAL LAW.	Levy of a tax for purpose of county library fund in addition to tax levy as limited by Sec. 11(b) of Art. X of the Const. Such levy will not prevent county court from increasing tax levy for county purposes

			within limit set by Sec. 11(b) of Art. X of Const. Only limitation is that tax shall not be levied in one year which will produce mathematically more than 10% in excess of taxes of previous year.
<a href="#">12-47</a>	Apr 4	CORPORATIONS.	A corporation doing business in this State may not transact its corporate business in this State under any other name than its corporate name.
<a href="#">12-47</a>	June 10	COUNTY COURTS.	Correality between county court and county highway engineer in administering road laws.
<a href="#">12-47</a>	June 12	RECORDER OF DEEDS.	Not required to record notice of levy on execution under Section 1343, R.S. Mo. 1939, until paid the recording fee therefor. Section 10975, R.S. Mo. 1939, was repealed by House Bill No. 469, Missouri Laws of 1945. Consequently, recorder not required to maintain "mortgage list" as required by said Section 10975.
<a href="#">12-47</a>	Oct 22	MOTOR VEHICLES.	Trucks which farmers use to transport agricultural products, livestock, or supplies to or from a farm or farms which are designed or regularly used for carrying freight and merchandise are "local commercial motor vehicles" and must contain the information on the vehicles, as required by Section 8369, Mo. R.S.A.
<a href="#">12-47</a>	Nov 10	PAROLE.	Parole authorities have power to parole convict where punishment imposed and affirmed by Supreme Court is a fine and jail sentence.
<a href="#">13-47</a>	Jan 21	BOARD OF PROBATION AND PAROLE.	When requested by the Board of Training Schools, the Board of Probation and Parole or the parole officer of said Board has authority to cause arrest of persons on parole.
<a href="#">13-47</a>	Feb 4	PAROLE. RULES OF PENITENTIARY.	Parolee not allowed time while on parole as against Prison Term; Prison authorities cannot make rules to defeat the three-fourths statute.
<a href="#">13-47</a>	Feb 5	ORDER OF PAROLE.	Order of Parole form meets requirements of Section 8992.39, Laws 1945, p. _____, S.C.S.S.B. No. 347, Sec. 39.
<a href="#">13-47</a>	Apr 7	LIQUOR CONTROL.	The bond required by Section 4960, Laws of 1945, is an indemnity bond and not a forfeiture bond.
<a href="#">13-47</a>	May 24	PROBATE COURTS. SOCIAL SECURITY. GUARDIANSHIP PROCEEDINGS. INSANITY.	Section 9417, Mo.R.S.A., applicable to all expenses incurred in proceedings to declare person of unsound mind and to appoint guardian.
<a href="#">13-47</a>	June 17	INTOXICANTS.	Under Section 4890 R.S. Mo. 1939, territories cannot be annexed or added to another one, in order to be taken outside the scope of said section.

<a href="#">13-47</a>	Aug 28	INTOXICATING BEVERAGE. LIQUORS.	Proper to place inscription of alcoholic content of nonintoxicating beer on neck label of bottle.
<a href="#">13-47</a>	Sept 15	CIRCUIT CLERK. COUNTY COURT. BUDGET LAW.	When circuit judge of third class county has approved appointment of deputies and assistants to circuit clerk, and set salaries, county must pay such salaries, even though not anticipated in county budget. Salaries to be paid out of class 6 of county budget.
<a href="#">17-47</a>	Mar 27	COUNTY COURT.	It is within the discretion of the county court to pay a wolf bounty up to but not exceeding ten dollars.
<a href="#">17-47</a>	Apr 30	MAGISTRATE COURTS. AUTOMOBILES.	Magistrate Courts have no authority to suspend or revoke license on misdemeanor conviction.
<a href="#">17-47</a>	Nov 1	COUNTY ASSESSORS.	Section 15 provides that the record owner of real property must be notified when the assessor increases the valuation of the property.
<a href="#">17-47</a>	Dec 4	REAL ESTATE BROKERS.	A person who is not engaged in the real estate business, who does not advertise or hold himself out as a real estate broker, and who, in a single transaction obtains a buyer of real estate for another for a promised compensation, is not a real estate broker within the meaning of the Missouri Real Estate Commission Act.
<a href="#">18-47</a>	Jan 13	TAXATION AND REVENUE.	Sec. 8527 of H.C.S.H.B. 784 of 63rd General Assembly held constitutional in so far as it directs return of portion of road and bridge tax to special road districts.
<a href="#">18-47</a>	Feb 13	ELECTIONS.	County hospital.
<a href="#">18-47</a>	June 24	MANUFACTURER’S LICENSE. MERCHANT’S LICENSE.	A person who quarries and crushes stone and sells same is a merchant and not a manufacturer. A person who makes cheese is a manufacturer.
<a href="#">18-47</a>	July 15	TAXATION. COUNTY COURT. COUNTY BUDGET.	County court has not authority to change the valuation of property returned by assessor. County court may apportion class for demands of the budget if there is not sufficient revenue to pay all such demands.
<a href="#">18-47</a>	Oct 9	MAGISTRATES.	No fees accrued to magistrate court when judge thereof grants temporary injunction. No record made in magistrate court of such proceeding.
<a href="#">18-47</a>	Oct 13	SPECIAL ROAD DISTRICTS. TOWNSHIP ORGANIZATION.	Special road district formed in county not under township organization under provisions of Arts. 10 or 11, Chap. 46, R.S.A., is not automatically dissolved when county votes in township organization, but such road district is not entitled to any part of taxes received by county or township under provisions of Sec. 8527, Laws 1945, p. 1478, or Sec.

			8820, H.B. 42, 64th General Assembly.
<a href="#">18-47</a>	Nov 13	PROBATE COURT. INDIGENT INSANE. COUNTY BUDGET.	County is liable for fees accruing in Probate Court in indigent insane hearings. Such fees, when not included in county budget, should be paid out of class 5 or class 6 of such budget.
<a href="#">18-47</a>	Dec 16	CRIMINAL LAW. PROSECUTING ATTORNEYS.	Construing Section 4420, H. B. 117, passed by the 64th General Assembly relative to failure to support minor children.
<a href="#">19-47</a>	Feb 18	ROADS & BRIDGES. SPECIAL ROAD DISTRICTS.	Territory of extended special road districts must be included in an area twelve miles square.
<a href="#">19-47</a>	Mar 25	CONSERVATION COMMISSION. MOTOR VEHICLES.	Construing House Bill No. 317, known as the Motor Vehicle Safety Responsibility Act, passed by the 63rd General Assembly, as it applies to employees of the Conservation Commission.
<a href="#">19-47</a>	Apr 18	CONSERVATION COMMISSION. FOREST CROP LAND.	Land classified as Forest Crop Land for 25 years under House Bill No. 1006, passed by the 63rd General Assembly, will automatically be removed from such classification thereafter.
<a href="#">19-47</a>	Apr 28	DEPARTMENT OF BUSINESS AND ADMINISTRATION.	Effect and meaning of Senate Bill No. 348 passed by the 63rd General Assembly on the duties and liability of the Department of Business and Administration, and the duties and responsibility of his subordinates.
<a href="#">19-47</a>	Apr 29	DEPARTMENT OF BUSINESS AND ADMINISTRATION.	Duties of Director of the Department of Business and Administration in making consolidated report to the Legislature and to the Governor of the activities of the divisions in his Department under sub-section (f) of section 4 of Senate Bill No. 348.
19-47	June 4	Mr. Con Cosetllo	WITHDRAWN
<a href="#">19-47</a>	Sept 30	SEMINARY FUND. SCHOOLS. STATE TREASURER.	Investment of Seminary Fund is under exclusive control of Board of Curators. State Treasurer liable on bond only if investment is not legal.
<a href="#">19-47</a>	Oct 16	BARBER BOARDS.	The State Board of Barber Examiners is not empowered to require of apprentices or students qualifications additional to those in Section 10134, R.S. Mo. 1939.
<a href="#">20-47</a>	Mar 28	TAXATION AND REVENUE.	Counties may, by a two-third vote, levy a tax above constitutional limit for health purposes.
<a href="#">20-47</a>	May 19	SHERIFFS.	Sheriff has the custody, rule, keeping and charge of the county jail. In counties of the third class, the sheriff recovers from the county court for board furnished city prisoners.
<a href="#">22-47</a>	Apr 19	MEMORIAL AIR PORTS.	Under House Bill 192 city receiving allotment of less than \$10,000 may at a latter date receive further allotment which will make up the full

			\$10,000 limit.
<a href="#">22-47</a>	May 27	AIRPORTS. SURPLUS GOVERNMENT PROPERTY.	Statutes constitute waiver of State’s prior claim to surplus government airports.
<a href="#">22-47</a>	June 5	DIVISION OF RESOURCES AND DEVELOPMENT. AVIATION. SCHOOLS.	Division of Resources and Development not authorized under subsection (g) of Section 15393.7, Mo. R.S.A., to inspect flying schools for the Department of Education.
<a href="#">22-47</a>	June 17	DIVISION OF RESOURCES AND DEVELOPMENT. CIVIL AIR REGULATIONS. COURTS.	Federal Government cannot confer on state agencies and courts power to enforce civil air regulations.
<a href="#">22-47</a>	Aug 1	AVIATION.	Division of Resources and Development not authorized under Sections 15393.1 to 15393.14, Mo. R.S.A., to represent the State in feeder airline application hearings.
<a href="#">23-47</a>	Jan 7	AGRICULTURE. COMMERCIAL FEEDING-STUFFS.	“Sun-cured Alfalfa Meal” and “Dehydrated Alfalfa Meal” are commercial feeding-stuffs, as defined in Section 14319, R. S. Mo. 1939, and require registration and payment of tonnage inspection fees, as required by Section 14326, R.S. Mo. 1939.
<a href="#">23-47</a>	June 2	SCHOOLS.	When premiums on policies of insurance on buildings on Central Missouri State Teachers College are paid out of the earnings fund reappropriated to the college, insurance money therefrom is to be turned into the state treasury.
<a href="#">23-47</a>	June 3	SCHOOLS. TAXATION.	Property owned by state college exempt from taxation.
<a href="#">24-47</a>	Jan 23	PROBATE AND MAGISTRATE COURTS.	Bonds of Magistrate and Probate Judges and clerks; necessary to furnish bond for each office held, except Magistrate Judge.
<a href="#">24-47</a>	Jan 31	TAXATION AND REVENUE.	Real property held by Trustees of Jacob L. Babler Trust for income producing purposes is not exempt from taxation.
<a href="#">24-47</a>	Feb 14	SCHOOL. PUBLIC SCHOOL. RETIREMENT FUND.	Mandatory retirement at age 70 not effective during duration of World War II which will not terminate until treaties of peace or until other proper governmental action.
<a href="#">24-47</a>	Aug 25	PUBLIC SCHOOL	Teachers in state training schools and school at Mt. Vernon not

		RETIREMENT ACT.	included.
<a href="#">24-47</a>	Sept 11	COUNTY COURTS.	After county court has given assent to electric company to erect poles, etc., through, on, under or across the public roads or highways of the county, and electric company has started construction of electric line and installed poles, etc., county court cannot revoke such order of assent.
<a href="#">24-47</a>	Dec 6	TAXATION. CITIES.	Taxes on property cannot be levied to pay principal and interest on revenue bonds issued by city for construction and operation of public utility.
<a href="#">24-47</a>	Dec 18	SHERIFF'S. CITIES.	Counties liable for Sheriff's costs in returning paroled inmates to State Hospitals. Cases appealed from Police Court of Cities of 4th Class do not become criminal cases.
<a href="#">25-47</a>	Mar 31	CRIMINAL LAW ARRESTS.	Sheriffs have authority to hold person under arrest without formal charge for a period not to exceed twenty hours; applies to misdemeanors as well as felonies; sheriffs have reasonable time to take persons arrested before magistrate.
25-47	July 23	Hon. Ralph H. Duggins	WITHDRAWN
<a href="#">26-47</a>	Jan 16	MAGISTRATES.	If one person holds both the offices of clerk of the probate court and clerk of the magistrate court he must file two bonds as required by Senate Bill 200 and Senate Bill 207 of the 63rd General Assembly.
<a href="#">26-47</a>	Jan 23	PROSECUTING ATTORNEY. NEPOTISM.	Prosecuting attorneys may be reimbursed for necessary and indispensable expenditure for stenographic services. No objection to county judges being related.
26-47	Jan 31	Board of Election Commissioners	WITHDRAWN
<a href="#">26-47</a>	Feb 11	MOTOR VEHICLES.	Expiration date of Missouri drivers' licenses issued between July 1, 1946, and June 30, 1947.
26-47	Feb 17	Hon. Walter A. Eggers	WITHDRAWN
<a href="#">26-47</a>	Oct 1	MAGISTRATE COURTS. PROBATE COURTS.	In counties of less than 30,000 inhabitants special probate judge and ex officio magistrate appointed or elected under Sections 2458 through 2462, R.S.Mo. 1939. Same compensation as regular judge to be paid from magistrate fund. Special probate judge in counties of more than 30,000 inhabitants entitled to same compensation as regular judge, to be paid by county.
<a href="#">26-47</a>	Oct 18	SCHOOLS. OFFICERS.	One person cannot hold at the same time the office of secretary and treasurer of a consolidated or town school district.
<a href="#">26-47</a>			

<a href="#">26-47</a>	Nov 7	MAGISTRATE COURTS.	Magistrate clerks can issue warrants and set the amount of and approve bonds in criminal cases.
<a href="#">26-47</a>	Dec 9	TAXATION. ASSESSMENT.	Assessment of taxes by cities may not be in excess of the valuation fixed for state and county purposes.
<a href="#">27-47</a>	Jan 3	SHERIFFS.	Sheriff is entitled to \$300 per day for attending circuit, probate and magistrate courts if his attendance has been requested by the judges of said courts.
<a href="#">27-47</a>	Jan 31	TAXATION AND REVENUE.	Liability of corporation for Missouri franchise tax in year subsequent to filing of articles of dissolution.
<a href="#">27-47</a>	July 25	TOWNSHIPS. ROADS AND BRIDGES. ROAD DISTRICTS. ELECTIONS. TAXATION.	Question of whether or not election held under provisions of Section 8529, Laws of Mo. 1945, authorized imposition of tax voted, depends on question of whether or not townships were formed into "general road districts" by the township boards.
<a href="#">27-47</a>	Nov 19	TAXATION.	Tangible personal property owned by Reconstruction Finance Corporation is not subject to taxation.
<a href="#">27-47</a>	Dec 18	TAXATION. FRANCHISE TAX. RAILROADS.	All property and assets of a railroad corporation should be taken into account in calculating franchise tax.
27-47	Dec 23	Hon. Clarence Evans	WITHDRAWN
<a href="#">27-47</a>	Dec 30	MAGISTRATE COURT. CRIMINAL COSTS.	Where fine and costs are immediately tendered upon plea of guilty or conviction, same should be received by the sheriff for distribution.
<a href="#">29-47</a>	Feb 18	COUNTY LIBRARY.	County library board has sole right to determine qualifications, pay and number of county library employees.
<a href="#">31-47</a>	Jan 10	TAXATION AND REVENUE. AGRICULTURAL AND MECHANICAL SOCIETIES.	Real property owned by agricultural and mechanical societies not exempt from taxation when not used exclusively for purposes set out in Section 14170, R. S. Mo. 1939.
<a href="#">31-47</a>	Jan 20	MAGISTRATES. JUSTICES OF THE PEACE.	Magistrates and justices of the peace in counties with township organization have concurrent jurisdiction in preliminary examinations for felony cases and in misdemeanor cases.
<a href="#">31-47</a>	Jan 23	TOWNSHIPS. ELECTIONS.	Election held in Livingston County in November, 1946, on question of continuing or discontinuing township organization was void since the petition for submission of question of continuing or discontinuing township organization was filed less than 60 days before date of such election.
<a href="#">31-47</a>			

<a href="#">31-47</a>	Mar 24	ELECTIONS. TAXATION.	A petition presented to county court under provisions of Sec. 14185, Laws of 1943, p. 317, before county court has set tax levy for county purposes, is of no effect, and county court has no authority to call such election. If county court does levy the constitutional limit for county purposes, no election can be held and no levy can be made under the provisions of Sec. 14185, Laws of 1943, p. 317.
31-47	Mar 27	Mr. W. C. Frank	WITHDRAWN
<a href="#">31-47</a>	June 12	AUDITS.	State auditor is not required to audit or formulate bookkeeping systems for the office of the sheriff of the City of St. Louis.
<a href="#">31-47</a>	July 1	COUNTY COURT. LIQUOR. REVENUE.	Fees derived from license charges, under Liquor Control Act, must be placed in the general revenue.
<a href="#">31-47</a>	Sept 8	ELECTIONS. LIQUIDATED COUNTY SCHOOL FUNDS.	County court can consolidate two or more election precincts in the county regardless of township boundaries.
<a href="#">31-47</a>	Oct 28	TOWNSHIP COLLECTORS.	Township collectors are not required to turn over tax books until after their final settlement with the county court.
<a href="#">32-47</a>	Sept 11	MAGISTRATES.	If reason for change of venue is bias and prejudice of inhabitants of a county, venue must be awarded to magistrate in adjoining county. Magistrate has no authority to require proof of such bias and prejudice.
33-47	Feb 20	Mr. Spencer H. Givens	WITHDRAWN
33-47	Mar 26	Hon. D. W. Gilmore	WITHDRAWN
<a href="#">33-47</a>	Apr 23	LABOR. WORKMEN'S COMPENSATION.	The Division of Workmen's Compensation has the power to appoint an assistant or deputy to the Director to whom the latter may delegate the authority to perform the ministerial acts of his office.
<a href="#">33-47</a>	June 25	POLICE RETIREMENT SYSTEM. STATUTES.	Section 8, subsection (1), paragraph (a) of House Bill 307, not retroactive in its operation.
<a href="#">33-47</a>	July 10	COUNTY COURTS. COUNTY FUNDS.	Moneys placed in wrong funds may be withdrawn and correctly credited to proper fund by a nunc pro tunc judgment of County Court.
<a href="#">33-47</a>	July 23	TAXATION. ASSESSOR.	No provision for compensating assessor nor picking up real estate transfers in recorder's office and transferring them to plat books in his office.
<a href="#">33-47</a>	Aug 23	WORKMEN'S COMPENSATION.	Dissolution of insurer is not of itself such a default of insurer as to render employer primarily liable to injured employee, his dependents



			or other persons entitled to rights thereunder.
<a href="#">33-47</a>	Sept 6	MAGISTRATES.	Three questions regarding abstracting and indexing unsatisfied judgments appearing in records of justice of the peace.
<a href="#">33-47</a>	Sept 26	WORKMEN'S COMPENSATION DIVISION.	Relating to tax moneys collected from insurance carriers and the transferal of the Division fund to the credit of the ordinary revenue fund of the state.
<a href="#">33-47</a>	Oct 23	FISH AND GAME. CRIMINAL LAW.	Construction of Section 20, Wildlife and Forestry Code, page 664, Laws of Missouri, 1945.
<a href="#">33-47</a>	Nov 17	FARMERS' FIRE AND LIGHTNING INS. COS.	Farmers' mutual fire and lightning insurance companies may not write policies against loss of personal property by theft.
<a href="#">35-47</a>	Jan 24	FUNCTIONS OF BOARDS OF EDUCATION.	Powers and duties of the Board of Education of consolidated school districts after organization of new district, and powers of board of directors of old district which form part of the consolidated district.
<a href="#">35-47</a>	Oct 29	ESTATE TAX.	Intangible personal property estate of nonresident subject to Missouri estate tax.
<a href="#">37-47</a>	Apr 9	SCHOOLS. SCHOOL ELECTIONS.	School election where a majority of voters favored annexation not held invalid because order of board of school directors calling election not set out in minutes.
<a href="#">37-47</a>	June 14	PROSECUTING ATTORNEYS. SCHOOL DISTRICTS.	School district may employ attorney. Prosecuting Attorney may defend school district in civil actions, in his private capacity.
37-47	July 10	Hon. Lane Harlan	WITHDRAWN
<a href="#">37-47</a>	July 10	TAXATION. CONSTITUTION. CITIES.	Under Section 6, Article X, Constitution of Missouri, 1945, property of the City of Sedalia, Missouri, is exempt from taxation.
<a href="#">37-47</a>	Nov 3	CHIROPODY.	One who is not licensed to practice chiropody who advertises and holds himself out as a "Cuneiform Specialist" violates the provisions of Section 9800 R.S.Mo. 1939.
<a href="#">37-47</a>	Dec 3	SCHOOLS.	Compensation of county superintendent for preparing budgets is part of his annual salary for the purpose of calculating his expense account.
<a href="#">38-47</a>	May 16	COMMON SCHOOL DISTRICTS.	Power to sell school property vested in voters of district at annual school meeting.
<a href="#">39-47</a>	Jan 17	MAGISTRATE COURTS.	Magistrates may hold court in towns other than the county seat but are not entitled to travel expenses; the clerk of the magistrate court should be present while court is in session.
<a href="#">39-47</a>	Aug 13	SALARIES.	Sheriffs not entitled to fee for arrests made by highway patrol; may

		FEES. SHERIFFS.	collect fee for trial or confession, but must turn same into revenue fund.
<a href="#">39-47</a>	Aug 19	WORKMEN'S COMPENSATION.	Division may make an order commuting compensation. Such order is reviewable by Commission. Commission or Division may order inspection of employer's premises, subject to limitations. Such order, if made by Division, is subject to review by the Commission.
<a href="#">39-47</a>	Aug 23	COUNTY ASSESSORS. COMPENSATION.	County assessors in second class counties not entitled to additional compensation for acting as member of the county board of equalization.
<a href="#">40-47</a>	Mar 11	NEPOTISM.	Appointment of deputy whose great-grandfather was also sheriff's great-grandfather and whose grandfather was brother of sheriff's grandfather, not in violation of nepotism provision.
<a href="#">40-47</a>	May 8	SCHOOLS.	In order to qualify under Section 10420, R.S. Mo. 1939, a school director elected must be a taxpayer, who shall have paid a state and county tax within one year next preceding his election.
<a href="#">40-47</a>	May 22	TAXATION. COUNTY LIBRARY. ELECTION.	Majority vote only is necessary for establishment of county library under provisions of Sec. 14767, R.S. Mo. 1939. Senate Bill 370, 63rd General Assembly, is authorization for levy of library tax in addition to constitutional limit and does not require two-thirds vote.
<a href="#">40-47</a>	June 28	ELECTIONS. TAXATION. ROADS AND BRIDGES.	Under the provisions of Sec. 8529, Laws of 1945, page 1480, the county court may designate the places of voting for the tax increase in a general or special road district authorized by the first paragraph of Sec. 12, Art. X of the Const.
<a href="#">41-47</a>	June 11	TAXATION AND REVENUE.	Missouri Power & Light Company not liable for Missouri income tax upon refunds ordered paid to consumers.
41-47	Aug 5	Mr. J. W. Hobbs	WITHDRAWN
<a href="#">41-47</a>	Sept 17	REAL ESTATE COMMISSION.	No license required for person merely soliciting the listing of real estate.
<a href="#">41-47</a>	Oct 30	REAL ESTATE COMMISSION.	Section 14 includes misdemeanors as well as felonies. A judgment upon an insufficient information is not a conviction within the meaning of Section 14.
<a href="#">41-47</a>	Nov 6	MISSOURI REAL ESTATE COMMISSION. LICENSES.	A previous conviction of arson does not disqualify one from obtaining a broker's license or a real estate salesman's license.
<a href="#">42-47</a>	Mar 4	EXCESS FEES. PROBATE JUDGES.	Disposition of excess fees earned by probate judges prior to January 1, 1947.
<a href="#">42-47</a>			

<a href="#">42-47</a>	Apr 18	SAVINGS & LOAN ASSOCIATIONS.	Savings & Loan Associations under Sections 2, 42 and 47 of House Bill #481 may enact and enforce a by-law to retain as a withdrawal fee a reasonable sum, perhaps to the extent of 50% of the dividends earned, where an account is withdrawn within one year after the investment thereof, and after the enactment of such by-law.
<a href="#">42-47</a>	May 15	PUBLIC PRINTING AND BINDING.	Definition of phrase “public printing and binding” as used in State Purchasing Agent Act.
<a href="#">42-47</a>	July 1	SAVINGS AND LOAN ASSOCIATIONS.	Three questions regarding rights of supervisor.
<a href="#">42-47</a>	July 11	TOWNSHIP BOARDS. ROADS AND BRIDGES.	When a special road district is formed under Art. 18, Chap. 46, R.S.A., twp. bd. of trustees must deliver to commrs. of spec. rd. dist. all tools and machinery to which dist. is entitled. Commrs. of spec. rd. dist. and twp. bd. of trustees cannot contract for redelivery of road tools and machinery. Commrs. of spec. rd. dist. and twp. bd. cannot make contract providing twp. will do road work in spec. rd. dis. for consideration of taxes due spec. rd. dist. under township levy.
<a href="#">42-47</a>	July 23	INCREASING SALARIES OF PUBLIC OFFICERS.	Salaries of public officers may be increased under the Constitution during the terms of such officers where additional duties are added to their regular duties.
<a href="#">42-47</a>	July 24	APPROPRIATIONS.	Availability of current appropriation to pay claims for refunds of motor vehicle fuel tax accruing during previous fiscal year.
<a href="#">42-47</a>	July 28	LAWS. CONSTITUTIONAL LAW.	Senate Bill 159 effective September 10, 1947; Said bill and Senate Bill 176 are constitutional.
<a href="#">42-47</a>	Aug 2	INCREASING SALARIES OF PUBLIC APPOINTIVE OFFICERS.	Salaries of public officials who are appointed and who have no fixed terms of office may be increased during their official periods of appointment.
<a href="#">42-47</a>	Aug 14	STATE GEOLOGISTS. PUBLIC OFFICERS.	Compensation of state geologist cannot be increased during present term of office. That of his chief assistant may be increased not to exceed \$5,000.00.
<a href="#">42-47</a>	Aug 16	COMMISSIONER OF AGRICULTURE.	Under provisions of Senate Bill No. 10 of the 64th General Assembly, after September 10, 1947, Commissioner of Agriculture will have no “term of office” and salary provided for in Senate Bill No. 10 will be paid to Commissioner of Agriculture.
<a href="#">42-47</a>	Nov 26	PENITENTIARY. INTERMEDIATE REFORMATORY.	Transactions between the penitentiary and the Intermediate Reformatory may be handled on a system of debits and credits.
<a href="#">_____</a>			

<a href="#">42-47</a>	Dec 11	REFUNDS FROM STATE TREASURY.	Section 9.061 of House Bill No. 445 of the 64th General Assembly held void.
<a href="#">42-47</a>	Dec 15	ESCHEATS.	Section 9.100 of H.B. 445 is ineffective. Court order necessary to obtain money in Escheats Fund.
<a href="#">42-47</a>	Dec 17	APPROPRIATIONS.	Appropriation available for six months after expiration of period for which made to pay obligations lawfully incurred during said period.
43-47	Jan 10	Mr. W. R. J. Hughes	WITHDRAWN
<a href="#">43-47</a>	Mar 24	COMPENSATION OF COUNTY COLLECTORS IN COUNTIES OF THE SECOND CLASS.	County collector may not retain any compensation for his services other than the annual salary of \$5,000.00.
<a href="#">43-47</a>	Apr 16	CONSERVATION COMMISSION. CRIMINAL LAW. MISDEMEANOR.	A misdemeanor cannot be prosecuted in a magistrate court prior to the filing of an information by the prosecuting attorney.
44-47	Apr 30	Hon. David E. Impey	WITHDRAWN
<a href="#">44-47</a>	May 27	SHERIFFS IN THIRD CLASS COUNTIES.	Sheriff may not retain an arrest fee or mileage for apprehending a person in Missouri who is charged with a felony in another state.
<a href="#">44-47</a>	Aug 14	COUNTY BOARD OF EQUALIZATION. COUNTY JUDGES. COUNTY CLERK. COUNTY SURVEYOR. COUNTY SHERIFF.	County judges, county clerk, county surveyor and sheriff in third class counties may receive compensation as members of County Board of Equalization.
<a href="#">44-47</a>	Sept 11	EMPLOYMENT BUREAUS.	The Baby Sitters Service, an organization furnishing sitters for its members, is subject to the provisions of Section 10131, R.S. Mo. 1939.
<a href="#">45-47</a>	Jan 9	SALES TAX. DIRECTOR OF REVENUE.	Director of Revenue authorized to look to records of one unit in order to compute a tax under another unit.
45-47	Jan 20	Dr. R. M. James, M. D.	WITHDRAWN
<a href="#">45-47</a>	Jan 23		Opinion Letter to the Hon. Owen G. Jackson
<a href="#">45-47</a>	Mar 11	FOREIGN INSURANCE CORPORATIONS— INVESTING FUNDS IN REAL ESTATE.	Neither foreign insurance corporations nor domestic insurance corporations under Sec. 5, Art. XI of our Constitution are authorized or empowered to invest their capital or funds, of any description, in real estate in this State, as an investment, but may only hold real estate for such purposes and for such time as are provided in said Sec. 5, Art. XI

			of the present Constitution of this State.
<a href="#">45-47</a>	Mar 20	INSURANCE COMPANIES— PREMIUM TAXES— DEDUCTIONS.	Under Senate Bill #98 insurance companies may take deductions for the whole preceding year in computing the amount of privilege or license tax they are required by Secs. 6098a and 6098b to pay for the privilege of doing business in this State during the ensuing year. Returns prepared by the Insurance Department for the use of companies in such computation should provide for deductions to be taken for the whole of the preceding year to the year in which such privilege tax must be paid.
<a href="#">45-47</a>	Mar 29	INSURANCE.	Charter amendment of Business Men's Assurance Company of America.
<a href="#">45-47</a>	Apr 22	INSURANCE.	Amendment of Articles of Inc. of the American Central Insurance Company.
<a href="#">45-47</a>	Apr 22	INSURANCE.	Amendment of Articles of Ass'n of the Kansas City Fire and Marine Ins. Company.
<a href="#">45-47</a>	May 2	COUNTY COLLECTOR. PUBLIC OFFICER.	Under Section 11068, R.S. Mo. 1939, County Collector not in default may also hold the office as member of Board of Directors of said School District.
<a href="#">45-47</a>	June 19	TAXATION. SALES TAX.	Cost-plus-contractors who pay a sales tax on materials which they use in such contracts may bill the firm with which they are contracting for reimbursement of the amount of such tax and such contractors would not be required to remit the amount of such reimbursement to the State Collector of Revenue.
<a href="#">45-47</a>	July 9	INCORPORATION BY PRO FORMA DECREE.	An organization by an association of persons under a mutual benefit proposal, where its Articles of Association and By-Laws show the proposed corporation would be making a profit for some of the members at the expense of other members, in insurance. Such association may not be incorporated under Section 5437, Article 10, Chapter 33, R.S.Mo. 1939, under a pro forma decree.
<a href="#">45-47</a>	Aug 8		Opinion Letter to the Hon. Owen G. Jackson
<a href="#">45-47</a>	Sept 3		Opinion Letter to the Hon. Owen G. Jackson
<a href="#">45-47</a>	Sept 3		Opinion Letter to the Hon. Owen G. Jackson
<a href="#">45-47</a>	Sept 16	MOTOR VEHICLE SAFETY RESPONSIBILITY ACT.	Taxicabs licensed and operating in municipalities as common carriers which are not regulated by ordinances, are subject to the provisions of the Motor Vehicle Safety Responsibility Act.
45-47	Sept 26	Mr. W. O. Jackson	WITHDRAWN
<a href="#">45-47</a>	Oct 7		Opinion Letter to the Hon. Owen G. Jackson
<a href="#">45-47</a>	Nov 18	DEPARTMENT OF	The Division of Health does not have the power to operate a general

		PUBLIC HEALTH AND WELFARE. DIVISION OF HEALTH.	hospital without legislative authority.
<a href="#">45-47</a>	Nov 19	INSURANCE.	Payment of claims, Insurance and Emergency Fund; Reserve fund, annual statement – stipulated premium company.
<a href="#">46-47</a>	Jan 15	TAXATION. COUNTY COLLECTOR.	Acceptance of tender of undisputed taxes on Railway property will in no way affect right to enforce collection of taxes, the validity or constitutionality of which is denied by the Railway. Nonacceptance of tender of part of taxes on Railway’s property will result in penalties attaching to entire amount of taxes due if any one or more of disputed levies are held valid, but penalties will not attach to the entire amount of taxes if all of disputed tax levies are held invalid.
46-47	Feb 7	Hon. Roy A. Jones	WITHDRAWN
<a href="#">46-47</a>	May 2	COUNTY SCHOOL FUND. LIQUIDATION AND DISTRIBUTION.	If the proposal to distribute the county school funds is approved, such distribution shall be made as soon as practicable or within a reasonable time.
<a href="#">46-47</a>	May 15	TAXATION. EXEMPTION.	Real estate belonging to non-profit organizations is not exempt from taxation.
<a href="#">46-47</a>	Aug 27	COUNTY HIGHWAY ENGINEER.	The duly elected or appointed surveyor of Henry County is ex officio county highway engineer until January 1, 1949. County court is vested with the power to employ road and bridge foremen and other employees; highway engineer selects his assistants, subject to approval by the county court.
<a href="#">46-47</a>	Sept 5	TAXATION.	Taxes levied and assessed against land while under private ownership, and which is subsequently transferred to a state college, cannot be collected against said college while land is used and occupied for the purpose of the organization. The transferor does remain liable for such taxes, and his personal property may be levied on for the amount due.
<a href="#">46-47</a>	Oct 30	NEWSPAPERS.	A newspaper which suspended publication during the war because of the owner being inducted into the armed forces may be reinstated within one year after hostilities have ceased with all benefits theretofore held in the matter of publishing legal notices.
<a href="#">47-47</a>	Sept 3	MAGISTRATE COURT. SHERIFF. FEES.	In re: Three questions on sheriff, jury and witness fees in magistrate court.
<a href="#">48-47</a>	Jan 24	PUBLIC WELFARE. SUPERINTENDENT.	Appointment by County Court in counties of the third and fourth class.
<a href="#">_____</a>			

<a href="#">49-47</a>	Nov 7	ASSESSORS. TOWNSHIP ORGANIZATION. COUNTIES.	Township assessors take office on the first day of September following election.
<a href="#">50-47</a>	Mar 14	RECORDERS. MORTGAGES.	Recorder of Deeds of St. Louis City has not authority to release deed of trust which secures notes not mentioned in the deed of trust.
<a href="#">50-47</a>	Nov 21	MARRIAGE. RECORDER OF DEEDS.	Marriage between aunt and nephew of half blood valid. Documents relating to corporations can be recorded by making photostatic copies thereof.
<a href="#">51-47</a>	Jan 25	PROBATE JUDGE. FEES. RECORDER OF DEEDS.	County Court of Boone County cannot make allowance to Probate Court of more than \$1800.00 per year for clerks, assistants and stenographers. Recorder of Deeds of Boone County, whose term expired January, 1947, is liable to county for fees received by him in 1945 and 1946 in excess of \$4000.00 plus payments to necessary deputies and assistants for each year.
<a href="#">51-47</a>	Aug 5	MAGISTRATES.	Magistrate to act in temporary absence of police judge, but not entitled to additional compensation.
<a href="#">51-47</a>	Oct 23	LOTTERIES.	Prize awarded by chance to holder of coupon given with purchase of merchandise.
53-47	Jan 10	Hon. Clinton Lindley	WITHDRAWN
<a href="#">53-47</a>	Apr 24	ELECTIONS.	Failure to hold township elections on the date as provided by statute does not permit the holding of an election on a subsequent date not provided by law. The present incumbent officers continue to hold office and discharge their duties thereunder until their successors are duly elected or appointed and qualified.
<a href="#">54-47</a>	Apr 17	MOTOR VEHICLES.	Reciprocity existing between the States of Missouri and Minnesota.
<a href="#">54-47</a>	Oct 28	SCHOOLS. TAXATION.	Real estate owned by William Jewell College and used exclusively for educational purposes is tax exempt. County court authorized to rebate taxes assessed against property owned by said school.
<a href="#">55-47</a>	Jan 24	TAXATION AND REVENUE.	A penalty of 10% per annum or 1% a month or fraction thereof, attaches to delinquent taxes as of January 1, when such delinquent taxes remain delinquent as of February 1, when the collector starts making his delinquent tax book.
<a href="#">55-47</a>	Apr 15	LABOR LAW.	A female employee engaged in a clerical capacity in one of the Cities Service Oil Company may work only nine hours a day for six days a week.
<a href="#">57-47</a>	Jan 16	PROBATE COURT. PROSECUTING	In re: Costs paid by county in indigent insane hearings; accrued fees due probate judge; duties of prosecuting attorney in indigent insane

		ATTORNEY.	hearing; prosecuting attorney cannot be appointed appraiser in assessing inheritance tax.
<a href="#">57-47</a>	Feb 10	MAGISTRATE COURTS.	Fees in criminal cases.
<a href="#">57-47</a>	Feb 18	COUNTY OFFICERS.	Mode of determining compensation for judges of the county courts in third class counties.
<a href="#">57-47</a>	Feb 26	COUNTY OFFICERS.	Tenure of county treasurers elected at general election on November 5, 1946.
<a href="#">57-47</a>	Mar 26	MAGISTRATES.	State of Missouri is not required to deposit \$5.00 when commencing a suit in the magistrate court; a magistrate shall not require plaintiff to provide security for costs in all proceedings; a \$5.00 magistrate fee is not to be apportioned for the purpose of paying costs of any proceeding.
<a href="#">57-47</a>	Apr 24	COLLECTORS.	Collector who voluntarily pays part of his compensation to the county and makes final settlement, cannot thereafter recover the same.
<a href="#">57-47</a>	June 4	TAXATION AND REVENUE.	Procedure to be followed in assessing real property at its true value.
<a href="#">57-47</a>	July 29	MOTOR VEHICLE.	Theft of truck unable to operate under its own power would constitute theft of motor vehicle.
<a href="#">57-47</a>	Oct 10	NEPOTISM.	An officer approving an appointment submitted to him of an employee related to him within the fourth degree of consanguinity or affinity forfeits his office under the provisions of Section 6 of Article VII of the Constitution of 1945.
<a href="#">57-47</a>	Oct 11	DEPARTMENT OF PUBLIC HEALTH AND WELFARE.	Division directors the sole appointing authorities within the meaning of the State Merit System Act.
57-47	Nov 17	Hon. Samuel Marsh	WITHDRAWN
<a href="#">58-47</a>	Sept 18	NOTARIES PUBLIC. JURISDICTION.	Jurisdiction of notaries public in the City of St. Louis in adjoining counties.
<a href="#">59-47</a>	July 25	SCHOOLS. CHANGE OF SITE.	Proposition for change of site of common school district schoolhouse may be submitted at an annual or special meeting.
<a href="#">59-47</a>	Sept 4	PUBLIC OFFICERS.	Right to reimbursement for travel expense necessarily incurred in discharge of official duties.
<a href="#">60-47</a>	Feb 3	PROBATE COURT. FEES.	Right of probate court to fees for holding hearing in an insanity case.
<a href="#">60-47</a>	Feb 7	COUNTY SCHOOL	Capital of township and county school funds invested in government



		FUNDS. LIQUIDATION. ELECTION.	bonds can be liquidated before maturity. By the petition of the voters county court must call special election for liquidation of school funds even though this expenditure has not been provided for in county budget.
<a href="#">60-47</a>	Feb 25	CORONERS.	In counties of the fourth class are entitled to actual and necessary expenses while carrying out their official duties.
<a href="#">60-47</a>	Feb 28	SHERIFF’S MILEAGE. MAGISTRATE COURT COSTS.	Sheriff entitled to actual expense not in excess of five cents per mile for taking prisoners to penitentiary; magistrate court costs to be taxed as provided for in Section 13409, R. S. Mo. 1939.
<a href="#">60-47</a>	June 10	AIRPORTS. EMINENT DOMAIN. CITIES OF THE FOURTH CLASS.	Fourth class city can condemn land a reasonable distance outside corporate limits to establish airports. Reasonableness of distance is question of fact.
<a href="#">62-47</a>	Feb 5	MAGISTRATES. PROBATE JUDGES. OFFICERS.	Person may not hold the position of probate judge and magistrate and mayor of a city at the same time.
<a href="#">62-47</a>	Feb 21	ROADS AND BRIDGES. HIGHWAY ENGINEER.	Funds from which the salary of the highway engineer may be paid.
62-47	Mar 21	Hon. Roy C. Miller	WITHDRAWN
<a href="#">62-47</a>	Apr 18	TAXATION.	Sec. 11041, H.C.S.H.B. 468, 63rd General Assembly, does not authorize the circuit judge to order levy of 3¢ on \$100 for maintenance, operation and repair of county buildings when constitutional limit for county purposes has been levied.
<a href="#">62-47</a>	Apr 22	LIBRARIES.	Allocation of state aid to tax maintained and supported libraries.
<a href="#">62-47</a>	June 26	COUNTY COURTS. CONSTITUTIONAL LAW. ROADS AND BRIDGES.	County court is without authority to appoint supervising board of road commissioners and prescribe the duties thereof.
<a href="#">62-47</a>	Sept 5	SCHOOLS. COUNTY SUPERINTENDENTS. SALARIES.	County superintendents of schools in counties of the third class may receive the additional compensation provided for in Senate Bill No. 177 of the 64th General Assembly.
<a href="#">63-47</a>	June 19	MAGISTRATE COURTS. CRIMINAL COSTS.	Where defendant is unable to pay costs, fee bill for same is prepared by magistrate and submitted to the clerk of the Circuit Court.
<a href="#">64-47</a>	Jan 17	TOWNSHIP ORGANIZATION.	In counties voting out township organization the county assessor and county collector take office immediately upon being appointed and assume powers and duties of ordinary county as provided by law;

			county takes title to money and property of township and assumes their liabilities; settlement of accounts between township officers and county court.
<a href="#">64-47</a>	Jan 22	TAXATION AND REVENUE.	Liability for taxation of mail carriers retirement pay as intangible personal property under H.C.S.H.B. No. 868.
64-47	Feb 3	Mr. M. E. Morris	WITHDRAWN
<a href="#">64-47</a>	Feb 4	STATE PURCHASING AGENT.	Purchases of certain supplies and printing for Missouri State Highway Commission to be made through Division of Procurement.
<a href="#">64-47</a>	Feb 4	TAXATION AND REVENUE.	In re: Five questions on taxing intangible personal property under H. C. S. H. B. 868.
64-47	May 7	Mr. M. E. Morris	WITHDRAWN
<a href="#">64-47</a>	June 18	DIVISION OF PROCUREMENT.	Purchases of paper from State Paper Procurement Revolving Fund.
<a href="#">64-47</a>	July 3	DEPARTMENT OF REVENUE.	Effect and meaning of Senate Bill No. 143 of the 64th General Assembly relating to the duties and responsibility of the Director of Revenue and the duties of the subordinates thereunder.
<a href="#">64-47</a>	July 18	TAXATION AND REVENUE.	Allowable deductions by resident of Missouri with respect to income subject to Indiana gross income tax.
<a href="#">64-47</a>	July 18	ROADS AND BRIDGES. TAXATION. TOWNSHIP ORGANIZATION.	Tax provided for in Sec. 8527, Laws of 1945, page 1478, is not a levy to be made by a township board, and is not a levy in excess of the levy provided for in Sec. 8820, Laws of 1945, page 1497.
<a href="#">64-47</a>	Aug 13	TAXATION AND REVENUE.	Duty of the Director of Revenue with regard to distribution of moneys collected under House Bills Nos. 868, 869, 888 and 948 of the 63rd General Assembly.
<a href="#">64-47</a>	Sept 5	STATE TREASURY.	Proceeds of sale of surplus property belonging to Missouri Training School for Boys to be deposited in the "Missouri Training School for Boys Fund."
<a href="#">64-47</a>	Oct 16	CRIMINAL LAW.	Construction of Section 4854, R. S. Mo. 1939, known as Habitual Criminal Act.
<a href="#">64-47</a>	Oct 21	PUBLIC RECORDS.	Availability of intangible personal property tax returns to public inspection.
<a href="#">64-47</a>	Oct 30	TAXATION. MANUFACTURERS.	No authority for refunding proportionate part of manufacturers' tax for 1946.
<a href="#">64-47</a>	Dec 11	TAXATION AND REVENUE.	Federal credit unions not required to collect the tax imposed upon the accounts of their members.

<a href="#">65-47</a>	Oct 22	DIVISION OF MENTAL DISEASES. POSTWAR FUND.	Under appropriation of \$100,000.00 for storeroom and \$15,000.00 for bakery, contract may be let in the amount of \$115,000.00 for constructing both as a unit.
<a href="#">66-47</a>	Oct 14	SECRETARY OF STATE.	Secretary of State authorized to fix compensation of all employees in his department.
<a href="#">66-47</a>	Oct 27	SECRETARY OF STATE.	It is his duty under Senate Bill No. 196, Missouri Laws of 1945, to compile, index, and publish all rules adopted by each agency. Also, it is his duty to publish the monthly bulletin, as required in said bill, setting forth the text of all rules filed during the preceding month by the state agencies.
<a href="#">67-47</a>	Mar 5	MAGISTRATES. CRIMINAL LAW.	Prosecuting attorney may file information for a misdemeanor in the circuit court and may file a delinquency case in the circuit court. Defendant cannot take a change of venue from circuit court to magistrate court.
67-47	Sept 23	Hon. A. T. Norton	WITHDRAWN
<a href="#">67-47</a>	Dec 8	TOWNSHIPS. ROADS AND BRIDGES. TAXATION. ELECTION.	In county under township organization county court may levy special tax for road and bridge purposes only under provisions of Sec. 8529, Laws of 1945, p. 1478. Township board cannot call election for purpose of voting tax for road purposes.
<a href="#">68-47</a>	Jan 18	MAGISTRATES.	Magistrate is required by law to appoint a clerk within a reasonable time after being sworn in as magistrate. Magistrate cannot appoint as clerk a school teacher who is employed full time as school teacher and unable to work during office hours as clerk of the magistrate court except on Saturdays and week ends.
<a href="#">68-47</a>	Feb 6	RECORDER OF DEEDS. DEPUTIES.	No provision is made under the laws for payment of deputy recorder of deeds in counties where the circuit clerk is ex officio recorder of deeds.
<a href="#">68-47</a>	Mar 13	MISSOURI TRAINING SCHOOL FOR BOYS. CONTAGIOUS DISEASE. ADMISSION.	Boy affected with contagious disease not to be admitted to Missouri Training School for Boys at Boonville, Missouri.
<a href="#">68-47</a>	May 2	MISSOURI REAL ESTATE COMMISSION.	Effect of conviction under Sec. 51, Title 187, U.S.C.A., upon right to procure real estate broker's or salesman's license.
<a href="#">68-47</a>	May 16	ROADS AND BRIDGES.	"General road districts" must be established by county court.
68-47	Aug 29	Hon. Don W. Owensby	WITHDRAWN

<a href="#">68-47</a>	Nov 21	COUNTY COURTS. PROSECUTING ATTORNEY. COUNTY TREASURER. HIGHWAY ENGINEER.	County court of third-class county may hire stenographer for prosecuting attorney, county treasurer and highway engineer, such stenographer to divide her time among said officers.
<a href="#">69-47</a>	Jan 8	DELINQUENT TAXES. PENALTIES.	The date for determining penalty on delinquent taxes, as provided in Section 11085, House Bill No. 765, applies to the City of Liberty.
<a href="#">69-47</a>	Jan 23	PROSECUTING ATTORNEYS. MAGISTRATES.	Prosecuting Attorneys may be reimbursed for actual and necessary traveling expenses in the investigation of crimes and the county court is authorized to provide for such expenses. Magistrate shall set salaries of his clerk, deputy clerks and employees.
<a href="#">69-47</a>	May 6	PARKS. STATE PARK BOARD.	State Park Board unauthorized to dispose of present transmission system in Cuivre River State Park.
<a href="#">69-47</a>	Aug 26	ELECTION. SHERIFF. CONSTABLE.	Sheriff to perform duties formerly preformed by constable during elections.
<a href="#">69-47</a>	Oct 7	FEDERAL. CONSERVATION COMMISSION. OFFICERS.	Right to enforce laws, rules and regulations pertaining to wildlife at Camp Crowder.
<a href="#">69-47</a>	Oct 9	MOTOR VEHICLES.	Motor vehicle registered in Iowa operating in Missouri intrastate in transporting passengers for compensation must register with Commissioner of Motor Vehicles and pay fee.
<a href="#">69-47</a>	Dec 11	TAXATION. COUNTY.	The only procedure to increase tax levy for county purposes, when the maximum tax has been assessed and levied, is by a vote of 2/3 qualified electors voting thereon and for said increased tax.
<a href="#">70-47</a>	Jan 8	MAGISTRATE COURTS.	Board of Aldermen of St. Louis has the power to provide for additional employees for the Magistrate Court of the City of St. Louis.
<a href="#">70-47</a>	Jan 16	TAXATION. MERCHANTS TAX.	Merchants' Tax provided for in H.C.S.H.B. 471, H.C.S.H.B. 536 and House Bill 995, passed by the 63rd General Assembly, comply with the provisions of Section 4 (a) of Article X of the Constitution of 1945.
<a href="#">70-47</a>	July 29	TAXATION. MANUFACTURER. MERCHANT.	Companies selling wood for fuel are cooperage companies; cooperage companies manufacturing completed staves and headings are manufacturers; companies making rough staves and headings under contract for other companies which complete manufacturing are manufacturers; companies offering for sale, generally, rough staves and headings are merchants.
<a href="#">70-47</a>	Aug 7	EDUCATION.	Interpretation of Senate Bill No. 4 of the 64th General Assembly.

			Military schools with college status not required to teach the courses enumerated in said bill in the college years.
<a href="#">71-47</a>	Mar 21	EXTRADITION.	Only messenger appointed by Governor under Sec. 3976, R.S. Mo. 1939, has authority to return fugitives from justice to this state, and expense must be paid from State Treasury in accordance with Sec. 3977, R.S. Mo. 1939, except in cases where defendant is returned for wife or child abandonment the expense of extradition must be paid by County Court.
<a href="#">71-47</a>	Apr 4	CONSTITUTIONAL LAW. TAXATION & REVENUE.	Constitution doesn't require tax moneys from intangibles to be deposited in State Treasury.
<a href="#">72-47</a>	Jan 23	SCHOOL FUNDS. COUNTY AND TOWNSHIP.	Type of securities in which county and township school funds may be invested.
<a href="#">72-47</a>	Aug 2	PAROLE. CRIMINAL LAW. INTERSTATE COMPACT.	Authorities of State of Florida may retake parolee in this state under interstate compact for violations committed subsequent to this state becoming a signatory to said compact.
<a href="#">73-47</a>	Mar 5	COUNTY TREASURER.	In counties of third class, except counties under township organization, treasurer not entitled to one-half of one percent for disbursing school money in addition to his regular salary.
73-47	Nov 14	Mr. Chas. F. Quinlin	WITHDRAWN
<a href="#">74-47</a>	May 13	SCHOOLS. COUNTY SCHOOL FUND. COUNTY COURT.	County court is not authorized to pay an agent for procuring insurance or collecting on delinquent school fund loans.
<a href="#">74-47</a>	Dec 8	SCHOOLS. BOARD OF DIRECTORS. VACANCIES.	Determination of whether or not a vacancy exists in a school board in a consolidated district due to a member's refusal to serve or neglect of duty is to be made by school board. Before such determination is made member should be notified and given a chance to defend himself.
<a href="#">76-47</a>	Feb 19	COUNTY COURT. COUNTY CLERK.	County court may allow up to \$500.00 per annum to county clerk for payment of additional compensation to deputies and assistants.
<a href="#">76-47</a>	Apr 18	ROADS AND BRIDGES.	County not liable for negligent operation of road and bridge machinery even though used in work optional with county.
<a href="#">76-47</a>	Apr 18	CIRCUIT COURT. CIRCUIT JUDGE. SALARY.	Circuit judge required to serve as jury commissioner under Section 13394, R.S. Mo. 1939, but not entitled to \$1300.00 allowed for such services under same section.

<a href="#">76-47</a>	July 24	ELECTIONS. COUNTY COURTS. ROADS AND BRIDGES.	County Court of Andrew County may call a special election to increase rate of levy for not to exceed four year term. "Respective purposes" authorize such election to be held for increasing tax levy for bridge purposes. Tax levy, under Sections 8527 and 8529, Laws of Mo. 1945, authorizes increase for only one year. Such election provided for in Sec. 8529, Laws of Mo. 1945, may be held in place or places in county designated by county court.
77-47	Feb 13	Hon. V. C. Rose	WITHDRAWN
<a href="#">77-47</a>	Feb 18	COUNTY COURT. MINERAL LEASES. COUNTY COLLECTOR.	(1) Member of county court or other county officer cannot buy county warrants at less than par. (2) If member of county court votes for employment of a relative within 4th degree, by consanguinity or affinity, he forfeits his office. (3) Where mineral leases have been made, taxes should be assessed to owner of land. (4) Sec. 11107, R.S. 1939, has no application to Maries County. (5) Without a vote of the people, tax rate cannot be increased in any year so it will produce mathematically more than 10% in excess of taxes levied for previous year.
<a href="#">77-47</a>	Apr 29	BONDS. ROADS AND BRIDGES.	Money derived from bond issue for grading, constructing, paving or maintaining of paved, gravel, macadamized or rock roads, and necessary bridges and culverts, may be expended for the purchase of necessary machinery.
<a href="#">79-47</a>	Dec 30	ROADS AND BRIDGES. SPECIAL ROAD DISTRICTS. TOWNSHIPS.	Levy of not to exceed 35¢ on property in special road districts in counties under township organization is made by township board. Additional levy of not to exceed 35¢ may be voted by special road district. County court in counties under township organization may not assist in building and maintenance of bridges in special road district.
<a href="#">80-47</a>	Mar 11	SHERIFFS.	Authority as conservator of the peace is county-wide, and includes violation of city ordinance if it constitutes an offense against the state. Allowed only such mileage as comes within Section 5, H.C.S.H.B. No. 872.
<a href="#">80-47</a>	May 15	COURT REPORTERS.	In circuits where there are counties with more than forty-five thousand inhabitants the court reporter is not entitled to hotel and traveling expenses.
<a href="#">81-47</a>	Feb 20	BANKING BUSINESS.	An express company having contracts with railroad companies for the operation of an express service upon the lines of such railroad companies, or the transatlantic steamship company, or a telegraph or telephone company, as exceptions to corporations prohibited from doing any acts of banking under Sec. 7890, R.S. Mo. 1939, possess the power of receiving for transmission or of transmitting the same, by draft, traveler's check, money order, or otherwise, without any

			authority or supervision of the Department of Finance of this State whatsoever.
<a href="#">81-47</a>	Apr 14	TRUST COMPANIES.	Corporations may be created under Section 8024, Article 3, Chapter 39, R.S. Mo. 1939, to do a trust company business as provided therein, without being required to do "banking" business.
81-47	June 3	Hon. H. G. Shaffner	WITHDRAWN
<a href="#">81-47</a>	June 11	BANKS. RESTRICTIONS ON LOANS.	Banks may not, either directly or indirectly, by any means loan to one person a sum greater than 20% of the capital stock actually paid in and surplus fund of such bank if located in any city having a population of less than 100,000 and over 7,000.
<a href="#">81-47</a>	July 1	TOWNSHIPS.	Section 26(a), Article VI of the 1945 Constitution, is a limitation on the amount of indebtedness a township board may incur for the township in any year without popular vote. Valid warrants issued by a township in previous years and still outstanding are not to be counted in computing the amount of indebtedness for the current year.
<a href="#">81-47</a>	Aug 13	BANKS.	A bank is required by law to pay on demand a depositor's balance due without delay or notice of intention to close an account.
<a href="#">81-47</a>	Sept 2	COMMISSIONER OF FINANCE. LIABILITY OF SURETY ON BOND.	The Commissioner of Finance is an insurer of unclaimed funds named in Sec. 7899, R.S. Mo. 1939. The liability of the surety on his bond is the same as that of the Commissioner himself. No statutory bond should exempt a surety on the bond of a public official from loss of funds for any cause. The depository of funds of a public official should not be required to post collateral security, since the surety on his bond is liable for all losses.
<a href="#">81-47</a>	Sept 16	LIQUIDATED BANKS.	Proceeds or dividends arising from corporation bonds held by a bank, later liquidated, such bonds being sold as remaining assets of a bank to individuals, are private property. The Commissioner of Finance has no duty to assume respecting such dividends or proceeds.
<a href="#">82-47</a>	Mar 8	COUNTY TREASURER.	County court must order treasurer to secure surety bond before county is liable for premium.
<a href="#">83-47</a>	Jan 13	COUNTY TREASURERS. TREASURER'S BONDS. SCHOOL FUND.	County treasurer to give bond under House Bill 494 in amount of highest probable amount on hands at any one time. The amount of bond computed as to school funds from all sources.
<a href="#">83-47</a>	Jan 23	COUNTY SCHOOL FUNDS. COUNTY COURT.	Government bonds purchased out of county capital school funds should be taken in the name of the county court as trustee of the particular school fund invested.
<a href="#">83-47</a>	Feb 13	FEES.	Board of prisoners in counties of the first class and the City of St. Louis.

<a href="#">83-47</a>	Feb 26	SPECIAL ROAD DISTRICTS.	Special road districts should severally vote road bonds to provide funds for participation in “milk route” road bill appropriation.
<a href="#">83-47</a>	Mar 7	STATE PURCHASING AGENT.	Supplies used by Missouri State Highway Patrol should be purchased through the State Purchasing Agent.
<a href="#">83-47</a>	Apr 15	APPROPRIATIONS. LIBRARY ADVISORY BOARD.	Appropriation to Library Advisory Board under head “Personal Service” for “salaries, wages and per diem of employees” does not include pay for travel and subsistence of such employees.
<a href="#">83-47</a>	May 12	COUNTY COLLECTORS.	Annual settlements of county collectors cover the period from March 1 to February 28.
<a href="#">83-47</a>	June 2	DIVISION OF PROCUREMENT.	Director of Revenue to procure supplies, material, equipment and contractual services through the State Purchasing Agent.
<a href="#">83-47</a>	June 7	DIVISION OF PROCUREMENT.	Duty of State Purchasing Agent to maintain inventory of removable equipment owned by State.
<a href="#">83-47</a>	June 14	SCHOOLS.	First-grade certificate which expired in 1925 or 1926 cannot be renewed by County Superintendent of Schools except under rules and regulations of State Board of Education.
83-47	June 17	Hon. Forrest Smith	WITHDRAWN
<a href="#">83-47</a>	June 20	MAGISTRATES.	Only fee to be allowed and collected by magistrate in criminal proceedings is magistrate court fee, provided for in Senate Bill No. 108.
<a href="#">83-47</a>	July 9	TOWNSHIP TREASURERS. COMPENSATION PAYABLE FROM GENERAL FUNDS.	Compensation of township treasurers in counties under township organization payable out of general revenue funds.
83-47	July 25	Hon. Forrest Smith	WITHDRAWN
<a href="#">83-47</a>	July 31	ROAD DISTRICTS. TOWNSHIPS. ELECTIONS. BONDS.	Special road district and township in Bates County are both entitled to have bonds registered when bonds of both political subdivisions were voted on same day and proceedings for election by township were initiated before proceedings by special road district.
83-47	Aug 30	Hon. Forrest Smith	WITHDRAWN
<a href="#">83-47</a>	Sept 24	COUNTY COLLECTOR. TAXATION.	Two per cent fee allowed collector under provisions of Sec. 11182, Laws of 1945, page 1851, such fee to be collected from taxpayer, is not collectable from taxpayer who pays taxes in month of January after such taxes have become delinquent.
<a href="#">83-47</a>	Oct 22	COUNTY JUDGES.	County judges in Jasper County to receive salary of \$1,250.00 for period of July 1, 1946 through December 31, 1946; not entitled to



			receive compensation during said period as members of county board of equalization.
<a href="#">83-47</a>	Nov 7	PRINTING. COURTS. PURCHASING AGENT.	Purchasing agent lets the contract for printing and binding court reports, but Supreme Court controls storage, distribution and sale of said reports.
<a href="#">84-47</a>	Jan 28	DRAINAGE DISTRICTS. LEVYING OF ADDITIONAL TAXES.	County courts may levy additional taxes to pay claims against the district, provided a total of all levies against the district does not exceed the total amount of benefits assessed.
<a href="#">84-47</a>	Apr 18	ROADS AND BRIDGES. TAXATION. TOWNSHIPS.	Maximum tax levy for township expense is 20¢ per \$100 valuation, but when levies for county purposes and township expenses total more than maximum levy provided in Sec. 11, Art. X, of Constitution, 80% of tax is paid to county and 20% to township. Tax levy authorized by Sec. 8529, H.C.S.H.B. 784, in addition to tax levy authorized by Sec. 8820, H.C.S.H.B. 798.
84-47	Sept 12	Hon. Edward W. Speiser	WITHDRAWN
<a href="#">85-47</a>	July 18	MOTOR VEHICLES.	Applicability of Motor Vehicle Safety Responsibility Act to taxicabs.
<a href="#">85-47</a>	Aug 27	MOTOR VEHICLES.	(1) "Bookmobiles" owned by County Library Districts exempt from provisions of motor vehicle registration and licensing provisions; (2) type of license required of persons employed to operate "Bookmobiles."
86-47	Jan 17	Hon. Taylor W. Strubinger	WITHDRAWN
<a href="#">86-47</a>	Jan 28	MAGISTRATE COURTS.	Distribution of costs and fines in criminal cases.
<a href="#">86-47</a>	Nov 26	CORONERS. DEATH CERTIFICATE.	Coroner may sign death certificate only in cases where death has occurred without medical attendance and registrar refers case to coroner for his investigation and certification because circumstances render it probable that death was caused by unlawful or suspicious means, or where relatives or friends of deceased request coroner to hold inquest for purpose of issuing death certificate.
<a href="#">87-47</a>	Jan 22	CIRCUIT CLERK. FEE.	Circuit clerk in third-class county entitled to change of venue fee earned, in addition to salary provided in House Bill 773, but not entitled to retain fees in case originally filed in circuit court by consent of parties.
<a href="#">87-47</a>	Nov 28	REPRESENTATIVE DISTRICTS. ELECTION	St. Louis Election Commissioners cannot alter representative districts until after next census.

		COMMISSIONERS.	
<a href="#">88-47</a>	Nov 14	COUNTY BUDGET LAW. ROADS AND BRIDGES.	County courts may not transfer funds from Class 3 of the Budget to any other class under the budget law.
<a href="#">89-47</a>	Jan 27	LEGISLATOR. MILEAGE. OATH.	It is unnecessary for Mr. David A. Peery to be sworn in as the Representative from Linn County. He is entitled to and should be paid the mileage provided for in Sec. 16, Art. III, of the Constitution.
<a href="#">89-47</a>	Jan 30	CIRCUIT CLERK AND RECORDER OF DEEDS. DRAINAGE DISTRICT. FEES.	Circuit Clerk and recorder of deeds, under House Bill No. 775, passed by the 63rd General Assembly, not entitled to retain fees or compensation for services rendered under Article 1, Chapter 79, R.S. Mo. 1939.
89-47	May 16	Hon. D. D. Thomas, Jr.	WITHDRAWN
<a href="#">89-47</a>	Aug 15	COUNTY BOARD OF EQUALIZATION. COUNTY JUDGES. COUNTY SURVEYOR.	Judges of county court in third class counties entitled to fees for holding court and as members of board of equalization when acting in both capacities on same day; county surveyor in counties of the third class entitled to fee as member of board of equalization, and compensation as county highway engineer, when acting in both capacities on same day.
89-47	Sept 22	Hon. B. C. Tomlinson	WITHDRAWN
<a href="#">90-47</a>	Feb 17	SCHOOLS.	County common school funds as used in Section 10400, House Bill # 494, means school moneys belonging to various school districts. County treasurer 4th class counties only entitled to salary provided for in Section 13800.4, House Bill No. 781.
<a href="#">90-47</a>	Mar 24	INSURANCE.	Approval of incorporation of Protective Mutual Casualty Company.
<a href="#">90-47</a>	May 23	SOIL CONSERVATION DISTRICTS.	The soil district of any county, in the absence of any statutory provision, is immune from any tort liability for the negligence of its employees while engaged in the soil conservation program as provided for in the Soil Conservation Districts Law.
<a href="#">90-47</a>	Aug 6	TRAINING SCHOOLS. CIRCUIT COURTS. JUVENILES.	Circuit court may modify its order of commitment to state training schools.
<a href="#">90-47</a>	Nov 21	STATE MERIT SYSTEM ACT. CANDIDACY OF EMPLOYEES FOR PUBLIC OFFICE. LEAVE OF ABSENCE.	Individual not candidate within meaning of State Merit System Act, Session Acts 1945, page 1157, until filing under Section 11550, R.S. Mo. 1939. No mandatory direction in Merit System Act requiring superior to grant leave of absence to prospective candidate.

		CANDIDATES.	
<a href="#">92-47</a>	Apr 9	SCHOOL FUNDS. COUNTY SCHOOL FUNDS.	May not be invested in time deposits even though bank pledges United States government bonds to guarantee deposits.
<a href="#">93-47</a>	Feb 7	COUNTY SCHOOL FUNDS, LIQUIDATION OF.	Liquidated capital of township and county school funds to be handled and distributed as considered proper by board of school district.
<a href="#">93-47</a>	Feb 18	CRIMINAL LAW.	Physical or mental examination of defendant by doctors procured by State; examination may not be made unless with the consent of defendant.
<a href="#">93-47</a>	Feb 18	MAGISTRATES.	Clerk of the magistrate court may not issue a commitment or a warrant, but may legally sign transcripts in criminal proceedings.
93-47	Feb 19	Hon. Wayne T. Walker	WITHDRAWN
<a href="#">93-47</a>	Apr 25	MOTOR VEHICLES.	Leaving the scene of an accident is a felony for which an operator's license may be revoked.
<a href="#">93-47</a>	May 21	SHERIFF. COUNTY COURT.	Sheriff of Greene County, Missouri, not entitled to be reimbursed by the County for attorney fees in the defense of his action in the performance of official duties.
<a href="#">95-47</a>	Feb 27	SHERIFFS IN THIRD CLASS COUNTIES.	Deputy sheriffs may be hired on part-time basis, when such appointment and the compensation of such deputies is approved by the Circuit Court.
<a href="#">95-47</a>	Feb 27	COUNTY BUDGET. COUNTY COURT.	County Court of Stoddard County should issue warrants for that part of the salaries of county officers of such county for which warrants have not been issued for the year 1946. Upon refusal of County Court to do so, mandamus is proper remedy to compel such action. Such warrants should be paid before warrants issued on class 5 fund of the budget.
<a href="#">95-47</a>	Mar 14	COUNTY CLERK. COUNTY COURT.	Duties of the county court in respect to determining salary of county clerk under House Bill No. 867 of the 63rd General Assembly.
<a href="#">95-47</a>	Apr 10	MAGISTRATES. COUNTY TREASURER.	One person may be employed by clerk in both the probate and county treasurer's office. County courts have the right to provide for additional clerk hire for the magistrate if the court finds that such a need exists.
<a href="#">95-47</a>	May 20	DIVISION OF WELFARE. OLD AGE PENSIONS.	Under sections 9759.31 and 9759.32, Mo. R.S.A., the Division of Welfare is a single state agency designated to administer the state social security act and federal social security act pertaining to the payment of old age assistance and aid to dependent children.
<a href="#">95-47</a>	Aug 8	MAGISTRATES.	Salaries of clerks and magistrate courts may be increased by county

			court, said increase to be paid by the county.
<a href="#">95-47</a>	Sept 17	COUNTY COURT.	When only two district judges are present at county court meeting and they are unable to agree on any matter submitted to them, the clerk is to designate one district judge as presiding judge and his decision is the decision of the court. When the presiding judge and one district judge are present and they disagree, the decision of the presiding judge is the decision of the court.
<a href="#">95-47</a>	Sept 24	COUNTY JUDGES.	No restriction in third class counties on number of times mileage may be charged for going to and returning from court.
<a href="#">95-47</a>	Sept 29	DIVISION OF WELFARE. APPROPRIATIONS. FEDERAL FUNDS.	Federal funds unclaimed by recipients for old age assistance and aid to dependent children shall not be returned to the general revenue fund of the State of Missouri.
<a href="#">95-47</a>	Oct 18	COUNTY.	Expense of publishing list of delinquent tax lists shall be paid out of the county treasury, and the cost of same shall be taxed as a part of the costs of the sale.
<a href="#">95-47</a>	Nov 24	MAGISTRATE COURT. COURT COSTS.	Defendant must pay magistrate fee even though county not required to deposit said fee at commencement of suit.
<a href="#">95-47</a>	Dec 29	COUNTY COLLECTOR. TOWNSHIP COLLECTOR. TAXATION.	In counties under township organization township collector may levy upon property of taxpayer by distraint and sale when taxpayer refuses, upon request, to pay personal taxes. Notice of taxes must be made to taxpayer personally. Goods seized to be sold for taxes may be sold any place collector designates. County treasurer and ex officio collection may proceed by levy, distraint and sale after tax books have come into his hands.
<a href="#">96-47</a>	Mar 20	SCHOOLS. TAX LEVY.	Under Section 10358, Senate Bill No. 208, passed by the 63rd General Assembly, a school district board of education may submit a proposal to the voters of said district for subsequent increase in the tax levy for the same year or years that an increase has already been voted in excess of the amount authorized by the Constitution without voter approval.
<a href="#">96-47</a>	Mar 27	SCHOOLS. BUILDING FUND TAX LEVY.	The provisions of Senate Bill No. 208, passed by the 63rd General Assembly, make it possible for school districts to authorize and levy a building fund tax for the purpose of purchasing school building sites, buying or erecting school buildings and repairing and furnishing the same.
<a href="#">96-47</a>	July 18	PENITENTIARY.	Transactions between various industries under the control of the Department of Corrections and between the penitentiary and said industries may be handled by a system of debits and credits.

<a href="#">96-47</a>	Aug 25	SCHOOLS.	School districts may combine temporarily for educational purposes even though districts are not adjacent to each other.
<a href="#">96-47</a>	Aug 27	SCHOOLS.	Senate Bill No. 4, 64th General Assembly repeals and supersedes Section 10374 of Senate Bill No. 100, 64th General Assembly. Senate Bill No. 4, does not become operative until July 1, 1948.
<a href="#">97-47</a>	Feb 5	AFFIDAVITS.	Army officers above the rank of lieutenant, and Navy officers above the rank of ensign, are authorized to take affidavits to a divorce petition of persons engaged in the military service of the United States outside of this State.
<a href="#">97-47</a>	Apr 14	TAXATION. INDEBTEDNESS.	10¢ tax levied under Sec. 13763, R.S.Mo. 1939, was valid under Const. of 1875, and in addition to maximum levy authorized by Sec. 11, Art X, Const. of 1875. Such tax levy for 1944, 1945 and 1946 was a valid and subsisting levy, and taxpayer who refused to pay such taxes is liable for taxes and penalties. Repeal of Sec. 13763 removed authority of county court to levy such tax in future. Mere irregularity in appointment of judges of election does not invalidate such election.
<a href="#">97-47</a>	Apr 17	MOTOR VEHICLES.	Minimum age of taxi drives as fixed by state law is eighteen. One who is engaged as a motor carrier or contract hauler is not operating a taxi under the definition as set out in subsection (d), Section 5720, Laws of 1941.
<a href="#">97-47</a>	July 16	ROADS AND BRIDGES. MUNICIPALITIES. TAXATION.	Residents of municipality within the boundaries of special road districts are not exempt from paying road taxes levied on property in such districts.
<a href="#">97-47</a>	July 19	COUNTY CLERK. COSTS.	Cost deposits in cases in which costs are unclaimed should be turned over to the county treasurer by the circuit clerk. Cost deposits in cases in which there is an insufficient amount to fully pay all those entitled thereto should be distributed pro rata.
<a href="#">97-47</a>	Sept 2	ACCOUNTANCY, BOARD OF.	Certificate of public accountant may not be issued if application is not made before January 1, 1946, or more than one year after honorable discharge even if applicant possesses all other requirements of Section 14911j.
<a href="#">97-47</a>	Oct 17	BOARD OF ACCOUNTANCY.	Governor may make recess appointments of members; members qualify on the date the required oath is taken.
<a href="#">97-47</a>	Nov 12	MAGISTRATE COURTS. CRIMINAL COSTS.	When felony charge dismissed before preliminary hearing, neither the state nor county, nor the prosecuting attorney are liable for costs. When misdemeanor charge dismissed before trial, county is liable for costs.
<a href="#">98-47</a>	Apr 3	QUO WARRANTO.	Disposition of fines assessed against fire insurance companies.
<a href="#">98-47</a>			

<a href="#">98-47</a>	May 29	CRIMINAL CONTEMPT.	Disposition of fine imposed for criminal contempt.
<a href="#">99-47</a>	Jan 8	COUNTY CLERK. COUNTY COURT.	Salaries.

COUNTY COURTS:

*Co. Clks*

County clerk may not take acknowledgments of various types of conveyances of real estate but may take all oaths or affirmations as are required by law or that may be incident to the exercise of the powers and duties of his office or incident to the powers and proceedings of the county court in which he is clerk.

January 6, 1947

FILED

1/15

Honorable George P. Adams  
Prosecuting Attorney  
Audrain County  
Mexico, Missouri

Dear Mr. Adams:

This will acknowledge receipt of several communications requesting an official opinion from this department. For the sake of brevity we have restated your questions, which we have construed to be as follows:

First, is the county clerk authorized to take all types of oaths and affirmations?

And, secondly, is the county clerk authorized to take acknowledgments in the conveyance of real estate?

Section 12 of Senate Bill 483, of the 63rd General Assembly, reads as follows:

"The clerk of the county court shall have power and is authorized to administer oaths and affirmations in all matters and proceedings incident to the exercise of the powers and duties of his office, and incident to the powers and proceedings of the county court of which he is clerk; and shall have power and authority to administer oaths and affirmations, and to take and certify depositions within the respective counties in all cases where oaths or affirmations are required by law to be administered. And, when required, he shall affix thereto his jurat and the

seal of the county court of which he is clerk."

It will be noted that this section does not give the county clerk the broad power of taking any oath or affirmation but rather limits him to taking oaths and affirmations that are required by law to be taken and oaths and affirmations that are incident to the powers and duties of his office or incident to the powers and proceedings of the county court.

In considering the second question presented to us we direct your attention to Section 3408, R. S. Mo. 1939, which provides:

"The proof or acknowledgment of every conveyance or instrument in writing affecting real estate in law or equity, including deeds of married women, shall be taken by some one of the following courts or officers: First, if acknowledged or proved within this state, by some court having a seal, or some judge, justice or clerk thereof, notary public, or some justice of the peace of the county in which the real estate conveyed or affected is situated; second, if acknowledged or proved without this state, and within the United States, by any notary public or by any court of the United States, or of any state or territory, having a seal, or the clerk of any such court, or any commissioner appointed by the governor of this state to take the acknowledgment of deeds; third, if acknowledged or proved without the United States, by any court of any state, kingdom or empire having a seal, or the mayor or chief officer of any city or town having an official seal, or by any minister or consular officer of the United States, or notary public having a seal."

This section specifically provides that the clerk of a court having a seal may take acknowledgments of every



conveyance or instrument in writing affecting real estate. This presents the question of whether or not the county court is still a "court" under the Constitution of 1945. In the case of State v. Horn, 79 S. W. (2d) 1044, the Supreme Court of Missouri adopted the following as a definition of a "court": (l. c. 1045)

"\* \* A court has been defined to 'consist of persons officially assembled under authority of law, at the appropriate time and place, for the administration of justice. A time when, a place where, and persons by whom judicial functions are to be exercised are essential to complete the idea of a court in the general legal acceptance of the term.' \* \* "

You will note that one of the requirements is that a court has the power to perform judicial functions. However, the judicial power of the state was vested in certain named courts by Section 1, Article V of the Constitution of 1945, which reads as follows:

"The judicial power of the state shall be vested in a supreme court, courts of appeals, circuit courts, probate courts, the St. Louis courts of criminal correction, the existing courts of common pleas, magistrates courts, and municipal corporation courts."

This section is the same in substance as Section 1, of Article VI of the Constitution of 1875, which reads as follows:

"The judicial power of the State, as to matters of law and equity, except as in this Constitution otherwise provided, shall be vested in a Supreme Court, the St. Louis Court of Appeals, circuit courts, criminal courts, probate courts, county courts and municipal corporation courts."

The above section was under consideration in the case of State ex rel. McDonald v. Lollis, 33 S. W. (2d) 98. In this case the question before the court was whether or not a circuit court in vacation had the authority to hear and determine election contests. In determining this question the court stated at l. c. 99 and 100:

"It will be noted that the act in question invests the judges of circuit courts in vacation with jurisdiction and authority to hear and determine contests of primary elections. Section 1 of article 6 of the Constitution provides that the judicial power of the state, as to matters of law and equity, except as otherwise provided in the Constitution, shall be vested in the courts named in said section. A judge of a court in vacation is not a court. It, therefore, logically follows that, if the hearing and determination of the contest of a primary election in the manner provided in said act is the exercise of judicial power, a law which attempts to confer such power on a judge in vacation would be in violation of section 1 of article 6 of the Constitution which lodges such power in the courts."

"The hearing and determination of the contest of a primary election in the manner provided in the act in question being the exercise of judicial power, that part of the act which attempts to vest a judge in vacation with jurisdiction and authority to exercise such power is violative of section 1, article 6, of the Constitution of the state which vests the judicial power of the state, as to matters of law and equity, in the courts therein named, except as otherwise provided in the Constitution."

Further evidence that the Constitutional Convention never intended the county court to have judicial powers, is shown by the fact that the county court was named as one of

those bodies wherein the judicial power of the state is vested in the Constitution of 1875 but was excluded in the like section in the Constitution of 1945. Also, the section of the Constitution of 1945 that provides for the county courts is now found in the article headed "Local Government" and not in the article headed "Judicial Department" where it was found in the Constitution of 1875. And lastly, the officers comprising the county court were referred to as "judges" in Section 36 of Article VI of the Constitution of 1875, whereas now they are referred to as "members" in Section 7, Article VI of the Constitution of 1945. Therefore, since the legal definition of "court" requires that it have power to exercise judicial functions, and since the judicial power of this state is vested in certain named bodies by the Constitution of 1945, which does not include the county court, we must arrive at the logical conclusion that a county court is not a "court" in the legal sense.

We believe that there can be no doubt that "court" as used in Section 3408, supra, should be given the strict legal definition and that it was the intention of the General Assembly that clerks of this type of courts should have the power to take acknowledgments for a conveyance of real estate and not clerks of any administrative tribunal which might possess some quasi judicial powers.

#### Conclusion

Therefore, it is the opinion of this department that the county clerk may take oaths and affirmations in all matters and proceedings incident to the exercise of the powers and duties of his office and incident to the powers and proceedings of the county court of which he is clerk. It is further our opinion that the county clerk is not authorized to take acknowledgments of conveyances or instruments in writing affecting real estate.

Respectfully submitted,

PERSHING WILSON  
Assistant Attorney General

APPROVED:

\_\_\_\_\_  
J. E. TAYLOR  
Attorney General

PW:EG

SCHOOLS:  
SCHOOL DISTRICT DIRECTOR }  
QUALIFICATIONS:

Annexation of portion of one school district to another; a struction of requirement that director of school district be resident taxpayer of district.

March 24, 1947



Honorable George P. Adams  
Prosecuting Attorney  
Audrain County  
Mexico, Missouri

Dear Mr. Adams:

We are in receipt of your letter of March 20, 1947, requesting an opinion from this department, which reads as follows:

"An issue has been raised and presented to me by the School District of Mexico relative to the eligibility of an announced candidate to become a director of the School District of Mexico if elected this coming April 1.

"The issue is two-fold, namely, (1) is this candidate a resident taxpayer of, that is, does he reside within the territory embraced by the school district, and, (2) has the candidate paid, or will he have paid, a state and county tax within one year next preceding the election on April 1, as provided by Sec. 10469, Revised Statutes of Missouri, 1939.

"The facts so far as I can ascertain them are as follows: Prior to July 7, 1903, the land upon which the candidate's residence is located, and in which he lives, was not embraced in, nor a part of the Mexico School District. On said July 7, 1903, the School Board of Mexico in called session passed the following motion:

"On motion the following territory having been released from the district to

which it belonged was added to the Mexico School District:

"S.W. 1/4 of the S. E. 1/4 Section 13, Township 51, Range 9

"Also the N.E. 1/4 of the N.W. 1/4 and the West half of the N.E. 1/4 and the West half of the S.E. 1/4 Section 14, Township 51, Range 9."

"The county surveyor states that part of the land released or transferred, to wit, the Northeast fourth of the Northwest fourth of Section 14, Township 51, Range 9, contains the residence of the candidate.

"A committee from the School Board in the effort to make all investigation possible with respect to the aforesaid release or change of boundary made inquiry and they could find no records of School District #55 pertaining to change of boundary or transfer of the aforesaid land to the School District of Mexico, nor did the County Superintendent of Schools, nor the County Court have any records of School District #55 pertaining to the aforesaid change of boundary or release of the aforesaid land.

"The land above described was added to the Mexico School District by a projection into School District #55 in the formation of a 'T', and which territory as projected includes a scattered few residences, and the children living in such residences have been attending Mexico schools, so far as I know, from and since the above board minutes of the Mexico School District.

"Did the Mexico School District legally acquire the territory in question so as to make the candidate a 'resident' of that district? The candidate's property has been

assessed as being in School District #55 and his 1946 taxes and prior taxes have been credited to School District #55. Therefore, if you conclude that he is a legal resident of the Mexico School District is he a 'resident taxpayer' of said Mexico School District so as to be eligible for the office of director?

"I will appreciate very much your opinion as to whether or not the candidate in question is a resident taxpayer of the Mexico School District and has paid a state and county tax 'within one year next preceding the election' to be held on April 1, 1947, under the above circumstances."

From our telephone conversation I understand that there are only two residents other than the candidate in the area which was annexed to the Mexico School District in 1903, and further, that the taxes paid by the other two residents have, since 1903, been credited to the Mexico School District; that the candidate's taxes were, until sometime between 1939 and 1941, credited to the Mexico School District, but after 1941 have been credited to School District No. 55.

The specific questions for our consideration are as follows: First, is the candidate a resident of the Mexico School District; and, second, is he a resident taxpayer within the meaning of the statute?

The statute setting up the requirements for school directors is Section 10469, R. S. Mo. 1939, which reads:

"The qualified voters of the district shall, annually, on the first Tuesday of April, elect two directors, who are citizens of the United States resident taxpayers of the district, and who shall have paid a state and county tax within one year next preceding their election or appointment, and who shall have resided in this state for one year next preceding their election or appointment, and shall be at least thirty years of age, who shall hold their office for three years and until



their successors are duly elected and qualified; and all vacancies in the board shall be filled for the unexpired term."

In order to answer the first question we must determine whether or not the annexation of the portion of District No. 55 to the Mexico District was proper so as to meet the legal requirements. At the meeting of the Mexico School District on July 7, 1903, a motion was passed to annex to the Mexico District a portion of the territory which was District No. 55. That motion indicates that the proper statutory procedure was followed in such annexation and even though the minutes of the school board meeting are the only records which have been found concerning this matter, we submit that there is a presumption that public officers properly perform their duties and follow the correct procedure in the absence of a showing to the contrary. In fact, there have been no records found relating to school matters in District No. 55. Our view is strengthened here by the fact that the children living in the annexed area have been attending the schools in the Mexico District as residents of that district presumably since 1903. The case of Henry v. Dulle, 74 Mo. 443, said at pages 451 and 452:

"But were it even necessary that the clerk of the board should certify the resolution to the township clerk, and that the township clerk should act upon it, before the resolution could be operative, yet still, in view of the fact alleged in the petition that since the organization of the City of Jefferson into a single school district the board of education has assumed control and directed the county clerk to include the out-lots in the list of taxable property liable to be taxed for the support of said school; and in view of the fact shown by the evidence that plaintiffs acquiesced therein by the payment of such taxes for the years 1870, 1871, 1872 and 1874, and the further fact that one of the plaintiffs voted at the election for school directors for the years 1878, 1879 and 1880; and in view of the further fact, shown by the map of the board of education of the City of Jefferson, and also the maps of township 44, range 11, offered in evidence, that the sub-districts in said township were made to conform to the resolution of the

board, and that according to all three of these maps the out-lots were embraced in the Jefferson City district, and not in any of the sub-districts, the presumption may be justified and indulged that the secretary of the board of education of Jefferson City did his duty in certifying the resolution of the board to the township clerk, and that the township clerk acted upon it and made the sub-districts of the township to conform to it. \* \* \*

And further, this presumption is not weakened even though the statutes have not been technically complied with, as was said in *State v. Begeman*, 2 S. W. (2d) 110, at page 111, as follows:

"In the first place, it is the salutary law that our courts must give a liberal construction to the working of the school laws. Indeed, the section of the statute, supra, requires no records to be kept of many of the jurisdictional prerequisites, and the fair presumption is indulged that preliminary steps have been complied with when the county superintendent entertains jurisdiction on appeal. *State ex rel. v. Andrea*, 216 Mo. 617, 116 S. W. 561; *School District v. Chappel*, 155 Mo. App. 498, 135 S. W. 75.

"In the latter case, this court held that it is our policy not to require extreme technical compliance of the school laws, but only a substantial compliance with the statutes, and that the efforts of laymen who carry into effect the laws pertaining to schools is accomplished when a substantial compliance has been had. As said in *School District v. School District*, 181 Mo. App. 583, 164 S. W. 688, technical niceties should be brushed aside, and we should rather 'seek to effectuate the beneficent spirit revealed, in aid of the efforts of well-meaning laymen. Because of this, substantial compliance will suffice.'"



A liberal construction is given to the working of the school laws. In *State v. McKewn*, 290 S. W. 123, 1. c. 126, it is said:

"\* \* \* Informalities in proceedings of this character, especially in regard to the public schools, are entitled to little consideration, if the material portions of the governing statute are complied with. *School Dist. v. New London School Dist.*, 181 Mo. App. 589, 164 S. W. 688, and cases. Although the proceedings may be informal if conceived in honesty, and thus conducted, they will not be set aside. *School Dist. 14 v. School Dist. 27*, 195 Mo. App. 504, and cases 507, 193 S. W. 634."

The case of *State v. School Dist. of Lathrop*, 284 S. W. 134, went still farther, holding that if such procedure is not absolutely correct it will not be overthrown where there has been long acquiescence. The court said at pages 136, 138, 139, 141 and 141:

"At the regular annual meeting of all the school districts, April 3, 1917, the school district of Lathrop, school district No. 44, and school district No. 45 voted to extend the boundaries of the district of Lathrop so as to include all the territory in the two country districts, Nos. 44 and 45. The illegality of that proceeding is asserted by the relators. They claim that the proceeding was void, and the district of Lathrop has no authority or jurisdiction over the territory which formerly comprised districts Nos. 44 and 45, and no right to collect taxes on the property therein; that the respondents Rogers and Stonum residing in the territory of the original districts Nos. 44 and 45 have no authority to act as directors of the school district of Lathrop. The respondents say that the proceeding was regular, and that the relators are guilty of such laches as to preclude their right to have it annulled."

"\* \* \* So that the present proceeding, instituted eight years after the original vote, the regularity of which he challenges, is the first time when a proper proceeding has brought the matter to the attention of any court.

\* \* \* \* \*

"The Stamper Case, 90 Mo. 683, 3 S. W. 214, supra, was a proceeding by injunction to restrain the collection of school taxes, on the ground that the school district was never legally organized, and the court had this to say (loc. cit. 687, 3 S. W. 215):

"Conceding, for the purposes of this case, without determining the question, that the change thus made was irregular and in excess of the powers conferred. \* \* \* \* \* In view of these facts, and the further fact that, during an interval of four years, the de facto existence of the district was recognized and parties interested have adapted themselves to the changed condition of things, presumably for school purposes, and incurring expenses necessarily incidental to conducting a school, we are fully justified in affirming the judgment of the circuit court on the ground, if on no other, that plaintiff, by his laches, has allowed a condition of things to exist for four years which would make it inequitable to grant the relief prayed for."

"That aptly applies to the situation here. \* \* \* \* \*

"In the Westport Case, supra, 116 Mo. loc. cit. 593, 22 S. W. 888, it was held that the state may by long acquiescence and continued recognition of a municipal corpora-

tion be precluded from bringing a proceeding to deprive it of franchises long exercised. \* \* \*

\* \* \* \* \*

"\* \* \* Unless some equity in favor of the state is shown, its laches ought to preclude it from attempting to cancel the proceedings by which the district of Lathrop was extended and cause the injurious results which would follow from the disorganization of that district. The inclusion of districts 44 and 45 in the district of Lathrop was undoubtedly intended to secure better school facilities for the children of those districts as well as the district of Lathrop. District 45 had had no school for four years. District 44 wanted the change. The result was a high school as well as a grade school. The best facilities were offered by the city for the education of its children, facilities which were denied children of these two districts before their inclusion in Lathrop district. There is not a suggestion in the record that there could possibly be any improvement of the schools or of school facilities or the opportunities for the children of former districts 44 and 45 to go to school by restoring the former condition. On the contrary, it is a reasonable inference that they would not be served as well. District 45 had no school, and the children there had to go to Lathrop before the change. Thus without any evidence that the school conditions would be improved, but with a situation which suggests that they would be impaired, with no complaint from any one who had school children or is interested in any school, this court should exercise its discretion and deny the relief sought.

"The proceeding is dismissed."

As far as we are able to determine there has been no question raised as to the validity and legality of the annexation proceedings in the present case.

Therefore, since that portion of District No. 55 under question here was legally annexed to the Mexico District, the candidate here is a resident of the Mexico School District within the meaning of Section 10469.

Now we come to the question of whether or not the candidate is a resident taxpayer of the Mexico School District. The candidate has paid his taxes for the year preceding the election date and since we have established that he is a resident of the Mexico School District the only remaining factor is as to the crediting of his taxes to the wrong school district. Until several years ago the taxes paid by the candidate were credited to the Mexico School District in which he resides, but after 1941 they have been erroneously credited to School District No. 55 by the county officials. Such an error should not preclude a person from election as county school director. The case of State ex rel. v. Brown, 172 Mo. 374, sets out the duties of the various county officials in this matter and shows the effect of an erroneously credited tax but does not indicate that the taxpayer is in any way discredited as a resident taxpayer of his district because of such error. The court said at 1. c. 379-380, 381:

"\* \* \*The plaintiff as curator of Hamilton was returned by the district clerk as being in district No. 4, and the county clerk, without ignoring the enumeration lists, could not have placed him elsewhere. The assessor is not required or authorized to determine the school district of a taxpayer; the "assessor's book" which he makes up--legally made up--contains no such information. The assessor has to do with no particular tax, but his duty is ended when he has ascertained and listed all the taxable real and personal property in his county, with the name of the respective taxpayer (Sec. 7531, R. S. 1889; amended, Laws 1893, p. 216), and made his assessment book therefrom.

"The assessor's book when turned over to the county court would not contain the

number of the school district of any taxpayer, and hence the equalization board could not remedy any such wrong as is here complained of. The alleged wrong first arises, when the county clerk, after the assessor's books are corrected and adjusted, makes out the school tax book, and then fails to proceed in so doing as the law directs.

\*\*\*\*\*

If this tax is properly due district No. 2, then the fact appears it has never been assessed or extended by the county clerk for district No. 2, but has been assessed or extended at a different rate in another district, and how then can the collector be compelled to collect a tax for district No. 2 which has never been extended by the county clerk? If the county clerk had no right or authority to assign the curator to district No. 4, and assess a tax against him according to the rate fixed by said district, then such taxation is simply illegal and void, and his property is not subject to levy to pay the same, and if seized and sold by the officer may be recovered \*\*\*\*\*"

"And in the case of State v. Heath, 132 S. W. (2d) 1001, the assessor failed to include the respondent in the assessment. However, this error did not affect respondent's obligation to pay the tax as a resident taxpayer. It was said at l. c. 1005:

"It is clear that, under the rule of State ex inf. Bellamy ex rel. Harris v. Menengali, supra, respondent was a resident tax payer of the district because he had paid taxes for 1935 (based on June 1, 1934, assessment) and continued to own the same taxable property in the district at all times thereafter. Even though the assessor failed to include him in his assessment of June 1, 1935, this omission did not relieve him of his obligation to pay the 1936 taxes, and these taxes could be collected by following the statutory procedure. \*\*\*\*\*"

The situation involved here is very similar to that in the case of *State v. Fasse*, 189 Mo. 532, where the court said at pages 536-537:

"Appellant insists the requirement that a school director must be a resident taxpayer of the district means that he must have paid taxes for school purposes within the district. That contention cannot be adopted without enlarging the language of the statute and changing its intention. The meaning is that a person who is a qualified voter of the district and also a taxpayer is eligible. A qualified voter is defined in the same section to be one who, under the general laws of the State, would be allowed to vote in any county for State and county officers and who has resided in the district thirty days preceding the school district meeting at which he offers to vote. Any person who possesses those qualifications is a qualified voter as defined in section 9798 (9759?) in regard to the qualifications of school director. If he is also a taxpayer (that is, a person owning property in the State subject to taxation and on which he regularly pays taxes) he is eligible to the office of school director whether he has in fact paid a tax within such school district or not; otherwise, when a new district is formed no one would be eligible to the office of school director; or, if territory is taken from one district and attached to another, no person residing in the newly attached part would be eligible to the office of school director in the district to which it is attached until he first had paid a school tax therein. Provisions are made by the statute for the formation of new districts and also for changing the territory of districts. (R. S. 1899, sec. 9742.) The statutes bearing on the subject must not be so construed as to have unreasonable consequences, and the construction contended for by appellant, we think, would have."



In that case the statute requiring school district directors to be resident taxpayers of the district is construed to include a resident who is a qualified voter of the particular school district and who is also a bona fide taxpayer. We submit that this construction is equally applicable in the present situation and that the candidate here is a resident taxpayer of the Mexico School District within the meaning of Section 10469.

Conclusion

Therefore, in view of the foregoing authorities, it is the opinion of this department that the candidate here is a resident taxpayer of the Mexico School District within the meaning of Section 10469, R. S. Mo. 1939, and qualified to run for school director of the Mexico School District.

Respectfully submitted,

DAVID DONNELLY  
Assistant Attorney General

APPROVED:

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J. E. TAYLOR  
Attorney General

DD:EG

SCHOOLS: When two school districts are annexed, the subsisting school district is entitled to all moneys belonging to the annexed school districts.

FILED  
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May 23, 1947

Honorable Walter S. Alexander  
Member, Missouri House of Representatives  
64th General Assembly  
Ashton, Missouri

Dear Sir:

This will acknowledge receipt of your request for an official opinion, which reads:

"I would like an opinion from your office on the proper way to transfer school funds where two school districts are annexed.

"I have two schools in my county that annexed last school election. The county Treasurer is not sure on the proper method of transferring this money, therefore would like your opinion on it."

Your request does not state the particular kind of schools or districts to be annexed. However, we think this not important.

Under Section 10450, R.S. Mo. 1939, it requires all funds belonging to the various school districts composing the enlarged district, upon becoming a part of said enlarged district, to immediately transfer all money in their custody to the treasurer of the enlarged district. Said section reads:

"The terms of office of all school officers of the various school districts comprising the territory incorporated in such enlarged school districts shall cease upon the adoption of the provisions hereof and the organization of the board of directors, and such officers shall deliver to the board of directors of the



enlarged school district all books and papers belonging to such component districts. All funds in the hands of the county or township treasurer to the credit of the various districts composing such enlarged district, shall be immediately transferred to the treasurer of such enlarged district. If any former six-director district shall be merged in any enlarged district, as provided herein, the treasurer of such former six-director district shall immediately turn over to the treasurer of such enlarged district, all funds belonging to such former six-director district, and shall make settlement therefor as provided by section 10480: Provided, that the directors of such enlarged district shall fully perform all existing contracts and legal obligations of the component districts."

Under Section 10498, R.S. Mo. 1939, it further provides that whenever any consolidated district is organized that on June 30th following said organization all money of said district shall be turned over to the board of directors of said consolidated district, and reads:

"Whenever any consolidated district is organized under the provisions of this article, the original districts shall continue until June 30th, following the organization of said consolidated district, and at that time all the property, money on hand, books and papers of the school districts whose schoolhouse sites are included within said consolidated district shall by the officers of aforesaid districts be turned over to the board of directors of the consolidated district, and also all bonds outstanding against the aforesaid districts shall become debts against the consolidated district. The division of property and

money on hand in case school districts are divided by the formation of any consolidated district shall be governed by sections 10413 and 10414."

Section 10484, R. S. Mo. 1939, further provides that whenever any entire school district or part of said district adjoining any city, town or village school district desires to be attached thereto, upon a majority voting for said annexation, if the entire district is annexed, then all of the money and property immediately passes into the possession of the board of said city or town school district, as the case may be, and reads:

"Whenever an entire school district, or a part of a district adjoining any city, town or village school district, desires to be attached thereto for school purposes, upon the reception of a petition setting forth such fact and signed by ten qualified voters of such district, the board of directors thereof shall order a special meeting for said purpose by giving notice as required by section 10418. Should a majority of the votes cast favor such annexation, the secretary shall certify the fact, with a copy of the record, to the board of said district and to the board of said city, town or village school district; whereupon the board of such city, town or village district shall meet to consider the advisability of receiving such territory, and should a majority of all the members of said board favor such annexation, the boundary lines of such city or town school district shall from that date be changed so as to include said territory, and said board shall immediately notify the clerk of said district which has been annexed, in whole or in part, of its action. In case an entire district is thus annexed, all property and money on hand thereto belonging shall immediately pass into the possession of the board of said city or town school district; but should only a part of a district be annexed thereto, said part shall relinquish all claim and title to any part of the school property and money on hand belonging to said original district, and that portion of the district remaining must contain within its limits thirty

children and thirty thousand dollars assessed valuation, or thirty children and nine square miles of territory. The voting at said special school meeting shall be by ballot, as provided for in section 10467, and the ballots shall be 'for annexation' and 'against annexation,' when the whole district is to be annexed, but if only a part is to be annexed, the ballots shall read 'for release' and 'against release.'"

The Supreme Court en banc, in *State v. Smith*, 121 S.W. (2d) 160, held that when a school district is annexed or merged in another school district, the subsisting school district is entitled to all the property and is likewise answerable for all liabilities in said districts. In so holding, the court said at l.c. 162 and 163:

"It has also been held to be the general rule in this state that in the absence of constitutional or statutory provisions to the contrary where one corporation goes entirely out of existence by being annexed to or merged in another corporation, then the subsisting corporation will be entitled to all the property and will be answerable for all the liabilities. When the benefits are taken, then the burdens are assumed. This general rule was applied to school districts in the case of *Thompson v. Abbott*, 61 Mo. 176, which case was cited with approval in *Mt. Pleasant v. Beckwith*, 100 U.S. 514, 25 L.Ed. 699, where it is stated that as extinguished municipal corporations have no power to levy taxes to pay debts, the town to which the territory and property of the annulled municipality was annexed should become liable for its outstanding indebtedness. The rule has been repeatedly approved in *Hughes v. School District*, 72

Mo. 643; Wilson v. Drainage District, 257 Mo. 266, 165 S.W. 734; Id., 237 Mo. 39, 139 S.W. 136; Abler v. School District, 141 Mo. App. 189, 124 S.W. 564; Gray v. School District, 224 Mo. App. 905, 28 S.W. 2d 683; Boswell v. Consolidated School District, Mo. App., 10 S.W. 2d 665; 43 C.J., Municipal Corporations, p. 143, Sections 122 and 123; 19 R.C.L. 732.

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"The question is: Was the consolidated school district, by assuming the debts of the component districts, 'allowed to become indebted' within the purview of the constitution and thereby subject to its restrictions? As stated above, it is admitted that the various debts of the various districts (the entire bonded amount sought to be refunded) when first incurred were created by the vote of the people in strict accordance with the provisions of the constitution. Upon the consolidation of these districts, the total debt by the terms of the statute became a charge against the consolidated district. It is important to note that the consolidated district merely assumed the debt; it did not create it. Furthermore, it did not become indebted by virtue of any act of its agencies, but succeeded to an old debt by virtue alone of the statute and the voters who chose to consolidate the districts. It was in fact born in debt. Upon consolidation the identities of the component districts fade and disappear completely and in their stead emerges a new entity in the form of the consolidated district. This new entity spontaneously becomes the owner of the properties and liable for the old debts. \*\*\*\*\*"

We have hereinabove referred to three forms of annexation of various kinds of school districts, one of which we feel sure must apply in this instance.

CONCLUSION

Therefore, in view of the foregoing decision and statutes, it is the opinion of this department that when two school districts under any of the foregoing statutes are annexed, the county treasurer, or whoever has custody of money belonging to said districts being annexed, shall transfer said money to the treasurer, board of directors, or board of said city or town school district, as the case may be, of the new district and obtain a receipt for same. As far as we know, there is no particular formality to follow in transferring said funds.

Respectfully submitted,

AUBREY R. HAMMETT, Jr.  
Assistant Attorney General

APPROVED:

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J. E. TAYLOR  
Attorney General

ARH:LR

SPECIAL BENEFIT ASSESSMENT

ROAD DISTRICT:

COUNTY COURT:

County court cannot compel commissioners of special benefit assessment road district to repair or maintain a particular road.

August 23, 1947

FILED  
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8/26

Honorable George P. Adams  
Prosecuting Attorney  
Audrain County  
Mexico, Missouri

Dear Mr. Adams:

This is in reply to your letter of August 19, 1947, requesting an opinion from this department, which reads as follows:

"The judges of the Audrain County Court have requested that I write you as to what, if any, authority they might have to direct the road commissioners of a special benefit assessment road district to maintain a particular road in their district.

"In other words, certain citizens in a particular district have complained to the County Court that a particular road is not being worked or maintained by the district as it should be. Does the County Court have any authority over the commissioners relative to such a matter?"

The sections under which special benefit assessment road districts are organized are Sections 8710 through 8735, Mo. R.S.A. Section 8710 provides:

"County courts of counties not under township organization may divide the territory of their respective counties into road districts, and every such district organized according to the provisions of this article shall be a body



corporate and possess the usual powers of a public corporation for public purposes, and shall be known and styled ' \_\_\_\_\_ road district of \_\_\_\_\_ county,' and in that name shall be capable of suing and being sued, of holding such real estate and personal property as may at any time be either donated to or purchased by it in accordance with the provisions of this article, or of which it may be rightfully possessed at the time of the passage of this article, and of contracting and being contracted with as hereinafter provided. Districts so organized may be of any dimensions that may be deemed necessary or advisable, except that every district shall be included wholly within the county organizing it and shall contain at least six hundred and forty acres of contiguous territory: Provided, that the county courts shall not have power to divide the territory within the corporate limits of a city having a population of 150,000 into such road district."

Under this statute all such road districts are public corporations organized under the authority of the Legislature (Embree v. Road District, 257 Mo. 593, 166 S.W. 282; State v. Harper, 301 Mo. 115, 256 S.W. 469) and are considered political subdivisions of the State. In State v. Hughesville Special Road Dist. No. 11, 6 S.W. (2d) 594, decided by the court en banc, it was said at page 596:

"The special road district contemplated by article 8, c. 98, R.S. 1919, is 'a political subdivision of the state for governmental purposes' -- a municipal corporation. Section 10834 (Now Section 8711, Mo. R.S.A.). It is brought into existence through the exercise of legislative power. State v. Thompson, 315 Mo. 56, 285 S.W. 57. \* \* \* \*"

(Words in parenthesis ours.)

See also Lamar v. Bolivar Special Road Dist., 201 S.W.

We submit that the county court has no authority to direct the officers of a political subdivision of a state to act in a particular manner, that is, to direct the commissioners of a special benefit assessment road district to repair and maintain a road within the district in a certain manner. This is especially true in the absence of expressed authorization in the statutes under which such legal entity was created.

After a special benefit assessment road district is organized and the commissioners appointed, the county court has very limited authority over said district, in fact the subsequent commissioners are elected by the voters of the district. However, the county court does have authority in considering protests against petitions for permanent improvements and in making orders authorizing the State Highway Department to make revised estimates of the costs of proposed improvements upon which tax bills or bonds are based, and, also, the jurisdiction to disincorporate said districts is vested in the county court.

The expression in the statutes of the above powers and authorization necessarily limits the authority of the county court to that which is set out, as it is a well-recognized rule of statutory construction that the expression of certain things is the exclusion of all others. The county court does not have general supervision over special benefit assessment road districts. It is clear that the Legislature intended the commissioners of said districts to have sole and exclusive jurisdiction over the repair and maintenance of roads within the district. Section 8714, Mo. R.S.A., provides, in part, as follows:

" \* \* \* Said commissioners shall have sole, exclusive and entire control and jurisdiction over all public highways, bridges and culverts within the district, to construct, improve and repair such highways, bridges and culverts, and shall have all the power, rights and authority conferred by law upon road overseers, and shall at all times keep such roads, bridges and culverts in as good condition as the means at their command will permit, and for such purpose may employ hands and teams at such compensation as they shall agree upon;



rent, lease or buy teams, implements, tools  
and machinery; all kinds of motor power,  
and all things needed to carry on such work:  
\* \* \* \*

The wording of the above statutory provision is too plain to permit any other construction. It is within the discretion of said commissioners as to what roads in the district shall be repaired or improved and the manner and extent of such repair. It is beyond the province of the county court to make an order requiring said commissioners to do what the law has already declared.

In the case of Schmidt v. Berghaus, 205 Mo. 409, we find an analogous situation. A mandatory injunction was sought to enjoin the commissioners of a special road district from spending certain funds on macadam or hard surface roads until all public roads in a special road district were in good repair. The court, in that case, said at pages 413 and 414:

"As to the mandatory part of the injunction, we find that section 10,585, Revised Statutes 1909, and section 79, page 467, Session Acts of 1917, leave it in the discretion of Commissioners as to what roads in any road district shall be improved and the manner of the improvements. The evidence in the record before us fails to show that the Commissioners are acting in violation of the law or are threatening to so act. In such case it is beyond the province of a court of equity to make a special order on a defendant requiring him to do what the law has already declared. (See McLemore v. McNeley, 56 Mo. App. 556; Lester Real Estate Co. v. St. Louis, 169 Mo. 227, 69 S.W. 300.)

Therefore, the county court does not have authority to direct the commissioners of said road district to repair or maintain a particular road in that district.

#### Conclusion.

In view of the foregoing, it is the opinion of this department that the county court does not have authority to

Honorable George P. Adams

-5-

compel the commissioners of a special benefit assessment road district to repair or maintain a particular road in that district.

Respectfully submitted,

DAVID DONNELLY  
Assistant Attorney General

APPROVED:

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J. E. TAYLOR  
Attorney General

DD:ml

SHERIFF'S FEES: Authority of the sheriff to bill county court for expenses of guarding insane persons.

FILED  
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September 16, 1947

Honorable George P. Adams  
Prosecuting Attorney  
Audrain County  
Mexico, Missouri

Dear Sir:

This is in reply to your letter of recent date wherein you request an official opinion from this department, which reads as follows:

"Please advise whether or not the sheriff is entitled to bill the county for the cost of employing a deputy for the purpose of guarding an insane patient confined in the county hospital awaiting a sanity hearing in the probate court, or must the sheriff provide such deputy and pay the costs thereof out of his own pocket.

"The deputy employed for this purpose was not the deputy who receives a regular salary from the county, for the reason that the paid deputy was engaged in other duties."

Under the general rule of statutory construction an officer who is entitled to fees must point to the statute authorizing such claims. With this rule in mind, we refer you to Laws of Missouri 1945, page 1562, which provides for the appointment of deputies by sheriffs in counties of the third class. Section 2 of this act reads as follows:

"The sheriff in counties of the third class shall be entitled to such number of deputies and assistants, to be appointed by such official, with the approval of the judge of the circuit

court, as such judge shall deem necessary for the prompt and proper discharge of his duties relative to the enforcement of the criminal law of this state. The judge of the circuit court, in his order permitting the sheriff to appoint deputies or assistants, shall fix the compensation of such deputies or assistants. The circuit judge shall annually, and oftener if necessary, review his order fixing the number and compensation of the deputies and assistants and in setting such number and compensation shall have due regard for the financial condition of the county. Each such order shall be entered on record and a certified copy thereof shall be filed in the office of the county clerk. The sheriff may at any time discharge any deputy or assistant and may regulate the time of his or her employment."

Under this section it would seem that the sheriff is only authorized to employ such deputies as the judge of the circuit court may authorize.

However, under Article 18, Chapter 1, R.S. Mo. 1939, which relates to insane persons, we find these sections which would be applicable to the question you have submitted. Section 497, R.S. 1939, provides as follows:

"If any person, by lunacy or otherwise, shall be furiously mad, or so far disordered in his mind as to endanger his own person or the person or property of others, it shall be the duty of his or her guardian, or other person under whose care he or she may be, and who is bound to provide for his or her support, to confine him or her in some suitable place until the next sitting of the probate court for the county, who shall make such order for the restraint, support and safekeeping of such person as the circumstances of the case shall require."

Section 498, R.S. 1939, provides:

"If any such person of unsound mind, as in the last preceding section is specified, shall not be confined by the person having charge of him, or there be no person having such charge, any judge of a court of record, or any two justices of the peace, may cause such insane person to be apprehended, and may employ any person to confine him or her in some suitable place, until the probate court shall make further orders therein, as in the preceding section specified."

Section 499, R.S. 1939, provides:

"The expenses attending such confinement shall be paid by the guardian out of his estate, or by the person bound to provide for and support such insane person, or the same shall be paid out of the county treasury, upon the order of the county court, after the same shall be duly certified to them by the probate court."

Referring particularly to Section 498, supra, it will be noted it is provided that if a person has custody and charge of an insane person, and such person does not confine the insane person if it is necessary for him to be so confined, or if no person has charge of the insane person, then the judge of any court of record may cause such insane person to be apprehended and may employ any person to confine him or her in a suitable place until the probate court makes further order.

It will also be noted from Section 499, supra, that if such insane person does not have an estate sufficient to pay the aforesaid expenses that it should be paid out of the county treasury, upon order of the county court, after such expense has been certified by the probate court.

#### Conclusion.

From the foregoing, it is the opinion of this department that the sheriff would not have authority to incur expenses

by employing a deputy for the purpose of guarding an insane patient confined in the county hospital awaiting a sanity hearing in the probate court unless some judge of a court of record has caused such insane person to be apprehended and has employed the sheriff to confine such person in a suitable place until the probate court makes further orders therein relating to the custody of such insane person. It is further the opinion of this department that if the sheriff is employed by a judge of a court of record to apprehend an insane person and confine him, as provided in said Section 498, R.S. No. 1939, and if such person does not have an estate sufficient to pay the expenses of confinement, that the county treasurer, upon an order of the county court, should pay for such confinement when a bill for same is duly certified to the county court by the probate court.

Respectfully submitted,

TYNNE W. BURTON  
Assistant Attorney General

APPROVED:

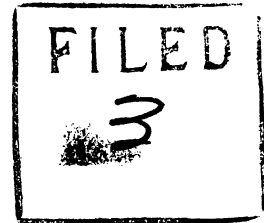
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J. E. TAYLOR  
Attorney General

TJB:ml

TAXATION: Retail sales of tangible personal property to cost-plus-fixed-fee contractors for the Federal Government  
SALES TAX: or its agencies are taxable under the Sales Tax Act.

January 21, 1947



Mr. George V. Aylward  
Attorney at Law  
Twelfth Floor Commerce Building  
Kansas City, Missouri

Dear Sir:

A few weeks ago we received a request from you inquiring about the application of the Missouri Sales Tax to certain transactions therein described. A few days after we received the request, we wrote for more information, and to date have not received a reply to that inquiry.

After further examination of your original request, I have decided to write an opinion based on the facts you have stated in your request. Your letter reads as follows:

"Pursuant to our conversation yesterday in regard to the sales tax on a plus cost contract which my client J. E. Dunn Construction Company has with the United States Government under the FPHA construction program I would like to have your office write an opinion whether or not my client should pay the sales tax on the materials purchased for the construction of the government houses.

"It is my opinion that under a plus cost contract the J. E. Dunn Construction Company would only be the agent of the government and therefore not liable for sales tax on materials purchased for the construction of these homes.

"Under the decision of the State of Alabama v. King Bowzer decided by the Supreme Court of the United States in November, 1941, and reported in 62 S.Ct. 43, the governmental exemption does not apply and the sales tax should be charged. However, they also

state that if the material is sold directly to a federal agency then it could not be taxable. All of the materials purchased by the J. E. Dunn Construction Company as the agent of the government goes to the FPHA construction program which is a federal agency. Either way I should like to have an opinion from your office so that I can pass same on to the Dunn Construction Company."

I note from your letter that you seem to be of the impression that because the construction company is acting as an agent for the government, and since the government is immune from state taxation, that the tax should not be imposed on sales to the Dunn Construction Company, which has a contract with the United States Government under the FPHA construction program. I think the case of State of Alabama v. King & Boozer, referred to in your letter, is controlling on the question here submitted.

The Missouri Sales Tax Act imposes the tax on the purchaser and requires the seller to report and pay the tax to the State Auditor. In the case of School District of Kansas City v. Smith, 111 S.W.(2d) 167, 1.c. 168, the court said:

"\* \* \* The purchaser is the taxpayer, and the seller, although responsible, is the agent or conduit through which the state seeks to facilitate the accounting for and the collection of the tax. \* \* \*"

In the case of City of St. Louis et al. v. Smith, 114 S.W. (2d) 1017, the court had before it the question as to whether or not contractors for the improvement of real estate were consumers of the articles which they purchased for such improvement or whether they were sellers of such articles to the person who owned the real estate to be improved. At 1.c. 1019, the court, in ruling on the question, said:

"In our judgment the contractors in this case did not buy the materials in question for the purpose of reselling such materials to the city. They were under contract to deliver to the city a finished product. It was the inseparable commingling of labor and material that produced the finished product. Our conclusion is that the



contractors used and consumed the material in order to produce the finished product in compliance with their contract. Since the contractors used and consumed the material, they and not the city are primarily liable for the one per cent. sales tax. The sale of the materials by the dealer to the contractors was the taxable transaction, and it was the duty of the dealer to collect the tax from the contractors at the time the sale was made."

From what you have written in your letter, it appears that the Dunn Construction Company, as a cost-plus-fixed-fee contractor under the FPHA construction program, would be in the same classification as a contractor in the case of City of St. Louis, supra.

The Missouri Sales Tax, in so far as it provides for the imposition of the tax on the purchaser and the reporting and paying of it by the retailer, is similar to the provisions of the Sales Tax Act for the State of Alabama which was under consideration by the United States Supreme Court in the King & Boozer case, 62 S. Ct. 43. From a reading of the King & Boozer case, it will be seen that the tax in that case was contested on the theory that a cost-plus-fixed-fee contractor was acting as an agent for the Federal Government, and since the Federal Government is immune from state taxation, then the tax should not be imposed on the agent for materials which he used in constructing buildings for the Federal Government. On the question of immunity from state taxes by the Federal Government, the court, in the King & Boozer case, said at l.c. 45:

"\* \* \* The Government, rightly we think, disclaims any contention that the Constitution, unaided by Congressional legislation, prohibits a tax exacted from the contractors merely because it is passed on economically, by the terms of the contract or otherwise, as a part of the construction cost to the Government. So far as such a nondiscriminatory state tax upon the contractor enters into the cost of the materials to the Government, that is but a normal incident of the organization within the same territory of two independent taxing sovereignties. The asserted right of the one to be free of taxation by the other does not spell immunity from paying the added costs, attributable to the taxation of those who

furnish supplies to the Government and who have been granted no tax immunity.  
\* \* \*

"The contention of the Government is that the tax is invalid because it is laid in such manner that, in the circumstances of this case, its legal incidence is on the Government rather than on the contractors who ordered the lumber and paid for it, but who, as the Government insists, have so acted for the government as to place it in the role of a purchaser of the lumber. The argument runs: the Government was a purchaser of the lumber, and but for its immunity from suit and from taxation, the state applying its taxing statute could demand the tax from the Government just as from a private individual who had employed a contractor to do construction work upon a like cost-plus contract."

Following the above statement, the court said that the question of whether or not a sales transaction is not taxable on account of federal immunity will depend upon the terms of the contract. The court then went into the provisions of the contract between the cost-plus-fixed-fee contractor and the Government, and in summing up the provisions of the contract, the court at l.c. 47 said:

"\* \* \* The lumber was sold and delivered on the order of the contractors which stipulated that the Government should not be bound to pay for it. It was in fact paid for by the contractors who were reimbursed by the Government pursuant to their contract with it. The contractors were thus purchasers of the lumber within the meaning of the taxing statute, and as such were subject to the tax. They were not relieved of the liability to pay the tax either because the contractors in a loose and general sense were acting for the Government in purchasing the lumber or, as the Alabama Supreme Court seems to have thought, because the economic burden of the tax imposed upon the purchaser

would be shifted to the Government by reason of its contract to reimburse the contractors." (Underscoring ours.)

From an examination of this entire opinion, we are led to the conclusion that the imposition of the tax in this case turned on the fact that the materials used by the contractors were sold and delivered to the contractors on their orders, and that the Government was not bound to pay for these materials. The court, in the King & Boozer case, thought that the legal effect of the contracts was to obligate the contractors to pay for the lumber used by them in their contracts with the Government.

As stated above, we do not have before us the contracts of the Dunn Construction Company with the Government; but if these contracts contain provisions similar to those contained in the King & Boozer case and in which the Dunn Construction Company, in its contracts for the purchase of articles of tangible personal property used, obligates the contractors to pay for the materials, then such transactions would be subject to the Missouri Sales Tax, even though the contractors were reimbursed for these materials by the Federal Government.

#### CONCLUSION

It is, therefore, the opinion of this department that if the contracts of the Dunn Construction Company with the Government under the FPHA construction program provide that the contractors obligate themselves to pay for the articles of tangible personal property used in such contracts, and they do pay for them, then such transactions are subject to the Missouri Sales Tax Act, even though the Dunn Construction Company may be reimbursed by the Government for these payments, pursuant to the terms of the contract.

Respectfully submitted,

APPROVED:

TYRE W. BURTON  
Assistant Attorney General

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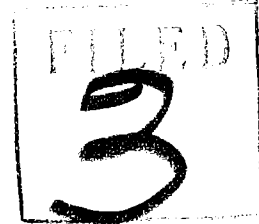
J. E. TAYLOR  
Attorney General

TWB:VLM

MAGISTRATE COURT: County Court has authority to permit the Magistrate to use the Circuit Court room at such times as it is not in use by the Circuit Court.

January 22, 1947

Honorable Omer H. Avery  
Prosecuting Attorney  
Lincoln County  
Troy, Missouri



Dear Sir:

This will acknowledge receipt of your letter, in which you request an official opinion from this department relative to the County Court's authority to provide room facilities for the Magistrate Court and jury room. Your letter reads as follows:

"The advent of the office of Magistrate presents a problem to the County, due to the lack of space in our Court House. There is no available space for Magistrate Court and jury room, and it is desired to use the Circuit Court room and facilities at such times as it will not conflict with the use thereof by the Circuit Court.

"This matter was discussed by the County Court with Judge Bruere, Circuit Court Judge, and Judge Bruere has forbidden the use of the Circuit Court room for the Magistrate.

"It is my opinion that the County Court has charge and control of the county property, including the Circuit Court room, and authority to permit the Magistrate to use the Circuit Court room at such times as it is not in use by the Circuit Court. However, before bringing the matter to issue with the Circuit Court, an opinion from your office is desired as to whether or not the County Court has a right to control and determine the use of the Circuit Court room at times when the Circuit Court is not in session. This situation now exists in many counties, especially counties with court houses that were built years ago without court room facilities for the Probate Judge."

In a reading of Senate Bill 207, passed by the 63rd General Assembly, dealing with magistrate courts, we find only one reference to the place where a magistrate court is to be held, and that is in Section 18, which provides:

"The county seat shall be the seat of the magistrate court, and the county court may, by proper order, provide an additional place or places in the county for the holding of magistrate court; provided however that in counties of the first class the county court may by proper order establish the seat of any magistrate court at some place within the county other than at the county seat."

There should be, we feel, no question but what it is the duty of county courts to establish and maintain out of the county funds the offices of the magistrate courts in their respective counties.

Section 2480, R.S. Mo. 1939, referring to the county court, provides:

"The said court shall have control and management of the property, real and personal, belonging to the county, and shall have power and authority to purchase, lease or receive by donation any property, real or personal, for the use and benefit of the county; to sell and cause to be conveyed any real estate, goods or chattels belonging to the county, appropriating the proceeds of such sale to the use of the same, and to audit and settle all demands against the county."

In the case of Sparks v. Purdy et al., 11 Mo. 220, the Supreme Court of Missouri said at l.c. 224:

"The law intrusts the County Court with the control and management of the property, real and personal of the county; and under this power the court superintends the public buildings. \* \* \* \* \*

In the case of Penix v. Shaddox, 263 S.W. 389, the Supreme Court of Arkansas said:

"It is the duty of a county to erect and furnish a courthouse, and to provide necessary offices for the several county officers. Law v. Falls, 109 Ark. 395, 159 S.W. 1130.

"Section 2279 of Crawford & Moses' Digest defines the powers generally of the county courts of the state. Among other things, the section provides that the county court of each county shall have the control and management of all the property, real and personal, for the use of the county and to cause to be erected all buildings and all repairs necessary for the use of the county.

"Thus it will be seen that the county court is given, not only the authority to furnish a courthouse, but to provide the necessary offices for the several county officers. This includes the power to designate the rooms which are suitable for each particular office, and the action of the county court in assigning the particular rooms which shall be occupied by the different officers is the act of the county. This power is not exhausted when once exercised; but is a continuing one, and the assignment of offices may be changed whenever, in the judgment of the county court, the public convenience will be promoted by the change."

In the case of the Board of Commissioners of Vigo County v. Stout et al., 136 Ind. 53, the Supreme Court of Indiana, in speaking of the duties of the County Commissioners, which is analogous to the county courts in Missouri, said at l.c. 57:

"The control of county property, and the management of county business generally, is confided by law to the commissioners of the county. In contemplation of law, in so far as the financial affairs of the county are concerned, the board of county commissioners is the county. The construction, maintenance, and custody of all county buildings, not excepting the court house, are in the hands of the board. They provide and care for all the

offices necessary for the conduct of county affairs, including court rooms, offices for the clerk and sheriff of the court, jury rooms, jail and other rooms and buildings convenient and necessary for the conduct of the business of the courts. This, of course, includes the means of access to the court, whether by doors, halls, corridors, stairways, or elevators." (Emphasis ours.)

Thus, from a reading of the above cited cases, we are lead to the conclusion that the county court controls the county property, real and personal; and that it is the duty of the county court to provide the necessary offices for the several county officers. This would, of necessity, include the furnishing by the county court of a room to be used for the magistrate court. Now, can the county court order that the circuit court room be used for this purpose when the circuit court is not in session? The Indiana Court, in the Vigo County case, supra, continued at l.c. 58:

"But while the powers and duties of the board of county commissioners within the county are thus ample and complete, as a constituent part of the administrative department of the State government, yet it must be kept in mind that these powers and duties are entrusted to the board for certain defined purposes, and that the commissioners are trustees for the carrying out of such purposes. The commissioners may not exercise their powers arbitrarily and without regard to the trusts committed to their keeping."

The case of *In re Court Room*, 148 Wis. 109, involved the question of whether the County Board, (which is the same as the county court in Missouri), had complied with a statute which required that it provide suitable and convenient quarters for the accommodation of the circuit court. The circuit judge, Judge Turner, contended that the county court had not so provided. The Supreme Court of Wisconsin said at l.c. 121:

"\* \* \* The authorities, in so far as any can be found on the subject, are to the effect that a constitutional court of general jurisdiction has inherent power to protect itself against any action that



would unreasonably curtail its powers or materially impair its efficiency. A county board has no power to even attempt to impede the functions of such a court, and no such power could be conferred upon it. Circuit courts have the incidental power necessary to preserve the full and free exercise of their judicial functions, \* \* \* \* \*

(Emphasis ours.)

In the Wisconsin case, supra, the court decided, from the record, that the quarters which the county board proposed to furnish were inadequate, and that the circuit judge was within his rights in refusing to occupy them. The Court, in so holding, said at l.c. 122:

"\* \* \* Judge TURNER acted within his right in deciding primarily that the quarters which the County Board proposed to furnish were inadequate. But the law vests in the county board the power to furnish court rooms, and, so long as those furnished are reasonably adequate, courts cannot insist that different quarters be provided, although they may be more commodious or pleasant or even more convenient. \* \* \* \* "

Thus it would seem to be only fair and reasonable that, since, as we have seen, it is the duty of the county to provide offices for its officers; and, since by the bill establishing and setting up the magistrate courts there is no specific provision for their court rooms, it is the County Court's duty to provide adequate facilities for the Magistrate Court. Such adequate facilities would seem to include such a room as the Circuit Court room. The county controls the county property, including the Courthouse in which the Circuit Court room is located. If the use of the Circuit Court room, in order to provide adequate quarters for the Magistrate Court is reasonable and necessary, and such as not to unreasonably curtail the powers or materially impair the efficiency of the Circuit Court, then it is within the power of the County Court to order such use of the Circuit Court room for use by the Magistrate Court when the Circuit Court room is not otherwise in use.

#### CONCLUSION

It is, therefore, the opinion of this department that, if

Hon. Omer H. Avery

-6-

there is no adequate space available in the Courthouse for the Magistrate Court and jury room except the Circuit Court room, then the County Court has authority to permit the Magistrate to use the Circuit Court room for the Magistrate Court room, to be used at such times as it is not in use by the Circuit Court.

Respectfully submitted,

WILLIAM C. COCKRILL  
Assistant Attorney General

APPROVED:

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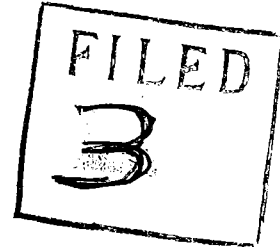
J. E. TAYLOR  
Attorney General

WCC:LR

COPY

RECORDER OF DEEDS: Three questions concerning fees for issuing verified copies of discharges in counties of the third class under House Bill No. 772.

February 24, 1947



Honorable William Aull III  
Prosecuting Attorney  
Lafayette County  
Lexington, Missouri

Dear Sir:

Receipt is acknowledged of your letter which reads:

"A question has arisen as to whether or not under House Bill 772 the outgoing Recorder of Deeds of Lafayette County, Missouri, a county of the third class, is entitled to collect the sum of \$.50 for issuing a verified copy of a discharge to a discharged veteran from July 1 to December 31, 1946. The verified copy of the discharge was not requested by the veteran for the purpose of using the same in the prosecution of any claim whatsoever as provided by Sec. 15077, R. S. Mo., 1939.

"(1) The initial question that I desire to have answered is whether or not the outgoing recorder is entitled to receive \$.50 for each verified copy of a discharge given to a discharged service man between the aforesaid dates when the same was merely requested by a discharge veteran, said request not being one made within the provisions of aforesaid Sec. 15077, R. S. Mo. 1939.

"(2) Should the answer to the above question be that the outgoing Recorder is not entitled to \$.50 fee for the verified copy, a further question presents itself. Assume a veteran requests and receives a verified copy of a discharge between July 1 and December 31, 1946. The then Recorder did not charge there for under the belief he would receive \$.50 from the county. In January, 1947, under the term of office of the new Recorder, an additional discharge is requested by said veteran, not for

any of the purposes enumerated in Sec. 15077, R. S. Mo. 1939. The question is: Should the present recorder of Deeds charge said veteran for this second verified copy of discharge or should he issue the same free of charge and collect \$.50 from the county.

"(3) Should the present recorder of Deeds not be entitled to collect \$.50 under the facts afore stated an additional question is presented. Assume the veteran receives a free, verified copy of a discharge between July 1 and December 31, 1946. In January 1947, he requests a copy of a discharge under the provisions of Sec. 15077, R. S. Mo. 1939. Is the present Recorder entitled to \$.50 from the county for the issuance of this additional discharge?"

Your inquiry presents three principal questions which shall be answered in the order they appear.

In your first question reference is made to House Bill No. 772 which became effective July 1, 1946. Therefore, we assume that you are asking whether or not the outgoing recorder of deeds would be entitled to receive a fee of fifty cents from the county for furnishing certified copies of discharge between July 1, 1946 and December 31, 1946, for Section 2, House Bill No. 772 in part provides:

" \* \* \* For each name which the recorder shall append to the aforesaid alphabetical list, and for each certified copy of such discharge as he shall furnish, the said recorder shall receive the sum of fifty cents, to be paid out of the county treasury, \* \* \* \* " (Emphasis ours)

At the time that House Bill No. 772 became effective the former or outgoing recorder of deeds was holding office, also the period of time between July 1, 1946 and December 31, 1946, was a portion of his term of office. So to answer your first question we must first determine whether or not he would have been entitled to receive the fee for furnishing copies of discharges during his term of office, as provided in the above quoted portion of House Bill No. 772. In an opinion submitted to the Honorable George A. Spencer, prosecuting attorney of Boone County, on July 5, 1946, this department held that the incumbent recorder of deeds in Boone County, a county of the third class, was not entitled to receive a fee of fifty cents, to be paid from the county treasury, for issuing certified copies of discharges because to pay him such fee would constitute an increase in his compensation during his term of office, and would be inconsistent with the constitutional restriction of Section 13, Article VII of the

Constitution of 1945 which, in part, provides that "the compensation of state, county and municipal offices shall not be increased during the term of office." The following is quoted from that opinion:

"The second duty required of the recorders concerns the issuing of discharges to the veterans, or their heirs, on request. This was a function of the recorder prior to House Bill #772, and does not constitute a new and additional duty to that office, and, therefore, falls within the restriction of Article VII, Section 13, of the Constitution of Missouri, 1945. The 50¢ fee allowed for the issuance of the first verified copy would not, therefore, be a proper charge against the county treasury in favor of the incumbent recorders during their terms. This fee will be due to the recorders who are elected at the succeeding elections \* \* \* \*. The present recorder shall issue the verified copies as though House Bill #772 had never been passed, and in accordance with Section 15077, R. S. Mo. 1939, as discussed herein later."

Therefore, in answer to your first question we believe that the outgoing recorder of deeds would not be entitled to receive a fee of fifty cents, to be paid from the county treasury, for certified copies of discharges issued to veterans between July 1, 1946, the effective date of House Bill No. 772, and December 31, 1946. The outgoing recorder would not have been entitled to such fee while he was the incumbent office holder, and therefore would not be entitled to it now.

The second question asks if the present recorder of deeds should charge a veteran for an additional verified copy of his discharge when the discharge is requested for a purpose other than those designated in Section 15077. R. S. Mo. 1939, or, should such copy be furnished free to the veteran and the recorder be permitted to collect a fee of fifty cents from the county.

Again reference is made to Section 2 of House Bill No. 772 which, in part, provides:

"\* \* \* \* Provided, however, that no such recorder shall be paid \* \* \* \* for any additional verified copy after the first. \* \* \* \*"

The above quoted portion of the act is a limitation on the provision ahead of it which provides, in substance, that the recorder,

shall receive for each certified copy of the discharge the sum of fifty cents to be paid out of the county treasury. Construing the statute as a whole as to its application to the present recorder of deeds it means that the county may be charged a fee of fifty cents for the first certified copy of a discharge which the recorder furnishes a veteran, but it cannot be charged "for any additional certified copies after the first." It is our notion the Legislature intended that, under no circumstances, could the recorder of deeds collect a fee of fifty cents from the county for furnishing an additional copy of a discharge to a veteran after the first has been furnished. The furnishing of any additional copies should be governed by the provisions of Section 15077, R. S. Mo. 1939, which provides:

"Whenever a certified copy or copies of any public record in the state of Missouri are required to perfect the claim of any soldier, sailor or marine, in service or honorably discharged, any any dependent of such soldier, sailor or marine, for a United States pension, or any other claim upon the government of the United States, they shall, upon request be furnished by the custodian of such records without any fee or compensation therefor."

This section has not been affected by House Bill No. 772, and if a veteran requests an additional copy to be used for any purpose specified in the statute he would be entitled to such copy requested without charge. However, if he desires a copy for some purpose other than those specified in the statute the recorder would be entitled to charge the person requesting the certified copy the same fee as for any other certificate and seal. He would not be entitled to furnish the certified copy free of charge and collect a fifty cent fee from the county.

In answer to your third question: If the additional certified copy of a discharge is requested by a veteran for any purpose specified in Section 15077, supra, it shall be furnished "without any fee or compensation therefor." The very wording of the statute implies that the recorder would not be entitled to receive any fee from the veteran when the certified copy is requested for a purpose specified in the statute. Further, the provision in House Bill No. 772 that no recorder shall be paid "for any additional verified copy after the first" clearly denies the recorder the right to receive a copy of fifty cents from the county for furnishing additional verified copies of a discharge.

#### CONCLUSION

Therefore, it is the opinion of this department that in

counties of the third class wherein the offices of circuit clerk and recorder of deeds are separate that:

(1) The former or outgoing recorder of deeds would not be entitled, under House Bill No. 772, to receive a fee of fifty cents to be paid from the county treasury for furnishing certified copies of discharges to veterans between July 1, 1946 and December 31, 1946, which was a period of time comprising a portion of his term of office.

(2) Where an additional certified copy of a discharge is requested of the present recorder of deeds, reference should be had to Section 15077, R. S. Mo. 1939, and if the request for the additional copy is for a purpose set out in the statute, such copy should be issued without charge, otherwise the recorder would be entitled to charge the person requesting the additional verified copy the same fee as for any other certificate and seal. In no event could the additional verified copy be furnished without charge and the recorder be permitted to collect a fee of fifty cents from the county.

(3) Where an additional verified copy of a discharge is requested by a veteran for any purpose designated in Section 15077, R.S.Mo. 1939, the same shall be furnished free of charge and the recorder of deeds would not be entitled to receive a fee of fifty cents from the county for furnishing such copy.

Respectfully submitted,

RICHARD F. THOMPSON  
Assistant Attorney General

APPROVED:

J. E. TAYLOR  
Attorney General

RFT:mw



COUNTY FARM ORGANIZATION: (1) Under Sec. 6, H.B. 112, 62nd G.A., Laws 1943, p. 319, it is mandatory that county farm agent's office or headquarters be located at county seat. (2) Location of office at county seat consisting merely of a stenographer and continuation of bulk of agricultural agent's work at a place other than county seat not compliance with requirements of said Sec. 6. (3) County court authorized to allot funds for county agent even though his office or headquarters not kept at county seat.

March 27, 1947

FILED

3

4/7

Honorable William Aull III  
Prosecuting Attorney  
Lafayette County  
Lexington, Missouri

Dear Sir:

This is in reply to your letter of recent date, requesting an official opinion of this department, and reading as follows:

"Reference is made to Revised Statutes 14287.5; the same being Laws of 1943, page 319, Section 6. The matter in question is that regarding the location of the county agricultural agent. (1) Under this section is it mandatory that said agent's office be located at the county seat? (2) Assuming that the office of the said agent is located at the present time at a place other than the county seat and assuming that the answer to question one is in the affirmative, would it be permissible under this section to locate a office at the county seat consisting of merely a stenographer and continue to maintain the bulk of said agricultural agent's work at a location other than the county seat? (3) Is it mandatory that the headquarters of the county agricultural agent be located at the county seat and is the county court authorized to allot funds for such agent so long as the offices or headquarters are retained in a place other than the county seat?"

The first and third questions contained in your opinion request are answered by an official opinion of this department rendered under date of December 10, 1943, to Hon. Phil H. Cook, Prosecuting Attorney of Lafayette County, a copy of which opinion we enclose.

Your second question reads as follows:

"(2) Assuming that the office of the said agent is located at the present time at a place other than the county seat and assuming that the answer to question one is in the affirmative, would it be permissible under this section to locate a office at the county seat consisting of merely a stenographer and continue to maintain the bulk of said agricultural agent's work at a location other than the county seat?"

Section 655, R. S. Mo. 1939, provides that words and phrases should be taken in their plain or ordinary and usual sense, unless they are technical words.

"Headquarters" is defined as a chief or usual place of residence. (Webster's New International Dictionary.)

"Office" is defined as the place where a particular kind of business or service for others is transacted; a house, room or apartment in which public officers and others transact business. (Webster's New International Dictionary.)

From these definitions, it is clear that "office" or "headquarters" refers to the principal place where the county agent transacts his business as such county agent and by virtue of his office as county agent. The Legislature specifically provided that "the" office or headquarters should be at the county seat. This can mean only that the principal place where the county agent transacts the business devolving upon him by virtue of his office should be located at the county seat.

The Supreme Court of Missouri said in *Graves v. Purcell*, 85 S. W. (2d) 543, 1. c. 547:

"In determining the true meaning and scope of constitutional or statutory provisions, the intent and purpose of the lawmakers is of primary importance. \* \* \*"

The General Assembly, in 1943, repealed Article 17, Chapter 102, R. S. Mo. 1939, and enacted in lieu thereof House Bill 112. The first sentence of Section 6 of House Bill 112 of the 62nd General Assembly, found in Laws of Missouri, 1943, page 319, is exactly the same as Section 14283, R. S. Mo. 1939, but the 62nd General Assembly added in Section 6 of that bill the second sentence, which contains the provision that the location of the

county agent's office or headquarters shall be maintained at the county seat. The intent of the Legislature in adding this particular provision to the county farm organization law could be only to assure that the county agent himself would conduct the business of his official position at the county seat.

Therefore, the location of an office at the county seat in which there is only a stenographer and the retention of the bulk of the county agent's work at another location would not be a compliance with the mandatory provisions of Section 6 of House Bill 112 of the 62nd General Assembly, found in Laws of Missouri, 1943, page 319.

#### CONCLUSION

It is the opinion of this department that:

(1) Under the provisions of Section 6 of House Bill 112 of the 62nd General Assembly, Laws of Missouri, 1943, page 319, it is mandatory that the county agent's office or headquarters be located at the county seat.

(2) The location of an office at the county seat in which there is maintained only a stenographer and the retention of the bulk of the county agent's work at a location other than the county seat is not a compliance with Section 6 of House Bill 112 of the 62nd General Assembly, Laws of Missouri, 1943, page 319.

(3) The county court is authorized to allot funds to the county organization for payment of the county agent even though the county agent does not maintain his headquarters or office at the county seat.

Respectfully submitted,

C. B. BURNS  
Assistant Attorney General

APPROVED:

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J. E. TAYLOR  
Attorney General

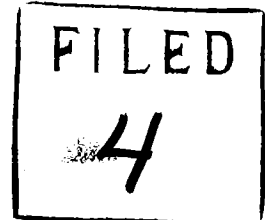
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COUNTY:  
SALARY:  
CIRCUIT CLERKS:

Construing House Bill 893, passed  
by the 63rd General Assembly.

February 18, 1947

Honorable Ralph Baird  
Prosecuting Attorney  
Jasper County  
Joplin, Missouri



Dear Sir:

This will acknowledge receipt of your request for an opinion upon the attached letter from Mr. Harold Jones, Clerk of the Circuit Court of Jasper County, Missouri, which letter reads:

"I am writing for an opinion in regard to my salary as Circuit Clerk of Jasper County. House Bill 893 passed and approved in the 63rd General Assembly, sets the salary at \$4,000.00 per annum in 12 equal installments. My term in office began the first Monday in January, 1947. The County Court contends that I should be deducted \$49.36 from my first installment in 1947 for reason of not taking office until January 6. The Statutes set out the Circuit Clerks term of Office to begin the first Monday in January. The old Statute did not mention equal installments but stated the Clerk should be paid on the first of each month.

"If the County Courts contention is right I would not receive by \$4,000.00 for my first year, nor can I find any provisions for payment at any later date.

"To clear this matter up, I would like to have an opinion from the Honorable J. E. Taylor, Attorney General for the State of Missouri."

The primary rule of statutory construction is to ascertain from the language used the intent of the lawmakers, if possible, and to put on the language its plain and rational meaning in order to promote its object. (See *Donnelly Garment Company v. Keitel*, 193 S.W. (2d) 577.) House Bill 893, passed by the 63rd General Assembly, specifically repeals no statute, but relates

to compensation for the clerk of the circuit court in second class counties. Section 1 of said bill provides that such circuit clerks shall receive as compensation \$4,000.00 per annum, to be paid in twelve equal monthly installments by warrants drawn on the county treasury. Also, that said clerk is allowed to retain, in addition to the aforesaid salary, all fees earned by him in cases of change of venue from other counties. Furthermore, said clerk is required to report all fees accruing to his office and remit same to the county treasury. Section 1, House Bill 893, reads:

"The clerk of the circuit court, in all counties, of the second class, shall receive as compensation for his services, the sum of \$4,000.00 per annum, to be paid in twelve equal monthly installments by the county on warrants drawn on the county treasury. He shall also be allowed to retain, in addition to said annual salary, all fees earned by him in cases of change of venue from other counties."

Under Section 13283, R.S. Mo. 1939, such circuit clerk shall be elected in the year of 1882 and every four years thereafter, and further provides that said clerk shall enter upon his duties on the first Monday in January next ensuing his election. Said Section 13283, R.S. Mo. 1939, reads:

"At the general election in the year eighteen hundred and eighty-two, and every four years thereafter, except as hereinafter provided, the clerks of all courts of record, except of the supreme court, the St. Louis court of appeals, and except as otherwise provided by law, shall be elected by the qualified voters of each county and of the city of St. Louis, who shall be commissioned by the governor, and shall enter upon the discharge of their duties on the first Monday in January next ensuing their election, and shall hold their offices for the terms of four years, and until their successors shall be duly elected and qualified, unless sooner removed from office."

Under Section 13283, supra, the term of the present Circuit Clerk of Jasper County, Missouri, began on January 6, 1947,

and said term will expire on January 6, 1951. The compensation allowed under Section 1 of said House Bill 893, allowing said clerk \$4,000.00 per annum, means that he is entitled to that amount of money yearly, or every twelve months during his term of office, and that said salary is required to be paid in twelve equal monthly payments. In view of the latter requirement that the salary shall be paid in twelve equal monthly payments, it was apparently the intention of the Legislature to exclude any other form of payment. We think the old maxim, expressio unius est exclusio alterius, is applicable in this instance, which means that the expression of one thing in a statute is the exclusion of all others. In *State ex rel. Barlow v. Holtcamp*, 14 S.W. (2d) 646, 1.c. 650, the court said:

"The probate court is a court of limited jurisdiction, possesses only such power as is conferred upon it by statute, and can exercise its jurisdiction only in the manner prescribed by statute." *St. Louis v. Hollrah*, 175 Mo. 79, 85, 74 S.W. 996, 998.

"Whenever a statute limits a thing to be done in a particular form, it necessarily includes in itself a negative, namely, that the thing shall not be done otherwise." 25 C.J. 220, note 16 (c)."

The first twelve warrants to be drawn will pay the Circuit Clerk for the first year of his term of office from January 6, 1947, to January 6, 1948. Likewise, monthly warrants in similar amounts shall be executed to said Circuit Clerk for the balance of his term of office. Had the law not provided the manner of payment of the compensation of said Clerk, then we would conclude that the County Court could pay said Clerk in the manner they are now attempting to put in effect. However, even then, the County Court would be required to pay the Circuit Clerk the full \$4,000.00 compensation per annum, and if the Court only paid him for the actual days he worked in January, 1947, then said Court would be required to pay him for whatever days he worked in January, 1951, prior to the first Monday in the month, which would be the last week of his present term of office. So, in reality, it makes little difference.

In *State v. Nordberg*, 193 S.W. (2d) 10, the court held that the Constitution of 1945, Section 23, Article IV, defining fiscal year for the state and all its agencies, shall be the twelve months

beginning on the first day of July in each year, does not apply to counties. The question might be raised as to whether the county court could pay the salary prescribed in said House Bill 893, since the per annum salary is for services rendered beyond the current year. Article 2, Chapter 73, R.S. Mo. 1939, placed counties under the county budget law, which required the county court to prepare, enter of record, and file with the county treasurer and state auditor a budget of estimated receipts and expenditures for the year beginning January 1, and ending December 31. Said article also required the county offices to furnish the clerk of the county court, on or before January 15th of each year, an itemized statement of an estimated amount required to pay all salaries and expenses for personal service during the current year. However, the Supreme Court, in *Gill v. Buchanan County*, 142 S.W. (2d) 665, held that statutes fixing salaries of county officers are in effect a direction to the county court to include such amounts in the budget of the county, and such statutes are not in conflict with the county budget law, but must be read and considered with the county budget law in construing it. That said statutes amount to a mandate to the county court to budget such amounts. In so holding, the court said:

"Defendant also contends that plaintiff is not entitled to recover because there was not a sufficient amount provided in the 1934 county budget for county court salaries to pay salaries of \$4,500 each. (Only \$840 more than the total of salaries figured at \$3,000 each was included in the salary fund for the county court.) However, as hereinabove noted, salaries of county judges are fixed by the Legislature and the Constitution prevents even the Legislature from changing them during the terms for which they were elected. Surely, the county court cannot change them, by either inadvertently or intentionally providing greater or less amounts in the salary fund in the budget. The action of the Legislature in fixing salaries of county offices is in effect a direction to the county court to include the necessary amounts in the budget. Such statutes are not in conflict with the County Budget Law but must be read and considered with it in construing it. They amount to a mandate to the County Court to budget such amounts. Surely no mere failure to recognize in the budget this annual obligation of the county to pay such salaries could set aside this legislative mandate and prevent the creation of this



obligation imposed by proper authority. Certainly such obligations imposed by the Legislature were intended to have priority over other items as to which the county court had discretion to determine whether or not obligations concerning them should be incurred. They must be considered to be in the budget every year because the Legislature has put them in and only the Legislature can take them out or take out any part of these amounts. \* \* \* \* \*

Therefore, we are of the opinion that the decision in Gill v. Buchanan County, supra, disposes of the contention that the County Court cannot pay the Circuit Clerk as provided in House Bill 893. Therefore, since House Bill 893, Section 1, specifically prescribes that said Circuit Clerk shall receive \$4,000.00 per annum and same shall be paid in twelve equal monthly installments, we must conclude that it was the legislative intent that said Circuit Clerk be paid in equal monthly installments and no other manner and that the County Court cannot reduce any warrants paying compensation to the Circuit Clerk in an amount less than one-twelfth of the annual compensation provided for said clerk.

Another well established rule of statutory construction is that a statute should not be construed to make it unreasonable where it can be given reasonable construction. See State ex rel. St. Louis Public Service Company v. Public Service Commission, 34 S.W. (2d) 486, 326 Mo. 169. See also Marler v. Marler's Estate, 104 S.W. (2d) 733.

#### CONCLUSION

Therefore, it is the opinion of this department that circuit clerks in second-class counties are entitled to receive a salary amounting to \$4,000.00 per annum, that said salary must be paid in twelve equal monthly installments as provided in House Bill 893, passed by the 63rd General Assembly. That the County Court cannot reduce any monthly payment below one-twelfth of the annual salary under said House Bill 893. Furthermore, the Circuit Clerk will in effect be paid for services

Honorable Ralph Baird

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rendered during the first month, notwithstanding the fact that he did not work the full month, since under the law he did not assume the duties of his office until the first Monday in January. However, the County will lose nothing by paying said Clerk in this manner, since he will be required to make up this week by working the last week during his term of office, from December 31, 1950, to the first Monday in January, 1951.

Respectfully submitted,

AUBREY R. HAMMETT, Jr.  
Assistant Attorney General

APPROVED:

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J. E. TAYLOR  
Attorney General

SCHOOL FUND DISTRIBUTION: County and Township school funds merged into one fund after liquidation.

2 to  
Mr. John

June 5, 1947

6/6



Honorable Ralph Baird  
Prosecuting Attorney  
Jasper County  
Joplin, Missouri

Dear Mr. Baird:

This is in reply to your letter of May 22, 1947, in which an official opinion of this department was requested on the following question:

"Is the capital of a particular Township fund to be distributed only to the schools in that Township, on a basis of enumeration, or, is the capital of the Township funds to be added to the capital of the Capital School Fund for countywide distribution to all the school districts of the County according to enumeration."

The specific question for consideration is whether the various county and township school funds, after liquidation, under the provisions of Section 7, Article IX of the 1945 Constitution, and Sections 10376 and 10383, Mo. R.S.A., which implement that section, are merged into one fund or whether they retain their separate identities for the purpose of distribution. Your attention is directed to the above constitutional provision, which reads as follows:

"All real estate, loans and investments now belonging to the various county and township school funds, except those invested as hereinafter provided, shall be liquidated without extension of time, and the proceeds thereof and the money on hand now belonging to said school funds

of the several counties and the city of St. Louis, shall be reinvested in registered bonds of the United States, or in bonds of the state or in approved bonds of any city or school district thereof, or in bonds or other securities the payment of which are fully guaranteed by the United States, and sacredly preserved as a county school fund. Any county or the city of St. Louis by a majority vote of the qualified electors voting thereon may elect to distribute annually to its schools the proceeds of the liquidated school fund, at the time and in the manner prescribed by law. All interest accruing from investment of the county school fund, the clear proceeds of all penalties, forfeitures and fines collected hereafter for any breach of the penal laws of the State, the net proceeds from the sale of estrays, and all other moneys coming into said funds shall be distributed annually to the schools of the several counties according to law."

You will note the Constitution provides that all securities, after liquidation, and money belonging to the county and township school funds "shall be \* \* \* preserved as a county school fund"; however, that "any county \* \* \* may elect to distribute \* \* \* the proceeds of the liquidated school fund." It is also provided that " \* interest accruing from investment of the county school fund, \* \* \* shall be distributed \* \* \*." The language of the Constitution is clear and unambiguous in providing that the liquidated county and township school funds are to be merged into and preserved as one fund, that is, the county school fund.

The wording of the statutes implementing said constitutional provision is equally as clear. Section 10376.1, Mo. R.S.A., provides as follows:

"Whenever there shall be presented to the body having in its charge the capital of the county and township school funds of any county or the City of St. Louis a petition, signed by qualified electors of said county or the City of St. Louis equal

in number to five per cent of the voters casting a ballot in said county or the City of St. Louis for the office of governor at the last preceding general election at which said office was voted upon, praying that the proposal be submitted to the qualified electors for making annual distribution of the capital of the liquidated school fund, such body shall cause an election to be held upon said proposal."

In the above section and throughout Section 10376.2, Mo. R. S. A., we find frequent use of such terms as "capital of the liquidated county and township school funds" and "accumulated balance of such funds." Where there is such a clear expression of the intention of the framers of the law found in the wording, we cannot admit to another construction but must give effect to that intention. This rule is set out in the case of *Gendron v. Dwight Chapin & Co.*, 37 S. W. (2d) 486, at page 488:

"In construing the act, we are bound to ascertain and give effect to the intention of the Legislature as expressed in the statute, and, where the meaning of the language used is plain, it must be given effect by the courts (*Betz v. Kansas City Sou. Ry. Co.*, 314 Mo. 390, 284 S. W. 455, 461; *Grier v. Ry. Co.*, 236 Mo. loc. cit. 534, 228 S. W. loc. cit. 457; *Sleyster v. E. Donzelot & Son* (Mo. App.) 25 S. W. (2d) loc. cit. 148), and this without regard to the results of the construction or the wisdom of the law as thus construed (*State ex rel. v. Wilder*, 206 Mo. 541, 105 S. W. 272), and we have no right, by construction, to substitute any ideas concerning legislative intent contrary to those unmistakably expressed in the legislative words (*Clark v. Railroad Co.*, 219 Mo. loc. cit. 534, 118 S. W. loc. cit. 44)."

The language of the provisions above is plain and unambiguous and must be taken as the final expression of the meaning

intended and given effect as written. In Thompson v. Siratt, 95 Fed. (2d) 214, a Missouri case, the Circuit Court of Appeals for the 8th Circuit said, at page 216:

"\* \* \* Where a statute is plain and unambiguous, and 'construction according to its terms does not lead to absurd or impracticable consequences, the words employed are to be taken as the final expression of the meaning intended.' United States v. Missouri Pacific Railroad Company, 278 U. S. 269, 278, 49 S. Ct. 133, 136, 73 L. Ed. 322; Helvering v. City Bank Farmers' Trust Co., 296 U.S. 85, 89, 56 S.Ct. 70, 72, 80 L.Ed. 62; Osaka Shosen Kaisha Line v. United States, 500 U.S. 98, 101, 57 S.Ct. 356, 357, 81 L.Ed. 532. \* \* \*"

Also, in the case of St. Louis Amusement Co. v. St. Louis County, 147 S. W. (2d) 667, at page 669:

"We need not conjecture as to the intent of the legislature in creating this exemption because we find the language of the statute is plain. And where the language of a statute is plain and unambiguous it may not be construed. It must be given effect as written."

This conclusion is strengthened by the fact that nowhere in the above cited constitutional and statutory provisions is there an indication that a former township school fund should retain its separate identity for the purpose of distribution to the school districts within that particular township.

#### Conclusion

Therefore, it is the opinion of this department that the county and township school funds, after liquidation, under the provisions of Section 7, Article IX of the 1945 Constitution,

Hon. Ralph Baird

-5-

and Sections 10376 and 10383, Mo. R. S. A., are merged into one fund, that is, a county school fund, which is to be distributed under the provisions of Sections 10376.1 and 10376.2, Mo. R.S.A., to all districts of the county according to law.

Respectfully submitted,

DAVID DONNELLY  
Assistant Attorney General

APPROVED:

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J. E. TAYLOR  
Attorney General

DD:EG



*Copy to  
D. Baird*

RECORDER OF DEEDS: Fees collected by Recorder of Deeds of Jasper County for acknowledging affidavit on application for license to marry must be accounted for, as provided by House Bill No. 897, Laws of Missouri, 1945.

July 28, 1947

FILED

4

Honorable Ralph Baird  
Prosecuting Attorney  
Jasper County  
Joplin, Missouri

Dear Sir:

This is in reply to your letter of recent date wherein you requested an opinion of this department regarding the accountability for fees of the Recorder of Deeds. Said letter reads in part as follows:

"I have at hand a request from the Recorder of Deeds, Jasper County, Missouri, for an opinion from you on the following question:

"Mo. R. S. 1939, Sec. 3366 -

"Licenses to be recorded. The recorder shall record all marriage licenses issued in a well-bound book kept for that purpose, with the return thereon, for which he shall receive a fee of \$1.00 to be paid by the person obtaining the same."

"The Recorder's question is, that inasmuch as the above section does not cover any charge by the recorder for the application, should the fee charged by the recorder for each affidavit on the application for marriage license be accounted for by the recorder, and turned into the County Treasury with other fees?

"It seems that it has not been the custom in this county for the recorder to hold himself accountable to the county for the monies derived from such affidavits."

Prior to the 63rd General Assembly, Section 13187, R.S. Mo. 1939, provided for the accounting of fees for recorders of deeds in counties such as Jasper County. However, House Bill No. 775, passed by the 63rd General Assembly, repealed

said Section 13187. House Bill No. 897, passed by the 63rd General Assembly, found in Missouri Laws of 1945, page 1560, relates to the fees and compensation of the recorder of deeds in counties of the second class. Section 1 of said act reads:

"The recorder of deeds, in counties of the second class, shall keep a full, true and faithful account of all fees of every kind received, and shall make a report thereof every year to the county court. He shall retain, as compensation for his services as county recorder, out of the fees received by him, a sum not in excess of \$4000.00 for each year of his official term, and all fees received by him over and above the sum of \$4000.00 for each year of his official term, shall be paid by him into the county treasury, to form a part of the jury fund of the county."

Section 2 of said act reads:

"It shall be the duty of the recorder of deeds to charge, receive and collect in all cases every fee, charge, or money due his office by law. He shall also, when he makes and files the report herein required at the end of each year of his official term, verify the same by affidavit, and said report shall show the source and amount of every fee or charge collected. All fees, charges and moneys collected by the recorder of deeds in excess of the amount to which he is entitled for compensation as herein provided, shall be the property of the county."

In this act the Legislature has provided for the method of compensation for the recorder of deeds in counties such as Jasper County. In *Nodaway County v. Kidder*, 344 Mo. 795, the court said at l.c. 801:

"The general rule is that the rendition of services by a public officer is deemed to be gratuitous, unless a compensation therefor is provided by statute. If the statute provides compensation in a particular mode

or manner, then the officer is confined to that manner and is entitled to no other or further compensation or to any different mode of securing same. Such statutes, too must be strictly construed as against the officer. (State ex rel. Evans v. Gordon, 245 Mo. 12, 28, 149 S. W. 638; King v. Riverland Levee Dist., 218 Mo. App. 490, 493, 279 S. W. 195, 196; State ex rel. Wedeking v. McCracken, 60 Mo. App. 650, 656.)

"It is well established that a public officer claiming compensation for official duties performed must point out the statute authorizing such payment. (State ex rel. Buder v. Hackmann, 305 Mo. 342, 265 S. W. 532, 534; State ex rel. Linn County v. Adams, 172 Mo. 1, 7, 72 S. W. 655; Williams v. Chariton County, 85 Mo. 645.)"

Such fees as he might receive for affidavits on an application for license to marry are fees the recorder collects by virtue of the duties of his office, and the above quoted Section 1 seems clear in its language when it says that all fees of every kind shall be accounted for.

#### CONSLUSION

Therefore, it is the opinion of this department that any fees the Recorder of Deeds of Jasper County might collect for affidavits on an application for license to marry are fees that are to be accounted for, as provided in Section 1 of House Bill No. 897 of the 63rd General Assembly, supra. Such fees shall be retained by him as compensation, the sum of which from all fees shall not exceed \$4000.00 for each year of his official term.

Respectfully submitted,

APPROVED:

Wm. C. COCKRILL  
Assistant Attorney General

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J. E. TAYLOR  
Attorney General

WCC:LR

MAGISTRATE COURTS: Magistrate jurors selected by Board of Jury Commissioners in counties wherein petit jurors are selected by such Board of Jury Commissioners.

FILED

October 21, 1947

110

Honorable Walter E. Bailey  
Judge of the Circuit Court  
Jasper County  
Joplin, Missouri

Dear Judge Bailey:

This is in reply to your letter of October 9, 1947, requesting an opinion from this department, which reads as follows:

"Owing to the uncertainty of the intent of the Legislature as expressed in Section 5 of Senate Bill No. 107, providing for the manner of selecting jurors for use in the Magistrate Courts of the State, I desire your opinion as to whether the County Court or the Jury Commission select these jurors in Jasper County Missouri.

"This Section reads, 'In all counties wherein by law Grand and Petit jurors are selected by a board of Jury Commissioners, such board of jury commissioners and the clerk thereof shall perform the duties hereby imposed on the county court and county clerk and shall proceed in the manner herein prescribed.'

"In this county the board of jury commissioners select the petit jurors but do not select the Grand Jurors as they are selected by either the Sheriff or the County Court, as directed by the Judge of the Circuit Court in which such grand jury are to be empaneled.

"We desire your opinion so that such jurors will be selected in the proper manner."

In counties of over 200,000 inhabitants and less than 700,000 inhabitants magistrate jurors are selected by the Board of Jury Commissioners in the same manner that circuit court jurors are selected. Section 3(c) of Senate Bill No. 107 of the 64th General Assembly provides:

"Provided, however, that in counties now containing or which may hereafter contain over 200,000 inhabitants and less than 700,000 inhabitants, the Board of Jury Commissioners shall select the jurors to serve in the Magistrate Courts from the regular Circuit Court jury wheel and under the same method and procedure as Circuit Court jurors are selected; and said jurors shall be summoned in the same manner as Circuit Court jurors are summoned."

There being no counties containing over 700,000 inhabitants, Senate Bill No. 107 is, in effect, a general provision relating to the method and procedure by which magistrate jurors are selected and summoned in counties having less than 200,000 inhabitants. The administration of said statute is enjoined on the county court and county clerk, except in certain counties as provided in Section 5 of Senate Bill No. 107, which reads as follows:

"In all counties wherein by law grand and petit jurors are selected by a board of jury commissioners, such board of jury commissioners and the clerk thereof shall perform the duties hereby imposed on the county court and county clerk and shall proceed in the manner herein prescribed."

It will be noted that in Jasper County, a county of 78,705 inhabitants according to the 1940 National Census, petit jurors are selected by a Board of Jury Commissioners. Sections 733 and 734 of the Revised Statutes of Missouri, 1939. Grand jurors in said county are selected by either the county court or the sheriff, as provided by Section 704, Mo. R.S.A.

From a literal reading of the provision in Section 5, that magistrate jurors shall be selected by a Board of Jury Commissioners in all counties wherein "grand and petit" jurors are selected by said Board of Jury Commissioners, it may be thought

that said provision applies only to those counties wherein both petit and grand jurors are selected in said manner. We do not believe that such was the intent of the Legislature in enacting Senate Bill No. 107. The method and procedure in selecting said jurors, as set out in said Senate Bill, necessarily applies to only counties of less than 200,000 inhabitants. In counties having more than 60,000 and less than 200,000 inhabitants, of which Jasper County is one, petit jurors are selected by a Board of Jury Commissioners, but no where in the statutes relating to the selection of grand jurors in those counties do we find a provision whereby grand jurors are selected by the Board of Jury Commissioners. On the contrary, they are selected by either the county court or the sheriff. Thus, the liberal words of Section 5 seem to set out an impossible requirement.

There are no counties of less than 200,000 inhabitants wherein both petit and grand jurors are selected by a Board of Jury Commissioners. In this classification only counties of more than 60,000 inhabitants and less than 200,000 inhabitants have a Board of Jury Commissioners, and in those counties petit jurors are the only jurors selected by such Board of Jury Commissioners.

A statute cannot be construed so as to make it require an impossibility or to lead to absurd results if it is susceptible to a reasonable interpretation. In *Donnelly Garment Co. v. International L. C. U. Union*, 99 Fed. 2nd 309, this rule is set out at page 317:

"It is a well established rule that all laws are to be given a sensible construction, and that a literal application of a statute which would lead to absurd consequences should be avoided whenever a reasonable application can be given to the statute consistent with the legislative purpose, *Hawaii v. Mankichi*, 190 U.S. 197, 212, 23 S. Ct. 787, 47 L. Ed. 1016; *United States v. Katz*, 271 U.S. 354, 357, 46 S. Ct. 513, 514, 70 L. Ed. 986; that general terms in statutes should be so limited in their application as to give a sensible construction, avoiding injustice, oppression or absurdity, *Church of the Holy Trinity v. United States*, 143 U.S. 457, 461, 12 S. Ct. 511, 36 L. Ed. 226; \* \* \*"

See also *Lambur v. Yates*, 148 Fed. 2nd 137, 1.c. 139, and *State v. Irvine*, 72 S.W. (2d) 96, 1.c. 100.

Where the plain meaning of words used in a statute produces an unreasonable result, we may follow the purpose of the statute rather than the literal words. *United States v. Rosenblum Truck Lines*, 315 U.S. 50, 86 L. Ed. 671, and *State v. Smith*, 115 S.W. (2d) 816. It must be presumed that the Legislature intended to accomplish something by its enactment. The over-all plan of the Legislature was to enjoin on the Boards of Jury Commissioners and the clerks thereof the duty of selecting magistrate jurors in the larger counties. We believe that this plan was intended to apply to all counties in which there is a Board of Jury Commissioners, and that the county court should not be burdened by said duty in counties where there are such Boards of Jury Commissioners set up for the expressed purpose of selecting jurors. The literal words of Section 5 must necessarily yield to the manifest intent of the Legislature.

#### Conclusion.

Therefore, it is the opinion of this department that in counties which contain over 60,000 inhabitants and less than 200,000 inhabitants wherein by law petit jurors are selected by a Board of Jury Commissioners, such Board of Jury Commissioners and the clerk thereof shall perform the duties imposed on the county court and county clerk by Senate Bill No. 107 of the 64th General Assembly, with regard to the selection of jurors for magistrate courts.

Respectfully submitted,

DAVID DONNELLY  
Assistant Attorney General

APPROVED:

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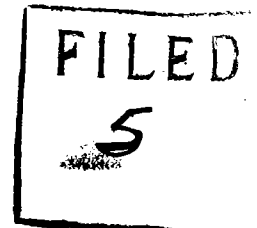
J. E. TAYLOR  
Attorney General

DD:ml

SCHOOL FUNDS, COUNTY & TOWNSHIP:  
MAGISTRATE FUNDS:

When a small balance remains after reinvestment of township and county school funds, this balance to be carried on books until legislation provides for disposal. Magistrate fines distributed to shools of the county.

January 24, 1947



Mr. Clinton Bartley  
Treasurer  
Cllaway County  
Fulton, Missouri

Dear Sir:

We have your letter of January 21, 1947, requesting an opinion from this department, which reads as follows:

"Under the new constitution I understand that all School Loans are called for payment and the money is to be reinvested in U.S. Government Bonds. However, in each case, Township and Capital funds there are small balances, less than \$100.00, the question is, what do I do with this money.

"I would also like to know if the fines collected by the Magistrate are to continue to go into the Capital School Fund (Principal) and invested in Bonds or into the School Loan Interest Fund and be apportioned to the School Districts."

In order to answer your first question we must observe the consitutional and statutory provisions relating to township and county school funds. Both Section 7 of Article IX of the Constitution of Missouri of 1945 and Senate Bill 162 of the 63rd General Assembly, which implements this section of the Constitution, require the liquidation and reinvestment of all real estate loans and investments belonging to township and county school funds. The first sentence of Section 7 of Article IX of the 1945 Constitution, is as follows:



Mr. Clinton Bartley

"All real estate, loans and investments now belonging to the various county and township school funds, except those invested as hereinafter provided, shall be liquidated without extension of time, and the proceeds thereof and the money on hand now belonging to said school funds of the several counties and the city of St. Louis, shall be reinvested in registered bonds of the United States, or in bonds of the state or in approved bonds of any city or school district thereof, or in bonds or other securities the payment of which are fully guaranteed by the United States, and sacredly preserved as a county school fund. \* \* \*

Senate Bill 162 (Section 10383) of the 63rd General Assembly, further provides that "all interest accruing from such reinvestment of the capital of township school funds and all other moneys lawfully coming into said funds" shall be distributed for the use of schools in the townships as provided by law. Similar provisions are made in both Section 7 of Article IX of the Constitution and in Senate Bill 162 (Section 10376) in regard to the interest accruing from county school funds after reinvestment. That part of Section 7 of Article IX of the Constitution, is as follows:

" \* \* \* All interest accruing from investment of the county school fund, the clear proceeds of all penalties, forfeitures and fines collected hereafter for any breach of the penal laws of the State, and net proceeds from the sale of estrays, and all other moneys coming into said funds shall be distributed annually to the schools of the several counties according to law."

Also in Senate Bill 162 (Section 10376):

" \* \* \* all interest accruing from such reinvestment of the county school fund, the clear proceeds of all penalties, forfeitures and fines collected for any breach of the penal laws of the state, the net proceeds from the sale of estrays, and all other money lawfully coming into said fund, shall hereafter be collected and distributed annually to the schools of the county as hereinafter provided in this article."

Mr. Clinton Bartley

Now we come to the question of the proper disposal of small balances remaining after liquidation and reinvestment of township and county school funds. It might seem that these small balances should be kept on hand until increased by other funds to a sum large enough to be invested in an authorized security. Such a procedure could not be effected however, because provision has been made in Senate Bill 162 for the distribution of interest and all other moneys coming into said funds. Therefore, there is no way these small balances can be built up or increased to a sum sufficient to invest in an authorized security. And since there is no provision for the distribution or other disposal of said balances, they must, as a matter of necessity, be carried on the books and records until further legislation provides a method for proper disposal.

The second question presented here, involving the proper disposal of fines collected by the magistrate court, is answered by Section 7 of Article IX of the Constitution and Senate Bill 162 (Section 10376), both hereinabove set out in part.

These provisions direct that all fines collected for any breach of the penal laws are to be distributed to the schools of the several counties, along with the interest accruing from the reinvestment of the county school funds, and other moneys coming into said funds, such distribution to be made according to law.

Therefore, fines collected by the magistrate court should be distributed to the schools of the several counties as provided by Senate Bill 162 (Section 10376) of the 63rd General Assembly.

#### CONCLUSION

Therefore, it is the opinion of this department that after township and county school funds are liquidated and reinvested under the provisions of Senate Bill 162 of the 63rd General Assembly, there remains a small balance which is not large enough to be reinvested in an authorized security, such balance should be carried on the books and records until further legislation provides a method for proper disposal. It is further the opinion of this department that fines collected by the magistrate court should be distributed annually to the schools of the county as provided by law.

Respectfully submitted,

DAVID DONNELLY  
Assistant Attorney General

APPROVED:

J. E. Taylor

ELECTIONS:

BONDS:

TAXATION

ROADS AND BRIDGES:

County may levy full amount permitted by Sec. 11(b), Art. X Constitution for county purposes. County may call special election to make unlimited tax levy for bridge purposes, for not to exceed four years, by two-thirds vote at such election. County may become indebted and issue bonds up to 10% of assessed valuation of county inclusive of existing indebtedness for bridge purposes.

July 16, 1947

FILED  
5

7/23

Honorable Emmett L. Bartram  
Prosecuting Attorney  
Nodaway County  
Maryville, Missouri

Dear Sir:

We are in receipt of your letter of recent date, requesting an official opinion of this department, and reading, in part, as follows:

"Nodaway County is a county having Township organization and with an assessed valuation of about \$40,000,000.00. Our county tax rate has been 38¢ for the last year and our Township tax has been running from a 20¢ levy for Polk Township, where Maryville is, to as high as 35¢ levy in some of the other townships; and then we have six or seven townships that have voted the additional 35¢ levy as provided in the 64th General Assembly House Bill.

"We have had, as you know, a lot of extra expense this year and will have more to maintain our bridges and roads in this county. Under the present tax rate of 38¢, our county cannot carry on its repair bills and the maintenance of the roads and bridges.

"I have seen Mr. Burns' opinion as to township levies, addressed to Honorable Edward W. Speiser at Keytesville, Missouri, dated April 18, 1947, but it does not cover our questions; and, I presume the same questions will be asked by the various County Courts of the twenty-four different counties having township organization. Our county, along

with these other counties, will want to know:

"1. If they can raise their levy without a special election to raise their levy from 38¢ to ?¢.

"2. Can the county call a special election and raise their rate of levy for a special tax for roads and bridges in excess to the 38¢ and the regular 10% raise that is given them under HCSHB 784?

"3. If they can call a special election to raise the tax rate for special road and bridge purposes, the amount that they can ask for that purpose in excess of the rates mentioned in question No. 2.

"4. If our county did have a special election and voted bonds to pay off this additional expenses, would the rate of levy to pay off the bonds have to bring their total levy within the amounts as stated in question No. 2?

"5. And can a county like Modaway County that is a third class county, vote bonds for this purpose.

\* \* \* \* \*

We note that in your request you ask if the county can raise the levy without a special election from 38¢ to ?¢. From the rest of your letter we presume that you are referring to the provision limiting a tax increase to ten per cent in any one year for county purposes, found in Section 11046 of House Bill No. 468 of the 63rd General Assembly, Laws of Missouri, 1945, page 1778. However, Section 11046 of House Bill No. 468 was repealed by House Bill No. 77 of the 64th General Assembly, and a new section enacted in lieu thereof which omitted the provision which limited the tax in any one year to one hundred ten per cent of that levied in the year before, and such bill contained an emergency clause and became effective May 19, 1947. Therefore, at the present time, a county may levy the full amount allowed by Section 11046 of House Bill No. 77 of the 64th General Assembly, in any year.

Your second question is in regard to the calling of a special election for raising the rate of levy for a special tax for

roads and bridges in excess of the 38¢ rate which you say was levied last year and the regular ten per cent raise authorized under House Bill No. 784 of the 63rd General Assembly. As we pointed out above, we assume that instead of referring to House Bill No. 784, you intended to refer to House Bill No. 468 of the 63rd General Assembly, and this opinion is being written under that assumption.

The question of whether or not the county can vote for a special tax for bridges depends on whether or not "respective purposes," as used in that part of Section 11 (c) of Article X of the Constitution reading as follows:

"In all municipalities, counties and school districts the rates of taxation as herein limited may be increased for their respective purposes for not to exceed four years, when the rate and purpose of the increase are submitted to a vote and two-thirds of the qualified electors voting thereon shall vote therefor; \* \* \*"

and under Section 11046 of House Bill No. 77 of the 64th General Assembly, refers to a tax which may be levied for bridges.

In the case of State ex rel. v. Wabash Ry., 3 S. W. (2d) 378, the Supreme Court held that a levy for roads and bridges under Section 10682, R. S. Mo. 1919 (Section 8526, R. S. Mo. 1939), was a tax for county purposes within the meaning of Section 12865, R. S. Mo. 1919 (Section 11046, R. S. Mo. 1939), which section provided that the county court should not levy in any one year taxes for county purposes which would raise more than one hundred ten per cent of the amount of taxes raised in the preceding year. At that time, Section 8526 provided that county courts should levy not more than 20¢ for road and bridge purposes. Such tax, in the case cited, was held to be a mandatory tax, and it was held to be part of the taxes for county purposes.

At the time the case above cited was decided, Section 22 of Article X of the Constitution of 1875, and Section 10683, R. S. Mo. 1919 (Section 8327, R. S. Mo. 1939), provided that a special tax in addition to the tax for county purposes could be levied for road and bridge purposes by the county court in counties not under township organization and by the township board in counties under township organization. It is to be noted that the special road and bridge taxes authorized by Section 12 of Article X of the present Constitution are in addition to the taxes for county purposes.

Section 8526, R. S. Mo. 1939, was repealed, effective July 1, 1946, by House Bill No. 784 of the 63rd General Assembly, found in Laws of Missouri, 1945, page 1478. The effect of the repeal of Section 8526 is to relieve the county court of the mandatory duty of making a levy for road and bridge purposes, but the mere repeal in no way affects the right of the county court to make a levy for bridges as part of the levy for county purposes.

Section 8825, R. S. Mo. 1939, provides as follows:

"Whenever it shall be necessary in any township to build a bridge, the cost of which shall exceed one hundred dollars, the township board of directors shall make out and cause to be presented to the county court a certified statement of the amount of money necessary for the construction thereof, and, if deemed proper, the said county court shall cause the bridge to be built by contract as provided by law."

Since the duty is placed on the county to build bridges in townships when the cost of constructing such bridges exceeds one hundred dollars, it is clear that such taxes for bridges may be levied by the county court and that such taxes are levied for a county purpose.

Section 8820 of House Bill No. 798 of the 63rd General Assembly, found in Laws of Missouri, 1945, page 1497, as amended by House Bill No. 42 of the 64th General Assembly, which bill will become effective ninety days after June 12, 1947, and which amends House Bill No. 798 only with regard to the payment to special road districts of tax money arising from property in such special road districts, provides that the county may retain 5¢ of the maximum 35¢ levy authorized by such section and by Section 12 of Article X of the Constitution, such levy being made by the township board in counties under township organization. The 5¢ that may be retained by the county is part of the special road and bridge tax, which is in addition to the tax for county purposes, and is not the exclusive tax levy from which the county in counties under township organization can obtain funds for bridges, but is in addition to the tax for county purposes which the county may levy.

We refer to the Debates of the Constitutional Convention at which the Constitution of 1945 was drafted with full knowledge of the rule which limits the reliance which may be placed on them. State ex rel. v. Osburn, 147 S. W. (2d) 1065. However,

we believe that it is significant that the debates show that in a discussion of Section 12 of Article X of the present Constitution, it was stated by Mr. Lindsay that an unlimited tax levy might be voted by the people under the provisions of Section 11 of Article X of the Constitution. In a discussion of Section 12 of Article X of the Constitution, the following appears at pages 5158-5159:

"MR. LINDSAY: Mr. Shepley, under Section 11 you have increased us from thirty-five cents to fifty cents.

"MR. SHEPLEY: Oh, I see. You are referring to that. I beg your pardon. I thought you were referring.....

"MR. LINDSAY (Interrupting): Then under Section 12 you have increased us twenty-five cents to thirty-five. We don't have any special road district so we are not concerned about the latter part of it.

"MR. SHEPLEY: I see.

"MR. LINDSAY: So that raises us from sixty cents to eighty-five cents. Now, I imagine Mr. Arnold over here, I think this is correct, isn't it, that if they need some additional funds above the twenty-five cents under Section 11 they can vote all they want?

"MR. SHEPLEY: If they have the special road district or the general road district.

"MR. LINDSAY: Well, under Section 11 it doesn't make any difference.

"MR. SHEPLEY: Special or general.

"MR. LINDSAY: They can do it anyway.

"MR. SHEPLEY: That's right.

"MR. LINDSAY: Fifty cents or a dollar if they need it."

There is no limit to the amount of the tax levy that can be voted, for not to exceed four years, by a two-thirds vote of

the people, under the provisions of Section 11046 of House Bill No. 77 of the 64th General Assembly.

Section 8606 of House Bill No. 752 of the 63rd General Assembly, Laws of Missouri, 1945, page 1477, provides as follows:

"The county courts of the counties of this state are hereby authorized to issue bonds for and on behalf of their respective counties for the construction, reconstruction, improvement, maintenance and repair of any and all public roads, highways, bridges and culverts within such county, including the payment of any cost, judgment and expense for property, or rights in property, acquired by purchase or eminent domain, as may be provided by law, in such amount and such manner as may be provided by the general law authorizing the issuance of bonds by counties. The proceeds of all bonds issued under the provisions of this section shall be paid into the county treasury where they shall be kept as a separate fund to be known as the 'Road Bond Construction Fund' and such proceeds shall be used only for the purpose mentioned herein. Such funds may be used in the construction, reconstruction, improvement, maintenance and repair of any street, avenue, road or alley in any incorporated city, town or village if such street, avenue, road or alley or any part thereof shall form a part of a continuous road, highway, bridge or culvert of said county leading into or through such city, town or village."

The general law providing for the issuance of bonds by counties is found in House Bill No. 749 of the 63rd General Assembly, Laws of Missouri, 1945, page 597. Section 3292 of such bill, enacted under the provisions of Section 26 (b) of Article VI of the Constitution of 1945, provides as follows:

"Any county in this state, by vote of two-thirds of the qualified electors thereof voting thereon, may become indebted in an amount exceeding in any year the income and revenue provided for such year plus any unencumbered balances from previous years; provided such indebtedness shall not exceed five per centum



of the value of taxable tangible property therein as shown by the last completed assessment for state and county purposes."

Section 3 of Article X of the Constitution of 1945 provides, in part, as follows:

"Taxes may be levied and collected for public purposes only, \* \* \* "

Since it is the duty of the county, under the provisions of Section 8825, R. S. No. 1939, to build bridges costing over one hundred dollars in townships, it is clear that a bond issue for such purpose would be a bond issue for a public purpose.

Section 3293 of House Bill No. 749 of the 63rd General Assembly, which section was enacted under the provisions of Section 26 (c) of Article VI of the Constitution of 1945, provides as follows:

"Any county in this state, by vote of two-thirds of the qualified electors thereof voting thereon, may incur an indebtedness for county purposes in addition to that authorized in Section 3292 not to exceed five per centum of the taxable tangible property shown as provided in Section 3292."

As pointed out, supra, "county purposes," as used in Section 11 of Article X of the Constitution, includes taxes which may be levied by the county court for bridges, and the term "county purposes," as used in Section 3293 of House Bill No. 749, authorizes a bond issue for an additional five per cent for bridge purposes.

Section 11 (e) of Article X of the Constitution of 1945 provides as follows:

"The foregoing limitations on rates shall not apply to taxes levied for the purpose of paying any bonded debt."

#### CONCLUSION

It is the opinion of this department that:

(1) The maximum tax levy allowed under Section 11046 of House Bill No. 77 of the 64th General Assembly may be levied

by the county court in any year.

(2) Under the provisions of Section 11046 of House Bill No. 77 of the 64th General Assembly, an unlimited tax levy may be voted by a two-thirds vote of the people voting thereon, for not to exceed four years, for bridge purposes.

(3) Nodaway County may vote to become indebted, for bridge purposes inclusive of existing indebtedness, to a maximum of ten per cent of the value of the taxable tangible property as shown by the last completed assessment for state and county purposes. Taxes to pay for such bonds are in addition to the taxes for county purposes listed in Section 11 (b) of Article X of the Constitution.

Respectfully submitted,

C. B. BURNS, Jr.  
Assistant Attorney General

APPROVED:

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J. E. TAYLOR  
Attorney General

CBB:HR

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COURT REPORTERS: Allowed amount actually expended in maintaining privately owned automobile while traveling in exercise of official duties.

FILED  
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August 11, 1947  
8/13

Honorable Garnett L. Bartram  
Prosecuting Attorney  
Nodaway County  
Maryville, Missouri

Dear Sir:

This is in reply to your letter of August 4, 1947, requesting an official opinion from this department, which reads as follows:

"Section 13347 R.S. Mo. 1939 among other things provides that a Court Reporter

"shall be allowed and paid all sums of money actually expended only in necessary hotel and traveling expenses while engaged \* \* \*"

"Our Court Reporter has asked me how much he may be permitted to draw per mile for the use of his own private car when he uses it in attending court, as mentioned in this section.

"Does the State Auditor have a maximum allowance for the use in said business of private automobiles?"

"We understand, of course, that the pay in this case does not come from the State Auditor but from the Counties, but I take it that I would, as Prosecuting Attorney, be justified in limiting the expenditure to the figure adopted by the State Auditor."

State officials and employees are allowed five cents per mile for travel by privately owned automobiles; no other expense is allowed. This allowance has no application in the present case.

Section 13347, R.S. Mo. 1939, provides as follows:

"Every official court reporter of a circuit or a criminal court in counties having forty-five thousand inhabitants and less shall be allowed and paid all sums of money actually expended only in necessary hotel and traveling expenses while engaged in attending any regular, special or adjourned term of court at any place in the circuit in which he is appointed, other than the place of his residence therein, or while engaged in going to and from any such place for the purpose of attending such terms of court. Such moneys shall be paid out of the county treasuries of the respective counties in said district in proportion to their respective populations."

You will note that the above provision does not set out an arbitrary amount to be allowed said court reporters for each mile traveled in the exercise of their duties, but rather provides that the amount actually expended for necessary travel expenses shall be allowed. Said provision necessarily has reference to travel by privately owned automobile as well as by bus or railroad, therefore it is quite evident that the traveling allowance of official court reporters using privately owned automobiles is that amount which is actually expended in maintaining said automobiles while traveling in the exercise of their official duties. Said statute is plain and unambiguous in its terms and should be given a literal construction. *Woodside v. Dent County*, 308 Mo. 227, 271 S.W. 766, 1.c. 767. Where a statute is plain and unambiguous it must be given effect as written. *St. Louis Amusement Co. v. St. Louis County*, 147 S.W. (2d) 667, 1.c. 669. We cannot search for a meaning beyond the statute itself. *State v. Phillips Petroleum Co.*, 160 S.W. (2d) 764, 1.c. 769.

In the case of *Norberg v. Montgomery*, 173 S.W. (2d) 387, the court said at page 390:

"We think the language of the Statute is plain and unambiguous, and the intent of the Legislature is clear, as we have already found. 'Rules for the interpretation of statutes are only intended to aid in ascertaining the legislative intent, "and not for the purpose of controlling the intention or of confining the operation of the statute within narrower limits than was intended by the lawmaker." Sutherland on Statutory Const., Sec. 279. If the intention is clearly expressed, and the language used is without ambiguity, all technical rules of interpretation should be rejected.' State ex rel. Wabash Ry. Co. et al. v. Shain, 341 Mo. 19, 106 S.W. (2d) 898, loc. cit. 899, 900."

We submit that the allowance intended by the Legislature in enacting Section 13347, supra, is the exact amount expended (State v. Woodside, 112 Mo. App. 451) in necessary travel by the most usually traveled and shortest practicable route (Hitch v. United States, 66 Fed. 937; United States v. Nix, 189 U.S. 199).

#### Conclusion.

In view of the foregoing, it is the opinion of this department that an official court reporter using a privately owned automobile is allowed, under the provisions of Section 13347, R.S. Mo. 1939, that amount actually expended in maintaining said automobile while engaged in travel, as authorized by said section, in the exercise of his official duties.

Respectfully submitted,

DAVID DONNELLY  
Assistant Attorney General

APPROVED:

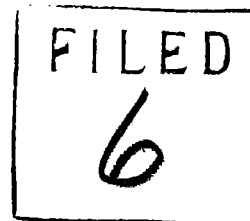
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J. E. TAYLOR  
Attorney General

DD:ml

LOAN AND INVESTMENT CORPORATIONS-- : A corporation organized under  
MANUFACTURING AND BUSINESS CORPORA- : Art. VIII, Chap. 33, R.S. Mo.  
TIONS. : 1939, as a Loan and Investment  
 : Company may not by amendment  
 : of its Articles of Incorpora-  
 : tion change the purposes of  
 : its incorporation to those of  
 : a manufacturing and business  
 : corporation.

February 18, 1947



Honorable Wilson Bell  
Secretary of State  
Jefferson City, Missouri

Attention: Honorable W. Randall Smart.

Dear Secretary Bell:

This will acknowledge the letter of the Corporation Attorney of your Department, Mr. W. Randall Smart, of recent date, requesting an opinion from this Department on the subject-matter contained in the letter. Mr. Smart's letter is as follows:

"A few days ago Mr. Gregory Stockard, an attorney of this city representing the Securities Credit Company, a Missouri corporation, presented to this department for filing Certificate of Amendment to the Articles of Incorporation of the Securities Credit Company. This amendment proposed to extend or enlarge the business purposes of this corporation. Upon examining the Articles of Incorporation of this corporation, we found that this corporation was formed under the Loan and Investment Act, Article 8, Chapter 33, Revised Statutes of 1939. In view of the opinion heretofore rendered by your department, we refused to allow the filing of the Certificate of Amendment. We have been requested to ask you for opinion in this matter.

"We are enclosing our correspondence and a copy of the Certificate of Amendment, and would appreciate your early attention in this matter."

There is also accompanying said letter a statement and memorandum of the law of the case, as he views it, by Honorable Lon Hocker, Jr., counsel for the applicant corporation here, for an amendment of the Articles of Incorporation of said corporation.

It is stated both by your Department and counsel for said applicant that Securities Credit Company was organized and incorporated under Article VIII of Chapter 33, R.S. Mo. 1939.

It is disclosed in both the letter of your Corporation Counsel and the memorandum of counsel for the applicant that under the general term used in both of said documents "enlarging the purposes for which the corporation is formed" it is meant that Securities Credit Company proposes and is attempting by said "amendment" to convert its corporate existence as a Loan and Investment Company organized under said Article VIII, Chapter 33, R.S. Mo. 1939, into a Manufacturing and Business Corporation, under the Corporation Code enacted by the Legislature of this State in 1943, Laws of Missouri, 1943, page 410, which was represented, in part, by Article VI, Chapter 33, R.S. Mo. 1939, before the repeal of said Article VI, Chapter 33, and the enactment in place thereof, of the new Corporation Code, Laws of Missouri, 1943, page 410.

Reference is made by the letter from your Department and the memorandum of counsel for Securities Credit Company to an opinion rendered by this Department on October 1, 1934, approved by the then Attorney General of this State, covering most of the questions submitted to this Department at this time. A copy of said opinion is attached hereto. Counsel for Securities Credit Company requests that said opinion be again reviewed by this Department in the light of some of the provisions which he points out as contained in the new Corporation Code, Laws of Missouri, 1943, page 410, and in particular, Section 3, l.c. 415, and Section 55, l.c. 440, thereof. It is the contention of counsel for Securities Credit Company that since many of its powers were repealed by the Constitution of this State adopted in 1945, particularly naming Section 40 (26) and Section 44 (Article III thereof) as effecting such repeal, and that because of such repeal such former powers of Loan and Investment Companies are now prohibited by the Constitution. It is further contended by Securities Credit

Company that because not specifically prohibited as a named enterprise from organizing as a Manufacturing and Business Corporation under said Section 3, Laws of Missouri, 1943, l.c. 415, that the corporation may, under the terms of said Section 55, Laws of Missouri, 1943, l.c. 440, enlarge by amendment, the purposes for which it was incorporated and thereby become a Manufacturing and Business Corporation, or at least be empowered as a Loan and Investment Company to exercise some, if not all, of the powers of a Manufacturing and Business Corporation.

We have carefully reviewed the former opinion by this Department. We do not find any grounds of fact or rule of law, constitutional, statutory, or by decision by our Appellate Courts, or text authorities, to justify us in departing from the ruling of said opinion of this Department of October 1, 1934. We believe it correctly stated the law as it then existed, and as the law now exists, in so far as that opinion extended. Counsel for Securities Credit Company, in suggesting that certain sections of our said Corporation Code, Laws of Missouri, 1943, page 410, in his view, would permit the change of said corporation from a Loan and Investment Corporation to a Manufacturing and Business Corporation does, we think, require our attention and conclusions.

Counsel for Securities Credit Company on page 3 of the memorandum states as his view thereon, the following:

"\* \* \* It has power to amend its articles by virtue of Section 55, which does not limit its grant of powers to amend to corporations organized in any particular way and it therefore may properly change its charter to conform to the change in the laws. \* \* \*"

With such view of said Section 55 we cannot agree. We believe that the intention of the Legislature in enacting said Section 55 was, in permitting any Manufacturing and Business Corporation to amend its Articles of Incorporation, that it should not depart entirely from the purposes set forth in its original Articles of Incorporation for which said corporation was formed. Note the proviso



in said Section 55, Laws of Missouri, 1943, l.c. 440, which is, in part, as follows:

"\* \* \* provided, that its articles of incorporation as amended contain only such provisions as might be lawfully contained in original articles of incorporation if made at the time of making such amendment, \* \* \*".

Thus, it will be readily observed that the purposes set forth in the amended Articles of Incorporation must be such as might have been contained in the original Articles of Incorporation. We believe, therefore, that said Section 55, Laws of Missouri, 1943, furnishes no authority for adopting an amendment changing entirely the statement of the purposes for which a corporation is formed from the statement of such purposes in the original Articles of Incorporation. We have high authority for this position in this State. Section 5, Article XI of the Constitution of this State of 1945, states, in part, the following:

"No corporation shall engage in business other than that expressly authorized in its charter or by law, \* \* \*".

Our Appellate Courts have had this direct question before them and have consistently held that a corporation is held strictly to the carrying on of the particular business set forth in its Articles of Incorporation as the purposes for which it was formed. The case of Bowman Dairy Company vs. Mooney, was before the St. Louis Court of Appeals on the question of whether a dairy company could sell other products as well as dairy products. The company was organized and set forth in its Articles of Incorporation that its purposes were to buy and sell dairy products, especially, milk, butter, cheese and ice cream. That company undertook to sell other edibles not the product of the dairy business. The dairy company sought by injunction to restrain another from violating a contract alleged to have been entered into with the dairy company providing that the defendant, Mooney, would drive a certain wagon in the sale of such other products not derived from the dairy business. The case is reported in 41 Mo. App. Rep. 665. The Court held that the dairy company had no right to sell such other

products as were not derived from the dairy business. The Court, l.c. 671, held as follows:

"It is a well-established principle that all corporate acts, not expressly granted to a corporation by legislative enactments, are prohibited by the common law; therefore, when a corporation derives its authority either from a special act of the legislature, or by virtue of a general law, to prosecute a particular business, in a particular way, it is as much incapacitated from engaging in another business as if it had not been incorporated at all. Any business prosecuted by a corporation must be expressly authorized by its charter, or must in some way be necessary to the successful prosecution of the business mentioned. \* \* \*".

The case of Van Doeren vs. Pelt, et al., was recently before the St. Louis Court of Appeals. The case was decided February 7, 1945, and is reported in 184 S.W. (2d) 744. The case grew out of a suit upon a note with the following background: The Secretary of State of this State on November 10, 1920, issued to the Walnut Park Loan and Investment Association, a Certificate of Incorporation as a Manufacturing and Business Company. On April 16, 1926, the Secretary of State issued a Certificate reciting that the Walnut Park Loan and Investment Association was organized under Article VII, Chapter 33, R.S. Mo. 1909, on November 10, 1920, and had that day filed a certified copy of a resolution adopting the provisions of Article VIII, Chapter 90, R.S. Mo. 1919, governing Loan and Investment Companies, and thereupon approved such resolution and asserted that said Walnut Park Loan and Investment Association be empowered with all the rights and privileges granted to such a corporation by the laws of this State.

The note in that suit was given by the defendants to the Walnut Park Loan and Investment Association. That company liquidated and dissolved. Prior, however, to its dissolution, the company assigned the note sued on to Van Doeren who filed the suit.

The Court held that when the defendants signed the note they admitted the corporate capacity of the Walnut Park Loan and Investment Association the assignor of plaintiff, and that defendants should pay the note.

The question of a Manufacturing and Business Corporation being unable to change by amendment to a Loan and Investment Company was indirectly involved in the suit. The Court declined to pass upon that particular question because, as the Court said, the Court was not called upon to do so in the case. But the Court discusses the statutes under which the Walnut Park Loan and Investment Association was organized as a Manufacturing and Business concern and also intervening statutes touching the organization of Loan and Investment Companies, and discussed very frankly the action of the Secretary of State in granting the Walnut Park Loan and Investment Association, a Manufacturing and Business Corporation, the right to adopt the provisions of the Loan and Investment Act. We think the Court's decision is susceptible of only one interpretation, and that is, that had the question of whether the Walnut Park Loan and Investment Association had the right to adopt the provisions of the Loan and Investment Company Act, and change from a Manufacturing and Business Corporation to a Loan and Investment Company been directly before the Court, and whether the procedure of the Secretary of State in granting such last named authority to said company was a mistake, the Court would undoubtedly have ruled that the Secretary of State did make a mistake and that the Walnut Park Loan and Investment Association being incorporated as a Manufacturing and Business Corporation could not adopt the Loan and Investment Company Act or become in fact a corporation carrying on the business of a Loan and Investment Company. The Court said on these questions, l.c. 746, 747, the following:

"It will be noted that the Loan Association was incorporated on November 10, 1920, which was after the Revised Statutes of 1909 had been superseded by the Revised Statutes of 1919, whereas the certificate of the Secretary of State granting to the Loan Association the rights and privileges of loan and investment companies recites that the Association was incorporated under Article

7, Chapter 33, R.S. Mo. 1909. This may have been an error of the Secretary of State, but regardless of whether the Loan Association was acting under the Revised Statutes of 1909 or those of 1919, it was acting under a certificate of authority from the State as a manufacturing and business company from and after November 10, 1920. What are now classed as loan and investment companies under Article 8, Chapter 33, R.S. 1939, Mo. R.S.A. Sec. 5418 et seq., were first provided for by an amendment to Article 7, Chapter 33, R.S. 1909, relating to manufacturing and business companies, which amendment appears in Laws 1919, pp. 239, 240 and 241, approved May 2, 1919. Then in the revision of 1919 this amendment so made to the article relating to manufacturing and business companies was carried as a separate article and appears under the heading 'Loan and Investment Companies,' as Article VIII, Chapter 90, R.S. 1919. This article has continued in the Revised Statutes and has now reached the current revision as Article 8, Chapter 33, R.S. 1939. When this Loan and Investment Companies Law was enacted in 1919 it provided by Section 7, Laws 1919, p. 241, as follows: 'Any company now incorporated under article VII of chapter 33 of the Revised Statutes of Missouri, 1909, as amended, which has heretofore exercised the powers conferred by this act may come within and be entitled to all the provisions of this act by filing with the secretary of state a duly authenticated copy of a resolution passed by a majority of the stockholders of said corporation of its election so to do, and by the payment of a fee of \$50.00 into the state treasury.'

"This section has been carried through the revisions of 1929 and 1939 the same

as originally enacted, except that in the revision of 1929 it reads, 'Any company now incorporated under article 7 of chapter 32, R.S. 1929, which has heretofore exercised the powers conferred by this article may,' etc., Rev. St. 1929, Sec. 4985, and in the revision of 1939 it reads, 'Any company now incorporated under article 6 of chapter 33, R.S. 1939, which has heretofore exercised the powers conferred by this article may,' etc. Mo. R.S.A. Sec. 5425.

"Appellants argue that it is apparent from a reading of this Section 7, Laws of Missouri 1919, page 241, that this was a law intended to cover a temporary situation then existing where some corporations previously incorporated under Article 7, Chapter 33, R.S. Mo. 1909, relating to manufacturing and business companies, which had by sufferance prior to the passage of the Loan and Investment Companies Act exercised powers later legalized for loan and investment companies by the Laws of 1919, might adopt such powers legally without reincorporating. There is much weight to such argument, but notwithstanding, the Legislature has left the section as originally passed, and two revision commissions have seen proper to carry it forward without question, except that each revision commission has changed the article and chapter number referred to therein so as to correspond to the current revision, and have thus recognized the section as permanent and not temporary. Appellants contend, as we understand, that the certificate conferring upon the Loan Association the rights and privileges of loan and investment companies is void because the Loan Association could not in 1926 have 'Heretofore exercised the powers' of loan and investment companies under its incorporation as

a manufacturing and business company in 1920. In other words, the defendants' position is that after the enactment of the loan and investment companies law in 1919, plaintiff could not legally be incorporated as a manufacturing and business company and later adopt the provisions of the Loan Investment Companies Law because Section 7 of the Loan Investment Companies Law had reference only to corporations then existing under the manufacturing and business companies laws. We will not attempt to say what is meant by Section 7, Laws of 1919, p. 241, nor by the same section as it now appears (Section 5425, R.S. 1939, Mo. R.S.A.), and do not think we are called upon to do so in this case. Sufficient to say that plaintiff was operating under a certificate of incorporation as a manufacturing and business company (now Article 6, Chapter 33, R.S. 1939, Mo. R.S.A. Sec. 5338, et seq.) from 1920 until 1926, at which time the proper officer of the State issued to plaintiff a certificate conferring upon it the rights and privileges of loan and investment companies, and if such acts of the Secretary of State were irregular it would not lie in the mouths of defendants to raise the question, because under the facts in this case defendants contracted with the plaintiff as a loan and investment company. When defendants entered into the contract and signed the note they solemnly admitted plaintiff's corporate capacity. \* \* \*".

We believe the former opinion of this Department, and the above cited and quoted authorities amply sustain your Department in refusing to allow the filing of the Certificate of Amendment by Securities Credit Company to change its statement of purposes for which it is organized from those of a Loan and Investment Corporation to a Manufacturing and Business Corporation.

Honorable Wilson Bell      -10-

CONCLUSION.

It is, therefore, the opinion of this Department, in view of the former opinion of this Department on the question, and considering the foregoing, that a corporation formed under Article VIII, Chapter 33, R.S. Mo. 1939, may not amend or change its Articles of Incorporation to obtain a Certificate as a Manufacturing and Business Corporation, and that your Department properly construes the law by refusing to allow the filing of such Certificate of Amendment.

Respectfully submitted,

GEORGE W. CROWLEY,  
Assistant Attorney General

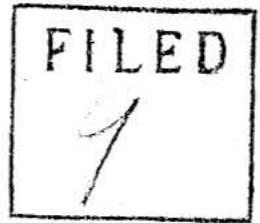
APPROVED:

J. E. TAYLOR  
Attorney General

COUNTY CLERK: County clerk must charge statutory fee for  
FEES: oath and certificate to affidavit of county  
COUNTY COLLECTOR: collector to the return of drainage tax books  
DRAINAGE DISTRICT: of circuit court drainage district.

*Copy to  
Z. Smith*

May 14, 1947



*520*

Honorable Ralph R. Bloodworth  
Prosecuting Attorney  
Butler County  
Poplar Bluff, Missouri

Dear Sir:

This is in reply to your letter of recent date, requesting an official opinion of this department, and reading as follows:

"My office desires an opinion on the following matter concerning the Inter-River Drainage District of Missouri, a drainage district that has been incorporated and organized a considerable number of years in Butler County, and is a political subdivision.

"The Collector of Internal Revenue for Butler County has always in the past made monthly statements of drainage tax collected in the proceeding month and likewise a monthly turn-over. His statements have always been verified by his affidavit made before the county clerk. As far as I can find, the County Clerk has never heretofore made the collector a charge for taking the affidavit or affixing his seal, and the Inter-River Drainage District of Missouri has never heretofore paid any charge for this.

"Just recently a representative of the State auditor's office advised our County Clerk that he must make a fifty cent charge each time he affixes his seal for anything other than County business. The County



Clerk of Butler County takes the position that this instruction would require him to make a charge of fifty cents for each affidavit made by the collector on each and every statement prepared by the collector and submitted to the district. The County Clerk does not charge the collector for affixing his seal to the statement of State and County taxes because the collector is engaged in county business.

"The collector is required by law, Sec. 12342, revised statutes of Missouri, 1939, to collect the drainage tax in just the same manner as he is required to collect and remit state and county taxes. His compensation is fixed by statute. The county Clerk of Butler County has requested an opinion from my office regarding this matter, and I in turn am requesting an opinion from your office. In short, the question is since the Inter-River Drainage is a public corporation, is the County Clerk required to charge the collector for his affidavit and seal on the settlements made in connection with the drainage tax. I will certainly appreciate an opinion from your office regarding this matter."

We are unable to find any provision in the statutes requiring the county collector to verify by affidavit monthly statements of drainage tax collections from the land in a drainage district organized under the provisions of Article 1, Chapter 79, Mo. R. S. A.

Section 11098 of House Committee Substitute for House Bill No. 765 of the 63rd General Assembly provides that the collector, on or before the fifth day of each month, shall file with the county clerk a statement, verified by affidavit, of all state, county, school, road and municipal taxes, and pay the same, less commissions, to the county treasuries and to the Director of Revenue, but that part of Section 12342, R. S. Mo. 1939, relative to the duties of the county collector with regard to drainage taxes reads as follows:

" \* \* \* The said collector shall make due return of all 'drainage tax books' each year to the secretary of the board of supervisors of the aforesaid drainage district, and shall

pay over and account for all moneys collected thereon each year to the treasurer of said district at the same time when he pays over state and county taxes. Said collector shall in said 'drainage tax book,' verify by affidavit his said return. \* \* \*

It will be seen from this quoted portion of Section 12342 that the collector must turn over to the treasurer of the drainage district the drainage taxes on or before the fifth of each month, but the only requirement made as to the collector with regard to making an affidavit is that he shall make due return of the "drainage tax book" each year to the secretary of the drainage district, and that the collector shall in the "drainage tax book" verify by affidavit such return. The only affidavit that is required by the statutes to be made by the collector is this affidavit of his return of the "drainage tax book" to the secretary of the district.

Section 12342 provides that the money collected as drainage district taxes shall be paid by the collector to the secretary of the drainage district, and the return of the "drainage tax book" shall be made to the secretary of the drainage district. Neither the county court nor the county clerk has any duties at all in connection with the collection or spending of the tax moneys of a drainage district organized under the provisions of Article 1, Chapter 79, Mo. R. S. A.

There is in the statutes no requirement that the oath to the affidavit required of the collector be administered by the county clerk. The oath to the affidavit may be administered by anyone authorized by the laws of this state to administer oaths and affirmations.

Section 13403, R. S. Mo. 1939, provides, in part, as follows:

"The clerks of the county courts, respectively, shall be allowed fees for their services as follows:

\* \* \* \* \*

"For oath and certificate to an affidavit..... 25

\* \* \* \* \*

Honorable Ralph R. Bloodworth -4-

Section 7 of House Bill No. 867 of the 63rd General Assembly provides, in part, as follows:

"It shall be the duty of the clerk of the county court in counties of the third class to charge and collect in all cases every fee accruing to his office by law, except such fees as are chargeable to the county including his per diem as secretary of the board of equalization. \* \* \*"

Since the county clerk is obliged to charge every fee accruing to his office by law, except those chargeable to the county, and since the fee for the oath and certificate to the return of the county collector of the "drainage tax book" is not chargeable to the county, it is the duty of the county clerk, if he does administer the oath in this case, to charge the fee required by law.

#### CONCLUSION

It is the opinion of this department that the county clerk must charge the statutory fee for the oath and certificate to an affidavit of the return of the county collector of the "drainage tax book," which return is made to the secretary of a drainage district organized under Article 1, Chapter 79, Mo. R. S. A.

Respectfully submitted,

C. B. BURNS, Jr.  
Assistant Attorney General

APPROVED:

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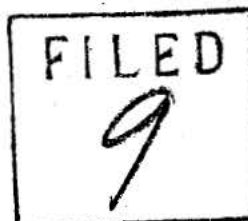
J. E. TAYLOR  
Attorney General

CBB:HR

*Copy to J. Smith*

RECORDER OF DEEDS: Recorder of Deeds can collect fees for listing names of veterans and issuing certified copies of discharges although no estimate was made in the budget.

July 18, 1947



Honorable Ralph R. Bloodworth  
Prosecuting Attorney  
Butler County  
Poplar Bluff, Missouri

Dear Sir:

This will acknowledge your request for an opinion which reads:

"Joseph Hayes, Recorder of Deeds of Butler County, Missouri, has advised with me on some matters concerning his office. I have given Mr. Hayes my opinion on the questions asked, but he still desires an opinion from the Attorney General's office on the questions. Therefore, I am requesting this opinion on behalf of the Recorder of Deeds of Butler County, and my own office, on the following questions:

"1. The law for indexing soldier's discharges became a law in June of 1946. There was nothing in the budget of the Recorder of Deeds at that time to take care of this matter, but the Recorder of Deeds with-held the fees for such indexing from the fees which accrued in his office for 1946. Under the act, is the Recorder of Deeds entitled to hold out the fees for indexing soldier's discharges out of the proceeds of his office accumulating from other fees, or must he turn in an itemized statement of such services rendered to the County Treasurer and collect these fees from warrant? In case the Recorder of Deeds is required to turn in his account for services rendered on this matter to the Treasurer of Butler County, and collect by warrant, the Recorder desires an opinion as to what adjustment should be made on the procedure that he used in collecting on this matter for 1946.

"2. In making up his budget for 1947, the Recorder of Deeds of Butler County did not include in that budget, an estimate of the fees for recording and listing the discharges of veterans of Butler County, Missouri. So if the Recorder of Deeds files an itemized list of fees due his office for such listing, with the County Treasurer of Butler County, and a warrant is issued to him for services rendered, this matter would not be covered by an estimate in his 1947 budget. The Recorder of Deeds desires an opinion as to whether he can collect from the County Treasurer of Butler County for such services rendered, or hold these fees out of the proceeds accruing in his office, without collecting by warrant, in spite of the fact that such an item was not included in his 1947 budget.

"3. Since this item was left out of the 1947 budget, could it be included in the 1948 budget of the Recorder of Deeds of Butler County, Missouri.

Your request generally asks the manner in which the recorder of deeds of Butler county is to collect his fees for listing names of veterans and issuing certified copies of discharges.

Butler county is a county of the 3rd class in which the offices of the circuit clerk and the recorder of deeds are separate.

Section 2 of House Bill No. 772, Laws Missouri 1945, provides as follows:

"In all counties of the third class where-  
in the offices of the circuit clerk and  
recorder of deeds are separate, the recorder  
of deeds shall, in addition to the duties  
imposed upon him by law, and by virtue of  
this article, have the additional responsi-  
bility to prepare and keep a separate alpha-  
betical list of the names of all residents  
of the county who have been discharged from  
the Armed Forces of the United States, which  
list shall show such veteran's name, post-  
office address, and the branch of service

from which he was discharged, the date of his discharge and the date of the recording of same, together with the book and page wherein such discharge is so recorded, which list shall be maintained by the recorder for public inspection and shall be up to date at all times; and in addition thereto, said recorders in the said counties shall have the additional responsibility of furnishing to all persons who have so reported their discharge from the Armed Forces of the United States one certified copy of such discharge upon request of such veteran, or if such veteran shall have deceased since the recording thereof, then by his heir, executor or administrator. For each name which the recorder shall append to the aforesaid alphabetical list, and for each certified copy of such discharge as he shall furnish, the said recorder shall receive the sum of fifty cents, to be paid out of the county treasury, which fees shall not be deemed to be accountable fees in determining the maximum amount which the recorder may retain as set forth in Section 1 hereof. Provided, however, that no such recorder shall be paid for the listing of any non-resident of the county, nor for the listing of any such discharge which has previously been so listed in any county, nor for any additional verified copy after the first. A veteran shall be deemed a resident of the county for the purposes of this section if he shall have resided in the county prior to his induction into the Armed Forces, and shall have returned there upon his discharge, or if he shall have resided in the county for more than ninety days next prior to the recording of such discharge with the intention of making the county his domicile."

(Underscoring ours.)

The above section provides that the recorder of deeds shall be paid his fees for listing names of veterans and issuing certified copies of discharges out of the county treasury, therefore, he could not employ a method in collecting such fees other than what is designated in the statute. Since his fees are to be paid out of the county treasury, we believe he would first be required to submit an itemized statement of the services rendered for which he would be entitled to fees before such fees could be paid. There is nothing in House Bill No. 772, supra, which would authorize him to collect such fees by withholding money out of the proceeds of his office accumulated by the collection of other fees.

Since the fees provided for in House Bill No. 772, supra, that accrued in 1946, were collected by the recorder of deeds withholding the amount of such fees from other fees collected, the question is asked what adjustment should be made so as to comply with the correct procedure for collecting such fees. In this regard we believe that the recorder of deeds should turn into the county treasury the amount of money withheld to pay such fees and also submit a statement of services rendered in listing names of veterans from the effective date of House Bill No. 772 (July 1, 1946) through December 31, 1946.

He would not be entitled to receive a fee of .50¢ to be paid out of the county treasury for furnishing certified copies of discharges to veterans between July 1 and December 31, 1946. We have, in effect, so held in an opinion submitted to William Aull III, prosecuting attorney of Lafayette county, a copy of which we now enclose. During the above period of time he would only be entitled to the .50¢ fee for listing the names of veterans. Consequently when the money he has withheld is turned in he would only be entitled to receive fees for listing names of veterans and none for issuing certified copies of discharges. Beginning January 1, 1947 he would be entitled to receive fees from the county treasury for listing names of veterans and for issuing initial certified copies of discharges to veterans, but not for issuing additional certified copies.

After the moneys, erroneously withheld by the recorder of deeds for 1946 fees, have been turned in and a proper statement submitted to the county treasurer for fees to which he is legally entitled for 1946, namely fees for listing names of veterans, we believe such fees could be paid by the county treasurer out of class six funds, if any are available, as provided in Section 10911, Mo. R.S.A., Laws Missouri 1941, page 650, which reads:



"Class 6. After having provided for the five classes of expenses heretofore specified, the county court may expend any balance for any lawful purpose: Provided, however, that the county court shall not incur any expense under class six unless there is actually on hand in cash funds sufficient to pay all claims provided for in preceding classes together with any expense incurred under class six: Provided, that if there be outstanding warrants constituting legal obligations such warrants shall first be paid before any expenditure is authorized under class 6."

You have also presented the question whether or not the recorder of deeds can receive the fees, as provided in House Bill No. 772, for 1947, in view of the fact that in making up his budget for 1947 he made no estimate of the fees he would be entitled to for that year.

Section 10912, R. S. Mo. 1939, in part, provides:

"It is hereby made the express duty of every officer claiming any payment for salary or supplies to furnish to the clerk of the county court, on or before the fifteenth day of January of each year an itemized statement of the estimated amount required for the payment of all salaries or any other expense for personal service of whatever kind during the current year\* \* \* \* \*."

Under the mandate of this statute the recorder of deeds should include in his budget an estimate of the fees he expects to receive for rendering services as provided in House Bill No. 772. However, in the case of Gill v. Buchanan County, 142 S. W. (2d) 665, the Supreme Court of Missouri was considering whether or not a county judge could recover the balance of his salary which had been erroneously budgeted at \$3000.00 instead of \$4500.00. In overruling the contention of the defendant county that the plaintiff could not recover because there had not been a sufficient amount provided for in the county budget for the payment of such claim, and that the plaintiff had failed to demand payment at the proper time, the court said at l.c. 669:



"\* \* \* Nevertheless, this court has consistently held that mere failure to claim the balance at the time is not a proper basis for estoppel in these cases. There are several reasons for this, all based upon the following differences between public office and private employment and the different situation of a municipal corporation or a governmental subdivision of the state from a private person or corporation:

"First: Payment of salaries fixed by the Legislature is a duty imposed upon the County by the Legislature, and the county is not entitled to assume that by paying a part of this obligation it has discharged the entire debt.

"Second: To permit estoppel in such cases would make it possible for executive or administrative officers to encroach upon and exercise the legislative functions of fixing salaries of other officers and even ignore the action of the Legislature with regard to them. This is against public policy for many reasons.

"Third: Failure to make a prompt claim cannot mislead a county to its detriment as it might in the case of an individual or private corporation, because a county can only be compelled to make payment out of tax revenue when there is a surplus in any year after all necessary charges have been met, or by a levy when it is not necessary to levy the full amount authorized by constitutional limitations to meet essential expenses, or, if it cannot thus create a surplus or raise funds by levy, to pay otherwise when a bond issue is authorized by the required majority of its citizens, willing to approve it by their votes. \* \* \* In short, even judgments for valid obligations cannot curtail future essential governmental activities."

Hon. Ralph R. Bloodworth

-7-

In view of the above case it appears that the recorder of deeds should make an estimate of the fees he expects to receive as provided for in House Bill No. 772, supra, when he is preparing his budget for each year, but a failure to include such estimate would not be a bar to recovery and he would be entitled to receive such fees from the county treasury.

CONCLUSION

Therefore, it is our opinion that the proper procedure for the recorder of deeds to follow in collecting fees provided for in House Bill No. 772, Laws Missouri 1945, page 1526, is to submit an itemized statement of services rendered, and the fees for such services, to the county treasurer and thereafter said fees shall be paid to the recorder out of the county treasury. There is nothing to authorize the recorder of deeds to collect such fees by withholding money out of the proceeds of his office accumulated by the collection of other fees. That said fees for services rendered in 1947 can be collected from the county treasurer although there was no estimate made by the recorder for such services and fees in his budget for 1947. But we believe that payment of these fees must be made from surplus funds available after all expenses for the current year have been paid. Beginning with the year 1948, the recorder of deeds when he is preparing his budget, should make an estimate of the fees he expects to receive and include said estimate in his budget.

Respectfully submitted,

RICHARD F. THOMPSON  
Assistant Attorney General

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Enc.

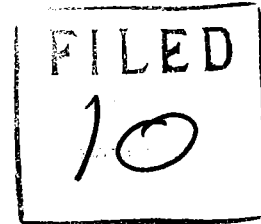
APPROVED:

J. E. TAYLOR  
Attorney General

CONTACT LENSES:  
STATE BOARD OF OPTOMETRY:

One who examines the eye to determine whether contact lenses should be used to correct defects or abnormal conditions, or who takes an impression mold of the eyeball, or who fits a contact lens to the eye, must be an optometrist, possessing a certificate of registration from State Board of Optometry, or a physician or surgeon, licensed to practice in this state.

January 6, 1947



Dr. J. R. Bockhorst, Secretary  
Missouri State Board of Optometry  
4023A West Florissant Avenue  
St. Louis 7, Missouri

Dear Sir:

This is in answer to your letter of recent date, requesting an official opinion of this department, and reading as follows:

"At the recent meeting of the State Board of Optometry, the Board requested me to seek your opinion as to whether under Missouri law a person engaging in the practice of prescribing and fitting contact lenses is required to possess a license either as an optometrist or as a physician and surgeon.

"Contact lenses, which are becoming increasingly popular, are used in lieu of ordinary lenses for the correction of visual defects. They are 'worn under the eyelids and in direct contact with the forward part of the eyeball, touching the sclera surrounding the cornea with the corneal area of the lens usually not in contact with the surface of the eyeball. The lens itself, made either of glass or plastic, is so ground as to focus light in accordance with the requirements of the individual patient and to correct his individual visual variations from normal. The contact lens is made from molds

Dr. J. R. Bockhorst

which are made by placing over the eyeball an impressionable material into which the form and surface conditions of the eyeball of the particular patient are impressed. From this mold the lens is cast and the corrective qualities required for the particular patient incorporated into the lens by grinding or other means to develop the proper refractive qualities. When the lens has been prepared and the necessary refractive qualities incorporated therein, it is then fitted to the eye and corrections made to secure a proper fit, irregularities being removed by grinding. When the contact lens is complete and properly fitted, it is necessary to instruct the patient in its proper use.' \* \* \* 'The operations involved in the making of the mold for such contact lense, the fitting and other required operative procedures are delicate and may result in infection of or trauma to the eye if inexpertly performed. Furthermore, such devices must be minutely exact in fit to function properly.'

"You will be interested to know that, to our knowledge, in every State in which an opinion has been sought on this question, the Attorney General has ruled that a person engaging in the practice of prescribing and fitting contact lenses must possess a license either as an optometrist or as a physician and surgeon.

"I am enclosing an original and copy of recent opinions given by the Attorneys General of Illinois and Oregon on this subject. You may retain the copies for your file. Will you be so kind as to return the originals to me when you send your opinion."

Your further letter, in reply to our request for additional information, reads, in part, as follows:

"In compliance with your request for information regarding the educational qualifications of an optometrist, I am sending under separate cover, the annual catalogs issued by

Dr. J. R. Bockhorst

several Colleges and Universities that are teaching accredited optometric courses of four thousand hours of instruction and conferring the degree Doctor of Optometry, or Bachelor of Science in Optometry upon completion of the course.

"I believe that from this set of catalogs, you will be able to know that contact lenses should be prescribed and fitted only by an optometrist or a physician and surgeon duly licensed as such by the State of Missouri.

"In the catalog of the Pennsylvania State College of Optometry, refer to pages 30 through 48. In the catalog of The Ohio State University Bulletin, Department of Optometry, see pages 25 through 36. In the Booklet of Southern College of Optometry, see pages 15 through 28. In the Columbia University Bulletin of Information, Announcement of Professional Courses in Optometry, see pages 21 through 28.

"It should be noted that in every such course the subjects of Ocular Anatomy, Histology and Pathology are taught, so that the optometrists are well prepared in the knowledge of eye structures and the effect of diseases and injuries upon these structures.

"It should be observed, however, that the prescription and fitting of contact lenses, while requiring a high degree of professional skill by those trained in the art of refracting, does not involve 'treating' the eyes.

"There are only a handful of apprentices in the entire State, but even before these men will be licensed to practice Optometry by our State Board, they will have to pass the same State Board Examinations in the same subjects as the men who study Optometry in professional schools."

The sections of the Missouri statutes dealing with the practice of optometry, relative to your inquiry, are the following:

Dr. J. R. Bockhorst

"After the first day of October, 1921, it shall be unlawful for any person to practice optometry or attempt to practice optometry without a certificate of registration as a registered optometrist issued by the state board of optometry. After the first day of October, 1943, it shall be unlawful for any person to serve, or attempt to serve as an apprentice under a registered optometrist without a certificate of registration as a registered apprentice issued by the state board of optometry prior to said first day of October, 1943, or renewal of such certificate. No new certificate of registration shall be issued to any apprentice after October 1, 1943."

Section 10113, R. S. Mo. 1939, which defines the practice of optometry, reads as follows:

"Any one of any combination of the following practices constitutes the practice of optometry:

"(a) The examination of the human eye, without the use of drugs, medicines or surgery, to ascertain the presense of defects or abnormal conditions which can be corrected by the use of lenses, prisms or ocular exercises.

"(b) The employment of objective or subjective mechanical means to determine the accommodative or refractive states of the human eye or the range of power of vision of the human eye.

"(c) The prescription or adaptation without the use of drugs, medicines or surgery, of lenses, prisms, or ocular exercises to correct defects or abnormal conditions of the human eye or to adjust the human eye to the conditions of special occupation. No registered apprentice may independently practice optometry. A registered apprentice may, however, under the immediate personal supervision of a registered optometrist, assist a registered optometrist in the practice of optometry."

Dr. J. R. Bockhorst

Exemptions from the operation of Chapter 66, R. S. Mo. 1939, which includes Sections 10109 to 10126, are found in Section 10114, R. S. Mo. 1939, which reads as follows:

"The following persons, firms and corporations are exempt from the operation of this act:

''(a) Physicians or surgeons of any school lawfully entitled to practice in this state.

''(b) Persons, firms and corporations who sell eye glasses or spectacles in a store, shop or other permanently established place of business on prescription from persons authorized under the laws of this state to practice either optometry or medicine and surgery.

''(c) Persons, firms and corporations who manufacture or deal in eye glasses or spectacles in a store, shop or other permanently established place of business, and who neither practice nor attempt to practice optometry, and who do not use a trial case, trial frame, test card, vending machine or other mechanical means to assist the customer in selecting glasses.'"

Qualifications for a certificate of registration as a registered optometrist are found in Section 10115, Laws of Missouri, 1943, page 974, which reads as follows:

"A person is qualified to receive a certificate of registration as a registered optometrist:

"(a). Who is at least 21 years of age.

"(b). Who is of good moral character and temperate habits.

"(c). Who has graduated from a high school or secondary school approved by the state board of optometry or who has completed an equivalent course of study as determined by an examination conducted by the state board of optometry.

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"(d). Who has graduated from a school of optometry approved by the state board of optometry or who has studied for three years as a registered apprentice under an optometrist registered under the laws of this state, provided, that said three years of study as a registered apprentice shall have been started prior to October 1, 1943.

"(e). Who has passed a satisfactory examination conducted by the state board of optometry to determine his fitness to receive a certificate of registration as a registered optometrist."

Section 10117, R. S. Mo. 1939, which provides for the examination of applicants for certificates of registration as registered optometrists, reads as follows:

"The state board of optometry shall hold examinations of applicants for certificates of registration as registered optometrists at such times and places as it may determine. The examination of applicants for certificates of registration as registered optometrists may include both practical demonstrations and written and oral tests, and shall embrace the subjects normally taught in schools of optometry approved by the state board of optometry."

Section 10122, Laws of Missouri, 1943, page 975, provides as follows:

"Upon payment of the required fee, an applicant who is an optometrist, registered or licensed under the laws of another state or territory of the United States, or of a foreign country or province may, without examination, be granted a certificate of registration as a registered optometrist by the state board of optometry in its discretion, upon the following conditions:

"(a). That the applicant is at least twenty-one years of age, of good moral character and temperate habits; and



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"(b). That the requirements for the registration or licensing of optometrists in the particular state, territory, county or province, where, at the date of the license, substantially equal to the requirements then in force in this state. The fee to be paid by an applicant for an examination to determine his fitness to receive a certificate of registration as a registered optometrist is \$10.00. The fee to be paid by an applicant for a certificate of registration as a registered optometrist is \$15.00. The fee to be paid by an applicant for a certificate of registration as a registered optometrist, who applies therefor pursuant to the provision of section 10118 of this chapter, prior to the first day of October, 1921, is \$10.00. The fee to be paid upon the renewal of a certificate of registration is \$5.00. The fee to be paid for the restoration of an expired certificate of registration as a registered optometrist is \$10.00."

It is clear that the determination of whether or not lenses, or prisms, or ocular exercises are needed in any particular case to correct defects or abnormal conditions of the human eye, or to adjust the human eye to the conditions of special occupation, must be made by an optometrist or a physician or surgeon, since such determination is, under the provisions of Section 10113, R. S. Mo. 1939, made the practice of optometry, and only those having a certificate as a registered optometrist or licensed as a physician or surgeon in this state may, under the provisions of Section 10109, Laws of Missouri, 1943, page 974, and Section 10114, R. S. Mo. 1939, engage in the practice of optometry in this state, and this would necessarily include the determination of whether or not contact lenses are needed in any particular case.

In your letter, you quote from a request for an opinion of the Attorney General of Illinois, as follows:

"The operations involved in the making of the mold for such contact lenses, the fitting and other required operative procedures are delicate and may result in infection of or trauma to the eye if inexpertly performed. Furthermore, such devices must be minutely exact in fit to function properly."

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It is obvious from the quoted statement that one who makes the mold for contact lenses and fits the lenses properly to the eye must have a thorough knowledge of the eye structure in order that such taking of the mold and fitting of the lenses may not result in injury to or infection of the eye, and in order that the lenses may function properly.

We have examined the catalogs of the Pennsylvania State College of Optometry, the Ohio State University, School of Optometry, the Southern College of Optometry, and the Columbia University, School of Optometry, and find that in each of these schools of optometry a thorough and comprehensive course of study of the structure of the eye is found, including the dissection of the eye in the orbit and when removed, as well as a study of all the various structures of the eye under the microscope. The course of instruction in the universities listed would undoubtedly give the requisite knowledge and training to properly fit contact lenses to one who had completed the course at such university.

Section 10115, Laws of Missouri, 1943, page 974, quoted above, provides that before one is qualified to receive a certificate of registration as a registered optometrist in Missouri, he must have been graduated from a school of optometry approved by the State Board of Optometry, or must have started a three-year apprenticeship under a registered optometrist of this state before October 1, 1943, and that such person must also pass an examination conducted by the State Board of Optometry of this state. The requirements of said Section 10115 that must be met before one is qualified to receive a certificate of registration as a registered optometrist are such that anyone who meets all the requirements set out in said section possesses a sufficient knowledge of the eye structure to properly prescribe and fit contact lenses, since the examination given by the State Board of Optometry must be passed satisfactorily by the applicant before a certificate is issued by the State Board.

#### CONCLUSION

It is, therefore, the opinion of this department that, under the laws of this state, one who examines the eye to ascertain the presence of defects or abnormal conditions which may be corrected by the use of contact lenses, or who takes an impression mold of the eyeball from which a contact lens is to be cast, or who determines the corrective qualities to be incorporated in the lens, or adjusts or fits the lens to the eye, must be an optometrist, possessing a certificate of registration as a registered

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optometrist issued by the Board of Optometry of Missouri, or a physician or surgeon, licensed to practice in this state.

Respectfully submitted,

C. B. BURNS, JR.  
Assistant Attorney General

APPROVED:

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J. E. TAYLOR  
Attorney General

JURORS:  
MAGISTRATE COURT:

Sheriff should summon jurors to serve in magistrate court from body of county, such jurors to have same qualifications as jurors chosen for regular petit jury, and to be paid as provided in Sec. 13419, R. S. Mo. 1939, from costs collected in cause in which jurors serve.

January 11, 1947



Honorable A. J. Bolinger  
Judge of the Magistrate Court  
Versailles, Missouri

Dear Sir:

This office is in receipt of your request for our opinion in which you ask concerning the qualifications, manner of selection and amount of pay of jurors in the new magistrate court.

Senate Bill No. 207, enacted by the 63rd General Assembly, and effective by its own provision on the 1st day of January, 1947, so far as this discussion is concerned (Section 146), contains the following provisions relating to the selection and qualifications of jurors in the magistrate court:

"Section 98. Before the magistrate shall commence an investigation of the merits of the cause, by an examination of the witnesses, or the hearing of any other testimony, either party may demand that the cause be tried by a jury, which jury shall be composed of twelve good and lawful persons having the qualifications of jurors in the circuit court, unless the parties shall agree on a less number, in which case the jury shall consist of the number agreed upon, not less than six; Provided, that three-fourths or more of the jurors concurring may return a verdict, which shall have the same force and effect as if rendered by the entire panel. If the verdict be rendered by the entire panel, the foreman alone may sign it, but if rendered by a less number

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than the entire panel, it shall be signed by all the jurors who agree to it.

"Section 99. The magistrate shall issue a summons directed to the sheriff or other officer provided by law, commanding him to summon eighteen, or six more than the parties may have agreed upon, good and lawful persons of the county, qualified to serve as jurors in the circuit court of the said county, who shall be nowise of kin to either party, nor interested in the suit, to appear before such magistrate at a time and place named therein to make a jury for the trial of the action between the parties named in the summons.

"Section 100. The sheriff or other officer provided by law shall execute such jury summons fairly and impartially, and shall not summon any person who he has reason to believe is biased or prejudiced for or against either of the parties. Jurors shall be personally served, and the sheriff or other officer provided by law shall make a list of the persons summoned, which he shall certify and annex to the summons, and return to the magistrate. If a sufficient number of competent jurors cannot be obtained from the panel returned, the sheriff or other officer provided by law shall immediately summon others to serve in their places."

The qualifications of jurors in the circuit court, referred to in both Section 98 and Section 99, supra, are to be found in Section 697, R. S. Mo. 1939, which is as follows:

"Every juror, grand and petit, shall be a male citizen of the state, resident of the county, sober and intelligent, of good reputation, over twenty-one years of age and otherwise qualified."

While you suggest that the word "qualifications" in referring to and modifying the word "jurors" may refer to the manner of selection of a juror as well, and that jurors in the magistrate court must be drawn in the manner provided in Section 706, R. S. Mo. 1939, we cannot concur, as we believe the qualifications referred to are those set out in Section 697,

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supra, and mean certain essentials possessed by the individual selected, at the time he is to act as a juror, regardless of the manner in which he came to be chosen.

In passing, it should be mentioned that no longer must a juror be a male citizen, because of provisions of the 1945 Constitution of Missouri and legislation thereunder.

We invite attention to the first sentence of Section 99, supra, where we find, "\* \* \* summons directed to the sheriff \* \* \* commanding him to summon eighteen \* \* \* " (underscoring ours), and, continuing, "good and lawful persons of the county." To us, it seems that a selection of a jury from the body of the county is contemplated.

These views are given further support by language in Section 100, supra, where we find, "The sheriff or other officer \* \* \* shall execute such jury summons fairly and impartially, and shall not summon any person \* \* \*." This is susceptible of no other meaning than that the sheriff is to use his discretion in "picking up" men who have the same qualifications as would be required of them if they were serving in the circuit court. A contrary interpretation would mean that the jury in the magistrate court, selected from the regular panel chosen for the circuit court, would rehear the case on appeal from the magistrate court, or at least have the opportunity to do so.

We find no provision in any bill or statute relating directly to the pay of jurors in the magistrate court. However, magistrate courts are now courts of record, as provided by Section 19 of Senate Bill No. 207:

"Magistrate courts shall be courts of record. \* \* \* "

This being true, we believe the compensation of jurors is governed by Section 13419, R. S. Mo. 1939, which is, in part, as follows:

"Jurors shall be allowed fees for their services as follows:

\* \* \* \* \*

"For each person summoned, attending and reporting to any court of record, per day, except as otherwise provided by law..... 1.00

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"For each mile traveled in going to and returning from the place of trial, in attending any trial before a court of record, per mile..... .05

"All fees allowed jurors as above shall be taxed as costs in the cases, respectively, in which they were summoned; but juries serving in more than one case on the same day, at the same place, shall only be allowed fees in one case; and any juror, who shall claim fees for attending in two or more cases, on the same day, at the same place, shall not be allowed fees for that day."

Without quoting at length Section 13398, R. S. Mo. 1939, that section provides for the collection of the jurors' fees mentioned, and in the absence of a provision authorizing the payment of jurors from the county funds or other sources, we must hold that payment of the jurors in any case is dependent upon the collection of the proper fees from the party to the litigation against whom the costs are properly chargeable.

We are cognizant of Sections 723, 724 and 725, all in R. S. Mo. 1939, and which apparently relate to jurors in courts in general, but consider them inapplicable because of Section 696, R. S. Mo. 1939, and the title of the article. Section 696 states that "except as otherwise provided by law," jurors shall be paid and summoned as set out in the article, while the article is styled "Grand and Petit Juries."

#### CONCLUSION

Summarizing our conclusions, it is the opinion of this office that the sheriff or other designated officer should summon jurors to serve in the magistrate court from the body of the county, such jurors to have the same qualifications as jurors chosen from the regular petit jury in the county, and that such jurors should be paid as provided in Section 13419, R. S. Mo. 1939, from costs collected in the cause in which the jurors serve, as provided in the latter section.

Respectfully submitted,

APPROVED:

ROBERT L. HYDER  
Assistant Attorney General

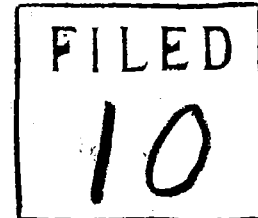
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J. E. TAYLOR  
Attorney General

SCHOOL FUND: Fines for violation of the Criminal Laws, including the violation of the Fish and Game or  
CONSERVATION: Conservation Laws and Regulations, should be paid to the county school fund; the magistrate is not under a duty of forwarding the same to the Department of Revenue; the same does not go to the credit of the Conservation Commission.

January 22, 1947

Honorable A. J. Bolinger  
Judge of the Probate Court  
Versailles, Missouri



Dear Sir:

This acknowledges your request, which is as follows:

"Section 7, Article 9 of the recent constitution not much changed from Section 8, Article 11, of the 1875 Constitution provides, that all fines and penalties for breach of the penal laws of the state shall be paid into the county school fund.

"Sections 10 and 11 of Senate Bill 366 make it the duty of the Magistrate to report to the Conservation Commission all fines assessed for violation of the fish and game law and to transmit the said monies to the department of revenue; which shall deposit the same to the credit of the Conservation Commission.

"Are not these provisions in conflict with the constitution, and to whom shall we pay fines collected for such violations?"

Replying thereto, it appears that Senate Committee Substitute for Senate Bill No. 366 repeals Sections 8864 to 8882, R.S. 1939, and enacts in lieu thereof twenty-seven new sections covering the powers of the Conservation Commission. Section 11 of said bill provides, in part, as follows:

"All moneys payable under the provisions of this chapter shall be promptly transmitted to the division of collection in the department of revenue, which shall



deposit the same in the state treasury  
to the credit of the Conservation Commission.  
\* \* \* \*

Your question becomes one of statutory construction and perhaps more so than it does of whether there is a conflict between the constitutional provisions. Your question concisely stated appears to be this: Should fines collected for breach of the laws or regulations of the Conservation Commission be sent to the Department of Revenue and be by them deposited in the State treasury to the credit of the Conservation Commission?

Section 7 of Article IX of the 1945 Missouri Constitution provides, among other things, with reference to school moneys, as follows:

"\* \* \* \* All interest accruing from investment of the county school fund, the clear proceeds of all penalties, forfeitures and fines collected hereafter for any breach of the penal laws of the State, the net proceeds from the sale of estrays, and all other moneys coming into said funds shall be distributed annually to the schools of the several counties according to law."

Section 43 of Article IV of the 1945 Missouri Constitution, with reference to the Conservation Commission, provides:

"The fees, moneys, or funds arising from the operation and transactions of the commission and from the application and the administration of the laws and regulations pertaining to the bird, fish, game, forestry and wildlife resources of the state and from the sale of property used for said purposes, shall be expended and used by the commission for the control, management, restoration, conservation and regulation of the bird, fish, game, forestry and wildlife resources of the state, including the purchase or other acquisition of property for said purposes, and for the administration of the laws pertaining thereto, and for no other purpose."

Section 8 of Article XI of our 1875 Constitution, pertaining to the county school fund, provided:

"All moneys, stocks, bonds, lands and other property belonging to a county school fund, also the net proceeds from the sale of estrays, also the clear proceeds of all penalties and forfeitures, and of all fines collected in the several counties for any breach of the penal or military laws of the State, and all moneys which shall be paid by persons as an equivalent for exemption from military duty, shall belong to and be securely invested and sacredly preserved in the several counties as a county public school fund; the income of which fund shall be faithfully appropriated for establishing and maintaining free public schools in the several counties of this State."

Section 16 of Article XIV of our 1875 Constitution, pertaining to the powers of the Conservation Commission, which was adopted as an amendment in 1937, provided, among other things, the following:

" \* \* \* \* The fees, monies, or funds arising from the operation and transactions of said Commission and from the application and the administration of the laws and regulations pertaining to the bird, fish, game, forestry and wild life resources of the State and from the sale of property used for said purposes, shall be expended and used by said Commission for the control, management, restoration, conservation and regulation of the bird, fish, game, forestry and wild life resources of the State, including the purchase or other acquisition of property for said purposes, and for the administration of the laws pertaining thereto and for no other purpose. \* \* \*"

It will be seen from the above that the provisions of the conservation amendment, which was in 1937 adopted as part of the Constitution of 1875, were carried forward into the 1945 Constitution without change insofar as concerns the powers of the Conservation Commission over monies, fees or funds arising from the operation and transactions of the Commission and from the application and administration of the laws and regulations pertaining to the bird, fish, game, forestry and wildlife resources of the State, etc. It would seem, therefore, that if there is any change in the constitutional law regarding disposition of fines, the change must be on account of changes in the constitutional provisions of Section 7 of Article IX of the 1945 Constitution from what the provisions on the same subject were in Section 8 of Article XI of the 1875 Constitution. Both of said last two mentioned sections are found in the Constitution under the article on education.

Said Section 7 of Article IX of the 1945 Constitution has two new provisions, to wit, (1) that "all real estate, loans and investments now belonging to the various county and township school funds: shall be liquidated and reinvested in bonds, "and sacredly preserved as a county school fund," and (2) that any county may by a majority vote "elect to distribute annually to its schools the proceeds of the liquidated school fund," in such manner as may be prescribed by law.

The said Section 8 of Article XI of the 1875 Constitution provides that "the clear proceeds of all penalties and forfeitures, and of all fines collected in the several counties for any breach of the penal or military laws of the State, \* \* \* shall belong to and be securely invested and sacredly preserved in the several counties as a county public school fund; the income of which fund shall be faithfully appropriated for establishing and maintaining free public schools in the several counties of this State."

Section 7 of Article IX of the 1945 Constitution provides that the county school fund shall consist of the present, at that time, county school funds but that they be converted into bonds "and sacredly preserved as a county school fund." It also gives the option by a majority vote to "distribute annually" said funds, if and when the Legislature so provides by law.

In the 1945 Constitution said Section 7 provides that

all interest accruing from the county school fund shall be distributed annually to the several county schools "according to law." In the 1875 Constitution the similar section (8 of Article XI) provided that "the income of which fund shall be faithfully appropriated for establishing and maintaining free public schools," and this provision appears to be the same in the one as in the other Constitution.

However, said Section 7 of Article IX of the Constitution of 1945, while using the same wording as to fines, to wit, "the clear proceeds of all penalties, forfeitures and fines collected hereafter for any breach of the penal laws of the State," requires that they be "distributed annually to the schools of the several counties according to law." But Section 8 of Article XI of the 1875 Constitution required said clear proceeds of all penalties and forfeitures, and of all fines collected for breach of the penal laws, to be (not distributed) "securely invested and sacredly preserved" as a county public school fund.

While it will be seen that there are a number of changes made by the 1945 Constitution from the provisions of the 1875 organic law, yet they do not on principle or in terms change the disposition of the fines assessed and collected on account of violation of the Fish and Game Law. The fact that the new Constitution provides the money arising from such fines shall be distributed instead of preserved (as the old Constitution did) can be no reason for saying they shall be paid to a different body.

The section in the old Constitution used the words "shall belong to" and be invested and sacredly preserved as a school fund, but the meaning of the new Constitution, that these same funds "shall be distributed annually to the schools of the several counties according to law," is identical with the meaning of the parallel section in the old Constitution. In both, the section in the old Constitution and the section in the new Constitution, the fundamental law requires said money to be paid to the school fund. The former required it to be preserved and all the interest paid out to the schools, while the latter does not require it to be preserved, but provides it shall be distributed. Distributed to whom? The Constitution definitely answers that question. It says it "shall be distributed annually to the schools of the several counties."

Bearing in mind the presumption of constitutionality of statutes enacted by the Legislature, we have considered this

question with a view of reaching the conclusion it was constitutional for the Legislature to provide that fines collected because of violation of the conservation laws should be paid to the Commission, but we cannot do so because there is no change in the fundamental law from which we may conclude that under the 1945 Constitution said money arising from such fines goes in a different way from what it did prior to the adoption of the 1945 Constitution.

Both Constitutions use the same language in defining what property is covered into the school fund. Both say "the clear proceeds of all penalties (and), forfeitures and (of all) fines for any breach of the penal laws" shall go to the county school fund, and the conclusion necessarily follows that the construction of the provisions of the section of the new Constitution is the same as that of the old Constitution.

This leads to inquiry as to what construction should the similar section in the old Constitution have. We have made inquiry and are informed that ever since the adoption of the 1937 amendment creating the Conservation Commission the administrative officials having in charge the enforcement of these laws have been paying said fines to the county school funds of the various counties. The construction of a statute by the executive department having charge of the enforcement of the same over a period of years, though not binding conclusively on the courts, is given weight, in *State ex rel. Hanlon et al. v. City of Maplewood et al.*, 99 S.W. (2d) 138, 231 Mo. App. 739. The Court applied the above doctrine, and said, 1.c. 143, S.W.:

"This construction of the statute by respondents appears to be reasonable in view of the language of the statute itself, and is entitled to great weight because it is the construction of those who, under all the provisions of the article prescribing the duties of officers of such cities, are charged with the responsibility of the government thereof. *State ex rel. Gass v. Gordon*, 266 Mo. 394, 412, 181 S.W. 1016, 1021, Ann. Cas. 1918B, 191."

Further, this same question that is here considered was ruled by the Supreme Court of Missouri, en banc, in 1906, in the case of *State ex rel. v. Warner*, 94 S.W. 962, 197 Mo. 650,

where it was held that:

"The fines authorized to be imposed for a violation of the Game and Fish law of 1905 belong to the school fund, and section 64 of that act, requiring all such fines to be paid into the State Treasury to be applied in meeting the expenses of enforcing the law, is in conflict with section 8 of article 11 of the Constitution, which requires all penalties and forfeitures collected in the several counties for any breach of the penal or military laws of the State to be added to the county school fund, and such fines when collected must be added to that fund."

The statute there considered, in terms, provided that the moneys collected from fines, penalties or forfeitures under the Fish and Game Law should be paid to the State Treasurer and placed to the credit of the game protection fund. The Court held that such a statute was unconstitutional because the section of the Constitution requiring the proceeds of fines for violation of the penal laws to be paid to the schools was violated. The opinion there recites, l.c. 654 Mo:

"By section 66, it is provided that 'moneys collected from fines, penalties or forfeitures, under this act, belonging to the game protection fund, shall be paid over by the officer authorized to collect said money to the State Treasurer on or before the first day of each month.'

"By section 64, it is enacted that 'all moneys sent to the State Treasurer in payment of . . . fines, penalties, forfeitures, shall be set aside by the State Treasurer and shall constitute a fund, known as the "Game Protection Fund," for the payment of the salary of the state game and fish warden, his necessary expenses, also for the payment of deputy game and fish wardens and their necessary expenses.'

"By other sections, the game and fish warden is authorized to appoint deputies for each Congressional district, and, furthermore, by section 53, 'all sheriffs, deputy sheriffs, marshals, constables or other peace officers, are declared to be ex officio game and fish wardens.' The act bristles with impaling provisions, the violation of which are denounced, seriatim, as misdemeanors, to be punished as criminal offenses by fines (and by imprisonment, in case the fines are not paid), ranging from \$5 to \$1,000, and the scheme is that all these fines should be paid to the State Treasurer to swell the corpus of the 'Game Protection Fund,' out of which fund comes the expenses of enforcing the law.

"At a certain time, one Weber was convicted before a justice of the peace in Jackson county of a misdemeanor for violating one of the provisions of said act, and was mulcted in a fine of \$50, which he paid. This fine was turned over to respondent, Warner, as county treasurer of Jackson County, who credited the same to the school fund of that county. Whereat relator brought this original proceeding to compel, by the moving writ of mandamus, said county treasurer to turn over said fine to the State Treasurer to be by him credited to the 'Game Protection Fund.'

"An alternative writ issued, directed to respondent, requiring him to pay over said \$50 to the State Treasurer for the use of said fund, or show cause why he has not so done. To this alternative writ, respondent made return interposing divers grounds as 'cause' for not obeying our writ. The only cause, deemed of consequence, is that where-by the constitutionality of those provisions of the act requiring such fines to be converted into the state treasury and into said fund is challenged. It is insisted said provisions violate section 8, article 11, of our Constitution, reading thus:

"All . . . , the clear proceeds of all penalties and forfeitures, and of all fines collected in the several counties for any breach of the penal or military laws of the State . . . , shall belong to and be securely invested and sacredly preserved in the several counties as a county public school fund; the income of which fund shall be faithfully appropriated for establishing and maintaining free public schools in the several counties of this State.'

"On the coming in of this return, relator demurred thereto. Thereby the question submitted becomes one of law and the issue will be treated as single and sharply defined as pointed out.

"Does the statutory disposition of these fines impinge upon the state Constitution? That is the question here, and, in our opinion, that question must be answered in the affirmative. It is with judicial reluctance we are constrained to this notion; for the law is a wholesome one. The mischiefs struck at and to be retarded are manifest; the benefits in view and to be advanced, many and salient; and in so far as this holding tends to emasculate the law and defeat its purposes (if so it results) by reducing somewhat the fund for its enforcement, it becomes a matter of pronounced solicitude and gravity. Before any provision of a statute may be declared unconstitutional, the courts should allow full play to all wise rules and maxims of construction and interpretation - inter alia, that its unconstitutionality should be so palpable and obvious as to leave no room for reasonable doubt in the court's mind. (State v. Layton, 160 Mo. l.c. 499.) Another unbending rule is that a state legislature (in contrast to the federal Congress) has all legislative power not prohibited to it by the state or federal Constitution. (State ex rel. v. Sheppard, 192 Mo. 497; Cass County v. Jack, 49 Mo. l.c. 199.) But considering, as we are bound to consider, the



constitutional provision, supra, as imperious, as written by plain men in plain language for a plain and high purpose; and approaching, as our duty is, the legislation in question without judicial austerity or over-refinement of interpretation, we have been able to arrive at no other conclusion than that fines arising from punishment of violators of the act in question, like all other fines arising from punishment inflicted by the criminal law, are devoted to a constitutional purpose of inflexible stiffness, to-wit, the education of the little ones, the children, of Missouri.

From the above it will be observed that the statute, if one were passed by the Legislature, diverting the proceeds of fines on account of violation of the penal laws from the public school fund would be unconstitutional. However, it does not become necessary in the matter before us to rule this statute here considered to be unconstitutional, but on the contrary it is our duty to uphold the constitutionality of same unless there is no reasonable view to take and reach the conclusion that it is constitutional. There is a reasonable view to take in reaching the conclusion that it is constitutional.

In 59 C. J., page 1096, par. 646, the law is thus declared:

"If possible an amendment will be so construed as to uphold its constitutionality rather than to render it unconstitutional,  
\* \* \* \*"

The Legislature is presumed to know the construction that has been placed by the courts upon the statutes, and it is therefore a fair view to take that the Legislature knew that it would be in violation of the Constitution to divert said fines from the public school fund. The conclusion necessarily follows that when the Legislature wrote into Section 11 of said Senate Bill that all moneys payable under the provisions of that chapter should be deposited into the State treasury to the credit of the Conservation Commission, they did not mean to include therein the moneys collected in fines arising because of violations of the Conservation Commission's laws or regulations. Said Section 11 of said

Honorable A. J. Bolinger

-11-

bill does not appear to violate the Constitution when this construction is placed upon it.

Conclusion.

It is our opinion that moneys collected as fines and penalties for breach of the penal laws of the State, including breach of the laws or regulations under the jurisdiction of the Conservation Commission, are required to be paid into the county school fund of the county in which the conviction is obtained, and it is not the duty of the magistrate before whom such conviction is obtained to transmit said moneys to the Department of Revenue.

Very truly yours,

DRAKE WATSON  
Assistant Attorney General

APPROVED:

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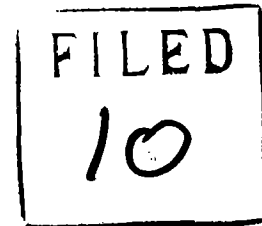
J. E. TAYLOR  
Attorney General

DW:ml

PROBATE JUDGES: Under the provisions of Article 2, Chapter 51, R. S. Mo. 1939, a "finding" must be made before the Probate Court can make an order.

July 9, 1947

Mr. Robert L. Borberg  
Prosecuting Attorney  
Union, Missouri



Dear Sir:

Your inquiry of recent date reads as follows:

"The Probate Judge of Franklin County, through this office, requests as opinion construing Sections 9346 and 9347, Laws 1945.

"The question: Whether or not the phrase 'If the probated court of the proper county shall so order . . . ' requires the court to make a finding of the patient's ability to pay or not to pay for hospitalization."

The first rule to apply when construing statutes is the one concerning legislative intent. The cases of Thompson v. City of Lamar, 17 S. W. 2d 960, 322 Mo. 514; State v. Naylor, 40 S. W. 2d 1079, 328 Mo. 335; hold generally:

"Purpose of statutory construction is to determine legislative intent."

When the meaning of language is to be determined the rule in Bellerive Inv. Co., v. Kansas City, 13 S. W. 2d 628, is to be followed:

"In construing statutes words of common use are to be construed in their natural and ordinary meaning."

A third rule of statutory construction, and an equally important one, is the rule of *pari materia*. In *State ex rel. Thompson v. Dirckx*, 11 S. W. 2d 38, the rule is announced as follows:

Mr. Robert L. Borberg

"All acts in pari materia should be construed together."

With these rules in mind let us turn to Article II, Chapter 51, of the Revised Statutes of Missouri 1939.

Section 9328, Laws of 1945, page 907, provides in part as follows, where the probate court is dealing with the insane poor:

"Section 9328. Probate courts to have power to send insane poor to state hospitals--semi-annual pay--county courts may sell warrants to pay costs. --The probate courts of the several counties shall have power to send to a state hospital such of the insane poor of their respective counties as may be entitled to admission thereto. Such probate court shall furnish the county court with a certified copy of the order finding the person to be an insane poor person and the order committing such person. \* \* \* \* \*

(Underscoring ours)

Section 9344, Laws of 1945, page 911, provides in part, when dealing with circumstances under which inmates of private or charitable institutions may be sent to state hospitals:

\* \* \* \* \* Said probate court shall hear said matter on the date mentioned in said notice or upon any day to which said court shall adjourn or continue the hearing thereof, in the manner now provided for resident insane persons. If the person charged shall be found by the court to be insane and indigent and to have been a resident, \* \* \* \*

(Underscoring ours)

Section 9346, Laws of 1945, provides as follows:

"Patients are county patients--when.--If the probate court of the proper county shall so order, the clerk thereof shall transmit to the superintendent a certificate, under his official seal, setting forth that any patient in a state hospital has not estate sufficient to support him therein. Upon the receipt of such certificate by the superintendent, such

Honorable Robert L. Borberg

person shall be a county patient of such county, and shall be supported by such county, as provided by this article in the cases of poor patients."

Section 9347, Laws of 1945, provides as follows:

"County patients may become pay patients.-- If the probate court of the proper county shall so order, the clerk thereof shall transmit to the superintendent a certificate, under his official seal, setting forth that any county patient in the state hospital from his county has sufficient estate to support and maintain him at the hospital. After the receipt of this certificate, the patient shall be a pay patient; and in such cases, charges shall be required and executed as in all other cases of pay patients; and upon a failure thereof, after reasonable delay, the superintendent shall discharge such patient in the manner as provided in this article in case of poor persons."

The constitutionality of these sections of the Missouri statute, quoted supra, was tested and upheld in the recent case of State ex rel. Victoria L. Kowats vs. Glendy B. Arnold, No. 40226, handed down the 9th of June, 1947, and not yet printed.

Applying the rules quoted above, and especially the rule of *pari materia* referred to above, it is apparent from the very language of the state, as demonstrated by the sections of the statutes quoted above, and underlined for clarity, that a finding must be made by the probate court before any order can be entered which is authorized by the statutes. In fact, the very terms themselves, given their ordinary meaning, disclose that a finding obvious that Section 9328, Laws of 1945, contemplates a finding being made by the court for said section uses the term "finding." Under that section the court must "find" the person poor and insane thereby enabling the court to make an order of commitment. The same is true of Section 9344, where the terms "shall be found" is read. What could be clearer than that it was the legislative intent that under the provisions of Article II, Chapter 51, R. S. Mo. 1939, there must be a finding by the probate court prior to its entering any order.

Mr. Robert L. Borberg

Furthermore, for this office to hold that a probate court under the provisions of Article II, Chapter 51, could make an order without any finding of fact would in effect revive the Star Chamber procedures which were endured under the infamous Stuarts. To allow a probate court to arbitrarily enter an order of commitment without any finding of fact would violate constitutional guaranties as well as common sense.

#### CONCLUSION

Sections 9346 and 9347, Laws of Missouri, 1945, contemplate a finding by the probate court of the facts related and upon which the order is based as authorized by said sections. In other words, for the probate court to enter an order under Section 9346, Laws of 1945, there must be a finding of the facts which entitle the court to make said order. The same applies to Section 9347.

Respectfully submitted,

WILLIAM C. BLAIR  
Assistant Attorney General

APPROVED:

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J. E. TAYLOR  
Attorney General

BOARD OF OPTOMETRY: Empowered under Section 47, Laws of Mo.,  
1945, page 1445, to change their fiscal  
year to begin on July 1.

FILED

10

November 5, 1947

Dr. J. R. Bockhorst, Secretary  
Missouri State Board of Optometry  
136 N. Second Street  
St. Charles, Missouri

Dear Sir:

This is in reply to your letter of October 18, 1947, in  
which you requested an opinion from this department, reading  
as follows:

"It is my understanding that the present  
Missouri Constitution requires all boards,  
bureaus and departments of the State  
government to conduct their business on  
a fiscal year dating of July 1, 1947  
through July 30, 1948. Because of the  
requirements of the Constitution, I be-  
lieve that Senator Frisby introduced a  
re-organization Bill #113 in the Senate  
for the purpose of changing the Optometry  
law so that our Board could conform with  
the requirements of the Constitution.  
Through some error or over-sight in making  
up the context of the bill, Senate Bill  
#113 was not only a re-organization bill  
for the fiscal year governing the Optometry  
Board, but also made a fundamental change  
in our law that was not the intent or pur-  
pose of the bill, therefore Senate Bill  
#113 was vetoed. I also understand that  
there has not been any new bill passed by  
the legislature taking care of this Board's  
problem. Recently, I received a letter  
from the Department of Revenue by Mr. G. W.  
Bates, Collector of Revenue, recommending  
that as Secretary-Treasurer of this Board,  
that I change the fiscal year of this Board

to conform with the Constitution. The question in my mind is 'Am I legally empowered to do so. If not, then is it legally possible for this Board to continue to operate under its present set-up of a fiscal year beginning April 1, 1947, terminating March 31, 1948?' In as much as I am under bond as to the collection of required fees for this Board, I would appreciate your sending me your opinion as to what course of action is correct for me to follow under the circumstances."

We refer you to Section 47, Laws of Missouri, 1945, page 1445, which reads as follows:

"The fiscal year of the state shall begin on July first and extend to and include the thirtieth day of June of the next calendar year, and the books, accounts and reports of the public officers shall be made to conform thereto. This provision shall not be deemed to refer to the fiscal year of the counties of the state."

We think that under the general provisions of Section 47, above, you are empowered to change the fiscal year of the Missouri State Board of Optometry to conform with the section, and, also, to conform with the Constitution.

#### Conclusion.

It is the opinion of this department that the Missouri State Board of Optometry is empowered, under the provisions of Section 47, Laws of Missouri, 1945, page 1445, to change its fiscal year to begin on July first and extend to and include the thirtieth day of June of the next calendar year.

Respectfully submitted,

APPROVED:

JOHN R. EATY  
Assistant Attorney General

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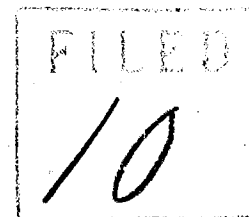
J. E. TAYLOR  
Attorney General

JRE:ml



97  
66  
Copy to  
J. Smith

TAXATION: Amount bid upon and paid for land that does not exist,  
TAX SALE: at delinquent tax sale, may be repaid, with interest,  
to the purchaser by the county court.



December 22, 1947

1/5

Honorable Robert L. Borberg  
Prosecuting Attorney  
Franklin County  
Union, Missouri

Dear Sir:

This is in reply to your letter of recent date, requesting an official opinion of this department and reading as follows:

"A sale of real estate for delinquent taxes was held Nov. 5, 1945, and was bid upon and bought in good faith by Purchaser for the sum of \$66.68, which amount included cost of sale, back taxes, and interest. The Collector made distribution of the funds received. The real estate purportedly sold does not exist, it having been erroneously described on the tax books for a number of years.

"Purchaser has made demand upon Franklin County for the refund of his money.

"Question 1. Is County legally obligated to refund to Purchaser?

"2. If the answer to '1' is 'no,' can County legally reimburse purchaser, expunging its moral responsibility?

"3. Does the error impose any legal liability upon the County Officers making the error?

"The Collector and County Court respectfully request opinions as to the above questions."

Section 11155, R. S. No. 1939, provides as follows:

"Whenever the county collector shall discover, prior to the conveyance of any lands sold for taxes, that the sale was for any cause whatever, invalid, he shall not convey such lands; but the purchase money and the interest thereon shall be refunded out of the county treasury to the purchaser, his representatives or assigns, on the order of the county court. Such invalid sale shall suspend for the period intervening between the date of the sale and the discovery of its invalidity the running of the statute of limitations. In such cases the county collector shall make an entry opposite to such tracts or lots in the record of certificates of purchase issued or redemption record that the same was erroneously sold, and the cause of invalidity, and such entry shall be prima facie evidence of fact therein stated. He shall notify the county clerk of such action, whose duty it shall be to make a like entry upon his sale record."

Section 11156, R. S. No. 1939, provides as follows:

"No sale or conveyance of land for taxes shall be valid if at the time of being listed such land shall not have been liable to taxation, or, if liable, the taxes thereon shall have been paid before sale, or if the description is so imperfect as to fail to describe the land or lot with reasonable certainty and for the first two enumerated causes, the money paid by the purchaser at such void sale shall be refunded, with interest, out of the county treasury, on order of the county court."

The sale held November 5, 1945, was an invalid sale because there was no power in any taxing authority to tax nonexistent land. Under the provisions of Section 11155, if no conveyance of the purported land has been made, the money should be refunded as provided in such section. While the provision in Section 11156, that no sale or conveyance of land for taxes shall be valid if at the time of being listed such land shall not have been liable to taxation, applies to land of the state, counties

or other political subdivisions, etc., we believe that such provision also applies to nonexistent land, since obviously such purported land would not be liable to taxation. Therefore, even if a purported conveyance of the nonexistent land had been made, under the provisions of Section 11156, the money should be refunded by order of the county court. We are enclosing a copy of an official opinion of this department rendered under date of July 29, 1943, to John W. Mitchell, which sets out the proper procedure and funds out of which such payment should be made.

CONCLUSION

It is the opinion of this department that where nonexistent land has been assessed for taxation in the county and a sale for delinquent taxes on such nonexistent land has been held, that under the provisions of Sections 11155 and 11156, R. S. Mo. 1939, the county court should refund to the purchaser at such invalid sale the money paid by the purchaser, with interest.

Respectfully submitted,

C. B. BURNS, Jr.  
Assistant Attorney General

APPROVED:

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J. E. TAYLOR  
Attorney General

CBB:HR

*Municipality*  
OFFICERS: City officials do not violate Section 4483, R.S. 1939, by leasing land to the University of Missouri, for experimental purposes, for a nominal consideration.

October 23, 1947

FILED  
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Honorable C. D. Bray  
City Attorney  
Campbell, Missouri

Dear Sir:

This is in reply to your letter of October 11, 1947, in which you requested an opinion, and reading, in part, as follows:

"The Federal Government, through the War Assets Administration, and Civil Aeronautics Administration, has ceded and granted to the City of Campbell, a Municipal Corporation, 355 acres of farm land, situated about 2½ miles from the city, which the Federal Government acquired, and used as an auxiliary airfield during the war. The city is to maintain two runways across said land for the public use of any and all airplanes desiring to land or take off from said field. The city is to have the use and the right to occupy and control all of the balance of the acreage, for any purpose it desires, not inconsistent with the provisions of said grant, that is to say, no manufacturing or industrial business shall be carried on and established which might interfere with the government's use of the land at some future time, \* \* \*

\* \* \* \* \*

"Because of the foregoing reasons, practically all of the business, industrial and mercantile men of the City of Campbell are in favor of the City of Campbell permitting the Missouri State University to use 50 to 90 acres of the airport land for such experimental purpose, and, believing that the

development of such enterprise in the trade territory of Campbell would in time be of much more benefit to the business interest of Campbell than the cash rent would be from such acreage, if rented out for individual agricultural purposes.

\* \* \* \* \*

"I realize that your office is not required to furnish opinions to city officials, but in view of the very large public interest, and the unanimous desire of the business interest of the City of Campbell, I would very much appreciate an opinion from your office, whether or not the city officials would be violating any part of Section 4483, by waiving the rent on that part of the land used by the Missouri State University for experimental purposes, and I thank you ever so much."

We assume that the land was lawfully acquired by the city of Campbell and that your inquiry is directed at the legality of the disposition of the property.

We understand the city of Campbell to be a city of the fourth class, and, as such, comes under the provisions of Chapter 38 of the Revised Statutes, 1939.

The powers and duties of the mayor and board of aldermen are set out in Section 7168, R.S. 1939, as follows:

"The mayor and board of aldermen of each city governed by this article shall have the care, management and control of the city and its finances, and shall have power to enact and ordain any and all ordinances not repugnant to the Constitution and laws of this state, and such as they shall deem expedient for the good government of the city, the preservation of peace and good order, the benefit of trade and commerce and the health of the inhabitants thereof, and such other ordinances, rules and regulations as may

be deemed necessary to carry such powers into effect, and to alter, modify or repeal the same."

This is rather a broad statute, and it would seem that the use contemplated to be made of the land in question would be covered by the provision, "the benefit of trade and commerce."

You mentioned in your letter that the city is to have control of the property not required for runways "for any purpose it desires." Of course, it is necessarily implied that the use would be for a municipal purpose. As we have said above, we feel that such a use of the property would come under the benefit of trade and commerce clause, and therefore would be for a municipal purpose.

Section 7096, R.S. 1939, provides, in part, as follows:

"Any city of the fourth class \* \* \* may purchase, hold, lease, sell or otherwise dispose of any property, real or personal, it now owns or may hereafter acquire;  
\* \* \* "

In view of the language in this section, we suggest that the lease be drawn with a money consideration included, nominal or otherwise. This would bring the transaction within the term, "lease," as used in Section 7096, and would eliminate a necessity for a construction of the phrase, "otherwise dispose of," as used in Section 7096.

Section 4483, R.S. 1939, reads, in part, as follows:

"If any member of any town or city council, or of any county court or commission or body charged with the administration or management of the affairs of any county, or any executive officer or member of any executive department of any city, town or county in this state, or any member of any board or commission charged with the administration or management of any charity or fund of a public nature, by whatever name the same may be called, shall knowingly and without authority of law vote for the appropriation, disposition or disbursement of any money or property belonging to

any such city, town, county, charity or fund, or any subdivision of any such city, town or county, to any use or purpose other than the specific use or purpose for which the same was devised, appropriated and collected, or authorized to be collected by law, or shall knowingly aid, advise or promote the appropriation, disbursement or disposition of any such money or property, for any purpose not directed and warranted by law, and such illegal appropriation, disbursement or disposition be in fact effected, every person so offending against the provisions of this section shall be deemed and taken to have feloniously embezzled and converted to his own use such money or property; \* \* \* \*

We think there is no violation of Section 4483 by the city officials completing the transaction in question, because the use is for one of the purposes for which the property was obtained by the city, namely, "for any purpose it desires."

Conclusion.

It is the opinion of this department that the city officials of Campbell, Missouri, do not violate Section 4483, R.S. 1939, by leasing real property, obtained from the Federal government, "for any purpose it desires," to the University of Missouri to be used as an experimental truck and vegetable farm, and receiving for the use thereof a nominal consideration.

Respectfully submitted,

JOHN R. BATY  
Assistant Attorney General

APPROVED:

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J. E. TAYLOR  
Attorney General

JRB:ml

ROADS AND  
BRIDGES:  
TAXATION:  
ELECTION:

Taxes levied for road and bridges purposes, authorized by first sentence of Section 12 (a), Article X of the Constitution are distributed four-fifths to the special road district from which the tax arose, and one-fifth to the county. Taxes levied under the second sentence of said section are all placed to the credit of the road district authorizing the levy. Elections authorizing the levy of not more than 35¢ additional road tax may be held on the day of a general or special election, provided the election is held within 20 days from the filing of the petition for the election.

February 4, 1947

Honorable Herbert S. Brown  
Prosecuting Attorney  
Grundy County  
Trenton, Missouri



Dear Sir:

This is in reply to yours of recent date wherein you request an opinion from this department on the following statement:

"Article X, Section 12 (a) of the Constitution of the State of Missouri, 1945, provides as follows:

"'Sec. 12 (a) Additional Tax Rates for County Roads and Bridges - Road Districts. "In addition to the rates authorized in section 11 for county purposes, the county court in the several counties not under township organization, the township board of directors in the counties under township organization, and the proper administrative body in counties adopting an alternative form of government, may levy an additional tax, not exceeding thirty-five cents on each hundred dollars assessed valuation, all of such tax to be collected and turned in to the county treasury to be used for road and bridge purposes. In addition to the above levy for road and bridge purposes, it shall be the duty of the county court, when so authorized by a majority of the qualified electors of any road district, general or special, voting thereon at an election held for such purpose, to make an additional levy of not to exceed thirty-five cents on the hundred dollars assessed valuation on all taxable real and tangible personal property within such district, to be collected in the same manner as state and county taxes,



and placed to the credit of the road district authorizing such levy, such election to be called and held in the manner provided by law."

"You will note that the second sentence of Section 12 (a) uses the following language:

"'In addition to the above levy for road and bridge purposes, it shall be the duty of the county court, when so authorized by a majority of the qualified electors of any road district, general or special, voting thereon at an election held for such purpose, to make an additional levy of not to exceed thirty-five cents on the hundred dollars assessed valuation on all taxable real and tangible personal property within such district, to be collected in the same manner as state and county taxes, and placed to the credit of the road district authorizing such levy, such election to be called and held in the manner provided by law.'

"Does this second sentence of Article X, Section 12 (a) of the Constitution of the State of Missouri, 1945, mean that every township in counties under township organization can levy a thirty-five cent tax, on a majority vote of the electors in said township, in addition to the other thirty-five cent levy authorized by the first sentence of Article X, Section 12 (a) of the Constitution of the State of Missouri, 1945? In other words, is a township board, on a vote of the majority of the electors of the township, authorized to levy and collect a total tax of seventy cents on the hundred dollars assessed valuation of all taxable property within the township?

"In connection with the above, your attention is called to Section 8527 and Section 8529 of House Bill No. 784, of the 63rd General Assembly and Section 8820 and Section 8830 of House Bill No. 798 of the 63rd General Assembly of the State of Missouri.

You will note that Section 8820 of House Bill 798 provides that the County Court of any county which has township organization may, in its discretion, order the County Treasurer to retain an amount not to exceed five cents on the one hundred dollars assessed valuation out of such special Road and Bridge Fund so created and to transfer the same to the County Road and Bridge Fund.

"The further question is submitted: Is the five cents on the one hundred dollars valuation, which the County Court may, in its discretion, order the County Treasurer to retain on behalf of the County Road and Bridge Fund, taken out of the thirty-five cent levy which the township board may levy by virtue of the first sentence of Section 12 (a) of Article X of the State Constitution, and does the County Court also have the right, in its discretion, to take an additional five cents out of the additional thirty-five cent levy as authorized by the second sentence of Section 12 (a) of Article X of the State Constitution?

"The further question is submitted: If it is your opinion that the township boards may levy an additional thirty-five cents, by virtue of the second sentence of Section 12 (a) of Article X of the State Constitution, on a vote of the majority of the people of the township, in addition to the thirty-five cent rate authorized by the first sentence of Article X, Section 12 (a), can such levy be voted on by the electors of such township at a regular township election?"

Your request, in substance, brings up three questions, namely: (1) Does the township board in counties under township organization, when authorized by a vote of the electors therein, have authority to levy and collect a total tax of seventy cents on the one hundred dollars assessed valuation of all taxable property in the township? (2) May the county court withhold from the road and bridge taxes, raised under

authority of Section 12 (a) of Article X of the Constitution, five cents on the one hundred dollars assessed valuation of all taxes raised for road and bridge purposes in the township or county which includes the taxes raised by the levy of not to exceed thirty-five cents by the county court or administrative body under township organization and the additional levy of not to exceed thirty-five cents authorized by the electors of a road district, general or special, in such counties or townships? (3) May the election authorizing the levy of the additional road and bridge tax be held at a time when the regular township elections are held?

Referring to the first question, we find that the Constitution and statutes seem to indicate that a tax of a total of seventy cents might be levied for road and bridge purposes in road districts, general or special. Referring to said Section 12 (a) of Article X of the Constitution, it will be seen that county courts in counties under township organization and the township board of directors under township organization, and the proper administrative body in counties adopting an alternative form of government, may make a levy for an additional tax not exceeding thirty-five cents on the one hundred dollars assessed valuation, and this tax is turned into the county treasury for road and bridge purposes. Then under the second sentence of said Section 12 (a), authority is granted to impose an additional levy for road and bridge purposes when such levy is authorized by a majority of the qualified voters of any road district, general or special. This tax, authorized by the election under the second sentence of said Section 12 (a), is placed to the credit of the road district authorizing such levy.

Referring to H.C.S.H.B. No. 798 of the 63rd General Assembly, which was approved on July 3, 1946, and especially Section 8820 thereof, it will be found that the Legislature set up the machinery for the carrying out of the provisions of the first sentence of said Section 12 (a) of Article X of the Constitution. This section, relating to counties under township organization, reads as follows:

"In addition to other levies authorized by law, the township board of directors of any township in their discretion may levy an additional tax not exceeding thirty-five cents on each one hundred dollars assessed valuation in their township for road and bridge purposes. Such tax shall be levied by the township board, to be collected by the township collector and turned into the county treasury, where

it shall be known and designated as a special road and bridge fund. The county court of any such county may in its discretion order the county treasurer to retain an amount not to exceed five cents on the one hundred dollars assessed valuation out of such special road and bridge fund and to transfer the same to the county special road and bridge fund; and all of said taxes over the amount so ordered to be retained by the county shall be paid to the treasurers of the respective townships from which it came as soon as practicable after receipt of such funds, and shall be designated as a special road and bridge fund of such township and used by said townships only for road and bridge purposes: Provided, that the amount retained, if any, by the county shall be uniform as to all such townships levying and paying such tax into the county treasury: Provided, further, that the proceeds of such fund may be used in the discretion of the township board of directors in the construction and maintenance of roads and in improving and repairing any street in any incorporated city, town or village in the township, if said street shall form a part of a continuous highway of the township running through said city, town or village."

This section confers on the township board of directors in counties under township or organization authority to levy a tax of not to exceed thirty-five cents on each one hundred dollars assessed valuation in their township for road and bridge purposes. The authority granted to township boards to make this levy is similar to the authority granted to county courts not under township organization under the provisions of Section 8527 of H. C. S. H. B. No. 784. The second sentence of said Section 12 (a) of Article X of the Constitution which authorizes the levy in addition to the first thirty-five cents levy for road purposes seems to authorize the county court only to make that levy, and the county court can only make the levy when authorized by a majority of the qualified electors of a road district.

Section 3529 of H. C. S. H. B. No. 784, passed by the 63rd General Assembly, makes provisions for the levying of a tax for road and bridge purposes. This tax may not be in excess of the thirty-five cents on the one hundred dollars assessed valuation, and it is in addition to the levy authorized by the first sentence of said Section 12 (a). This section reads as follows:

"Whenever ten or more qualified voters and taxpayers residing in any general or special road district in any county in this state shall petition the county court of the county in which such district is located, asking that such court call an election in such district for the purpose of voting for or against the levy of the tax provided for in the second sentence of the first paragraph of Section 12 of Article X of the Constitution of Missouri, it shall be the duty of the county court, upon the filing of such petition, to call such election forthwith to be held within 20 days from the date of filing such petition. Such call shall be made by an order entered of record setting forth the date and place of holding such election, the manner of voting and the rate of tax the court will levy, which rate shall not exceed thirty-five cents on the hundred dollars assessed valuation in all taxable real and tangible personal property in the district. A copy of such order shall be published in two successive issues of any newspaper published in such district, if any, and if no newspaper is published in such district, three certified copies of such order shall be posted in public places in such district. The first publication in said newspaper and the posting of such notice shall be not less than ten days before the date of such election. Such court shall also select one or more judges and clerks for such election to receive the ballots and record the names of the voters."

Said Section 12 (a) of Article X of the Constitution and the statutes hereinbefore referred to clearly disclose that the township boards in counties under township organization do not have authority to levy the additional tax of not to

exceed thirty-five cents for road and bridge purposes authorized by the second sentence of said constitutional provision. However, it might be noted that in the event such township comprised a general or special road district, such additional levy might be voted in accordance with the statutory mode proscribed for holding such election. In that event, the additional levy would necessarily be made by the county court in accordance with the terms of the constitutional provision referred to.

Then, referring to Section 8531 of said H. C. S. H. B. No. 784, it will be seen that the lawmakers have placed a construction on the second sentence of said Section 12 (a) of Article X of the Constitution to the effect that taxes raised under the levy authorized by a vote of the electors of the district are to be placed to the credit of the district authorizing such special levy. It would therefore appear from the provisions of these sections and from the provisions of the second sentence of said Section 12 (a) of Article X of the Constitution that the county court would not have the right in its discretion to take an additional five cents out of the additional thirty-five cents levy which is authorized by the second sentence of said Section 12 (a) and by said Section 8529 of said H. C. S. H. B. No. 784.

On the question of whether or not the election to determine whether or not the additional levy may be authorized may be held on the day when regular township elections are held, we do not find any provision in the Constitution or in the law which would prohibit the election from being held on that date. The only directions that the act seems to provide pertaining to the time of holding the election are found in said Section 8529 of said H. C. S. H. B. No. 784. This section provides that when ten or more qualified voters and taxpayers, residing in any general or special road district, petition the county court in the county in which such district is located, asking for an election on the question of whether or not the additional tax shall be imposed, then it is the duty of the county court to call the election on this question within 20 days from the date of the filing of such petition. The rule seems to be that in the absence of any statutory provision, the body calling an election may exercise its discretion as to the date when such election may be held. This rule was announced in a Kentucky case, *Furste v. Gray*, 42 S.W. (2d) 889, 240 Ky. 604:

"Time for holding special election may, by writ of election, be fixed for same day as general election; that being in discretion of officer issuing writ."

From a review of the cases, we think our lawmakers have observed this rule and made special provisions for holding certain elections which the lawmakers thought should not be held on general election days. We refer to the local option laws. In the case of *State ex rel. v. Ruark*, 34 Mo. App. 325, the court, in discussing the reason for the provisions of the law prohibiting local option elections to be held within a certain time before or after the holding of a general election, made this statement at l.c. 329:

" \* \* \* The evident intention of the law making power of the state was to free the elections on the whiskey question, from all partisan and local influences, and that such elections should be uninfluenced by the excitement aroused by other recent elections, or by contemplated elections.\* \* "

Apparently the members of the 63rd General Assembly saw no reason to provide that the election to authorize the special levy for road and bridge purposes could not be held on a general election date. In the absence of such legislation, it would seem that the county court could designate a general election date for the date for holding such election provided it is within 20 days after the petition for such election is filed.

#### CONCLUSION

From the foregoing, it is the opinion of this department that:

(1) Township boards of directors in counties under township organization are authorized to levy and collect a tax of thirty-five cents on the one hundred dollars valuation for road and bridge purposes, under the provisions of Section 12 of Article X of the Constitution of 1945. In the event such township comprises a general or special road district and it is desired to levy the additional thirty-five cents, or some portion thereof, under the provisions of Section 12 of Article X of the Constitution of 1945, an election upon that proposition must be held. In the event that such proposition receives a majority of the votes, such additional levy must be made by the county court.

(2) The county court does not have authority to take any part of the levy of the additional tax authorized by the second sentence of said Section 12 (a) of Article X of the

Hon. Herbert S. Brown

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Constitution, but all of the taxes authorized by that levy must be placed to the credit of the road district voting and authorizing such special levy.

(3) The county court may call the election to authorize the collection of the additional road tax and provide that said election may be held on the same date that the regular township elections are held, provided such election is held within 20 days of the filing of the petition.

Respectfully submitted,

TYNE W. BURTON  
Assistant Attorney General

APPROVED:

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J. E. TAYLOR  
Attorney General

TWB:VLM



OFFICERS)  
SALARIES AND FEES)

Sheriff cannot be paid mileage for travel beyond the State for the purpose of returning a prisoner who has waived extradition.

February 11, 1947

FILED

12

21  
24

Honorable Herbert S. Brown  
Prosecuting Attorney  
Trenton, Missouri

Dear Sir:

We have your letter of recent date, which reads as follows:

"It is requested that your office furnish me an opinion relative to the question herein-after set forth in this letter.

I have recently had the matter come up wherein a fugitive from justice in this county was captured in the State of Iowa and advised the Iowa authorities that he was willing to waive extradition to the State of Missouri. This being true, there was no necessity to institute extradition proceedings, and send my Sheriff to the State Capitol to get an extradition warrant from the Governor, and then to have the Sheriff go to the Governor of Iowa and get his consent to the extradition, and then return the prisoner to Missouri, as all that was necessary for the Sheriff to do was to go to Iowa and return the prisoner.

Sections 3976 and 3977, Revised Statutes of Missouri, 1939, provide that where formal extradition proceedings are instituted, the expenses thereof may be allowed and paid out of the State Treasury.

Sections 13411 to 13414, Revised Statutes of Missouri, 1939, provide that Sheriffs are allowed mileage in certain cases, including mileage for the arrest of persons charged with crime. However, there is no provision in the law that a Sheriff is

allowed mileage for trips outside the State of Missouri to return fugitives, and my Sheriff informs me that he has previously had such fees, where he has made claim for them, turned down by the State Auditor.

In the case which I recently had, and which is abovementioned, the Sheriff went from Trenton, Mo. to Indianola, Iowa, to return this fugitive, and as this fugitive waived extradition, it was not necessary to institute extradition proceedings. However, as I understand the law, the Sheriff can only claim mileage from Trenton, Mo. to the Iowa line, whereas in fact he had mileage from the State line on to Indianola, Iowa. This procedure saved the necessity of going to Jefferson City and instituting formal extradition proceedings, obtaining an extradition warrant from the Governor, and then proceeding to the State Capitol of Iowa and getting the consent of the Governor of Iowa and then going on to pick up the fugitive. Although this method was much cheaper, there appears to be no provision for the Sheriff obtaining mileage for his expenses past the State line.

Therefore, I would appreciate your office advising me if there is any provision in the law, which apparently there is not or which I have been unable to find, which would authorize a Sheriff of Missouri to obtain mileage for distances covered outside the State of Missouri to return a fugitive who has waived extradition, and, therefore, no extradition proceedings or Governor's warrant, was necessary."

To answer your question, we must turn to the statutes of the state, for the fees and compensation of all public officers are matters controlled entirely by statutes. In Maxwell v. Andrew County 347 Mo. 156, 146, S.W. 2d 621, 625, the Supreme Court said:

"It is well established law that the right of a public officer to be compensated by salary or fees for the performance of duties imposed on him by law does not rest upon any theory of contract, express or implied, but is purely a creature of the statute."

So also in *Nodaway County v. Kidder* 344 Mo. 795, 129 S.W. 2d 857, 860, the Supreme Court said:

"It is well established that a public officer claiming compensation for official duties performed must point out the statute authorizing such payment."

Unless, therefore, there are statutes allowing the sheriff mileage for the trips you mentioned in your letter, he cannot be paid such mileage.

Section 3976 R. S. Mo. 1939 provides for the extradition of a person charged with a crime in this state who has been apprehended in another state. Said section reads as follows:

"Whenever the governor of this state shall demand a fugitive from justice from the executive of another state or territory, and shall have received notice that such fugitive will be surrendered, he shall issue his warrant, under the seal of the state, to some messenger, commanding him to receive such fugitive and convey him to the sheriff of the county in which the offense was committed, or is by law cognizable."

Section 3977 provides for the payment of the expenses of the messenger who is selected to return the prisoner to this state. Said section reads as follows:

"The expenses which may accrue under the last section, being first ascertained to the satisfaction of the governor, shall, on his certificate, be allowed and paid out of the state treasury, as other demands against the state."

We understand it is not claimed by the sheriff you mentioned in your letter that he might be entitled to mileage under the foregoing statutes, but these statutes become important in determining your question because they show that the Legislature has provided a method by which persons who return prisoners from another state into this state may be paid their expenses. In *Nodaway County v. Kidder*, supra, 129 S.W. 2d 1.c. 860, the Court said:

"The general rule is that the rendition of services by a public officer is deemed to be gratuitous, unless a compensation therefor is provided by statute. If the statute provides compensation in a particular mode or manner, then the officer is confined to that manner and is entitled to no other or further compensation or to any different mode of securing same. Such statutes, too must be strictly construed as against the officer."

Since the foregoing two statutes provide a mode or manner by which persons may be paid their expenses for returning prisoners from another state to this state, neither the sheriff nor any other person can be paid in any other manner. The sheriff rendered valuable services, but he must be presumed to have rendered them gratuitously unless compensation or reimbursement is provided by statute.

Section 13413 R. S. Mo. 1939 provides for the fees which a sheriff may be allowed for services in criminal cases. The section is long and will not be quoted here, but suffice it to say that said section does not provide any fee or compensation for the mileage of the sheriff mentioned in your letter.

Section 13414 R. S. Mo. 1939 reads as follows:

"Sheriffs, county marshals or other officers shall be allowed for their services in criminal cases and in all proceedings for contempt or attachment as follows: Ten cents for each mile actually traveled in serving any venire summons, writ, subpoena or other order of court when served more than five miles from the place where the court is held: Provided, that such mileage

shall not be charged for more than one witness subpoenaed or venire summons or other writ served in the same cause on the same trip."

Section 13414 does not cover the situation you mention in your letter, because when the sheriff was traveling through the other state to get the prisoner he was not serving any venire summons, writ, subpoena or other order of court. No court of this state could have issued him any writ or process which would have authorized him to execute it in another state. The Supreme Court in the case of State ex rel v. Allen, 180 Mo. 27, 30, said:

"It is axiomatic under our complex system of government that the laws and judgments and powers conferred by a State have, proprio vigore, no extra-territorial force. (McGinnis v. Foundry Co., 174 Mo. 225.) Therefore a writ issued by a court can only be executed within the jurisdiction of the court, and confers no authority upon anyone to attempt to execute it outside of the jurisdiction of the court."

Section 13415 R. S. Mo. 1939 should be noted also. It reads as follows:

"No sheriff or ministerial officer in any criminal proceeding shall be allowed any fee or fees for any other services than those in the two preceding sections enumerated, or for guards not actually employed."

So it is provided that the only fees and mileage which a sheriff may claim in a criminal case are those set forth in Sections 13413 and 13414, supra. The Supreme Court held in Maxwell v. Andrew County, supra, that Section 13415 in effect limited the fees of a sheriff in criminal cases to those set out in Sections 13413 and 13414. In that case the Court said, 146 S. W. 2d 1.c. 626:

"The statutes regulating the compensation of sheriffs expressly provide for the payment of mileage in certain cases. For example, such provision is made when the officer is serving subpoenas or writs or transporting a prisoner to the penitentiary. The specification in the statute of instances when

mileage is to be paid and money lawfully be received by the sheriff constitutes an implied prohibition upon its collection in other instances. Particularly is this true when we consider the provisions of S. 11793, specifically limiting the compensation to be received by sheriffs."

It thus becomes clear that the statutes do not make any provision for the sheriff to be paid mileage for going beyond the State of Missouri to return a prisoner who has waived extradition. The justice or injustice, wisdom or folly of the statutes as we find them is not a question for those who interpret and enforce them, but such questions are for the Legislature.

Conclusion

It is, therefore, the opinion of this department that a sheriff cannot be paid mileage for travel beyond the State of Missouri for the purpose of returning to this state a prisoner who has waived extradition.

Yours very truly,

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Harry H. Kay  
Assistant Attorney General

APPROVED:

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J. E. Taylor  
Attorney General

HHK/vlv

TAXATION:  
CONSTITUTIONAL  
LAW:

Levy of a tax for purpose of county library in  
addition to tax levy as limited by Sec. 11(b) of Art. X of  
Const. Such levy will not prevent county court from increas-  
ing tax levy for county purposes within limit set by Sec. 11(b)  
of Art. X of Const. Only limitation is that tax shall not be  
levied in one year which will produce mathematically more  
than 10% in excess of taxes of previous year.

April 1, 1947

FILED

12

Mr. Joe M. Brown  
Assistant Prosecuting Attorney  
Greene County  
Springfield, Missouri

Dear Sir:

This is in reply to your letter of recent date, request-  
ing an official opinion of this department, and reading as  
follows:

"The County Court has propounded the follow-  
ing question:

"In the event that a proposition for the  
assessment of a tax of two mills on the  
dollar for the purpose of a county library  
fund is approved at a coming election will  
such a tax prevent the County Court, if  
necessary, from increasing its present  
proposed levy of forty-four cents on the  
hundred dollars to fifty cents on the hun-  
dred dollars, which is the constitutional  
limitation for this County under Section  
11 (b) of Article 10 of the Constitution."

"Please find attached a copy of our letter to  
the County Court wherein we state that in our  
opinion the library tax would not prevent the  
County Court from the levy of a tax up to the  
maximum of fifty cents on the one hundred dol-  
lars assessed valuation for general county pur-  
poses under Section 11(b) of Article 10.

"We shall appreciate receiving your opinion on  
this matter."

Senate Bill No. 370 of the 63rd General Assembly provides as follows:

"Section 1. Any county, or other political subdivision otherwise authorized by law to support and conduct a library may levy for library purposes in addition to the limits prescribed in Section 11, Article X of the Constitution a rate of taxation on all property subject to its taxing powers in an amount as now or hereafter prescribed by law; Provided, that political subdivisions now having or hereafter having a population of not less than 300,000 inhabitants nor more than 600,000 inhabitants according to the last Federal decennial census are authorized to levy for library purposes a rate which shall not exceed ten cents on the hundred dollars assessed valuation, annually, on all taxable property in such subdivision.

"Section 2. Since the statutes are inadequate to permit a levy of taxation for library purposes in accordance with Section 11, Article X of the Constitution in excess of all other rates otherwise permitted by law and because it is necessary to make such levy for library purposes for the immediate preservation of the public peace, health and safety of the inhabitants of this state, an emergency exists within the meaning of the Constitution and this act shall be in full force and effect from and after its passage and approval."

The provision of Senate Bill No. 370 authorizing a levy made for library purposes to be in addition to the constitutional limits of taxation prescribed by Section 11 of Article X of the Constitution, which limits are found in Section 11(b) of such article, is in conformity with and is the authorizing by law of a levy under authority of the last clause of Section 11(c) of Article X, in excess of the limit set by Section 11(b) of such article.

Section 14767, R. S. Mo. 1939, provides that upon petition of one hundred taxpayers of a county who are outside of cities in such county maintaining public libraries in part at least by taxation, such petition asking for the formation of a county library district and asking that an annual tax of not to exceed two mills on the dollar be levied, the county court shall submit



the proposition at an annual election the first Tuesday in April; and further provides that if a majority vote is cast for establishment of the district and for the levy of the tax, the district shall be established and the tax levied and collected in like manner with other taxes in the rural school districts of the county.

Section 14767, R. S. Mo. 1939, is the law authorizing the county library district to support and conduct a library, and such section, together with Section 14773, R. S. Mo. 1939, provides the amount of the tax as now prescribed by law, that is, two mills on the dollar for maintaining and conducting a free county library, and an additional tax of one and one-half mills on the dollar for building purposes, for a period not to exceed five years, when such additional tax for building is voted.

Since Section 14767, R. S. Mo. 1939, now authorizes a tax levy not to exceed two mills on the dollar when voted by the majority of those voting in an election in a proposed library district, such a tax levy is the levy specified in Senate Bill No. 370, and is by the provisions of that bill in addition to the tax limit in Section 11(b) of Article X of the Constitution.

The only restriction on the county court's authority to levy the fifty-cent limit for county purposes in Greene County is that provision of Section 11046 of House Committee Substitute for House Bill No. 468 of the 63rd General Assembly, providing that no county court shall order a rate of levy that will produce mathematically more than ten per cent in excess of the taxes levied for the previous year.

#### CONCLUSION

It is the opinion of this department that a tax levy of two mills on the dollar for the purpose of a county library fund in Greene County is a levy in addition to the limit of the rate of taxation as fixed by Section 11(b) of Article X of the Constitution. The tax levy of two mills on the dollar for the purpose of a county library fund in Greene County will not prevent the county court from increasing the present tax rate of forty-four cents on the one hundred dollars for county purposes. The only limit on the tax levy for county purposes in Greene County, within the limit set out by Section 11(b) of Article X of the

Mr. Joe N. Brown - 4

Constitution, is that of Section 11046 of House Committee Substitute for House Bill No. 468 of the 63rd General Assembly, providing that no county court shall order a rate of levy that will produce mathematically more than ten per cent in excess of the taxes levied for the previous year.

Respectfully submitted,

C. B. BURNS, Jr.  
Assistant Attorney General

APPROVED:

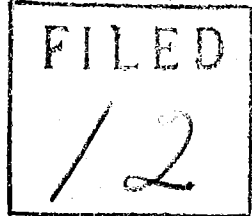
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J. E. TAYLOR  
Attorney General

CBB:HR

CORPORATIONS: A corporation doing business in this State may not transact its corporate business in this State under any other name than its corporate name.

April 4, 1947



Honorable Joseph N. Brown  
Assistant Prosecuting Attorney  
Springfield, Missouri

Dear Mr. Brown:

This will acknowledge your letter of recent date, requesting an opinion from this Department whether a corporation may transact business in Missouri under a name other than its corporate name.

Your letter is as follows:

"RE: BANKERS LIFE & CASUALTY COMPANY

"Enclosed please find copies of two letters received from the above-mentioned company relative to doing business under a trade name and requesting that such trade name be filed of record in the recorder's office of this county.

"Please note that this company states that it is licensed to do business in the State of Missouri. It occurred to me that in the event it is licensed to do business as the Bankers Life and Casualty Company it would not be within the law for them to operate under a trade name.

"Please advise whether or not it is permissible under the law of this state for a corporation and particularly a life insurance company to do business under a trade name other than its incorporation name."

It is assumed that since the corporation named in this matter as the Bankers Life & Casualty Company, with its home office in Chicago, Illinois, and being a

foreign corporation, that said corporation has been licensed to carry on life and casualty insurance in the State of Missouri, as such, as domestic corporations do when organized under Article 2, Chapter 37, R.S. Mo. 1939.

Our new Corporation Code appearing in the Laws of Missouri, 1943, pages 410 to 491, inclusive, provides for a different and a very comprehensive manner of procedure by corporations in this State over the laws governing corporations under the old Corporation Code of this State.

Section 7 of our new Corporation Code, page 418, provides:

"Section 7. Regulating name of corporation.--The corporate name:

"(a) Shall contain the word 'corporation,' 'company,' 'incorporated,' or 'limited,' or shall end with an abbreviation of one of said words.

"(b) Shall not contain any word or phrase which indicates or implies that it is organized for any purpose other than a purpose for which corporations may be organized under this Act.

"(c) Shall not be same as, or deceptively similar to, the name of any domestic corporation existing under any Act of this State or any foreign corporation authorized to transact business in this State, or a name the exclusive right to which is, at the time, reserved in the manner provided in this Act."

Section 8 of the new Code on page 418, further provides that a domestic corporation may change its name (emphasis supplied).

Sections 9 and 10, Laws of Missouri, 1943, page 419, permit other activities of corporations, such as maintaining a registered office, the selection and registry of an agent, the change of address of its registered office,

or a change of its registered agent. But it will be observed that said sections require the corporation in all of such activities that the corporation adhere strictly in the performance of all of the same to its corporate name.

We find no authority whatever in the Insurance Code respecting the organization and incorporation of insurance companies, or in the general corporation code, authorizing a corporation of any character to transact its corporate affairs in any other than its corporate name.

We do find authority which is not only persuasive, but convincing, that it was the intention of the Legislature, in granting to corporations under said Section 8, Laws of Missouri, 1943, page 418, the exclusive right to the use of a corporate name, that the obligation thereby was cast upon such corporations, not only to use its corporate name adopted in its Articles of Incorporation, but that for the protection of the public, and the elimination of its possible intrusion upon the rights of others, it must transact its business solely and exclusively also under its corporate name.

The natural query in such a situation as we are considering here is, "why a corporate name at all?". It is because if there were no corporate name the operators of any enterprise would be simply an association of persons, which might operate merely as a co-partnership or as an association of individuals under which "corporate" powers could not be exercised at all. Our statutes define privileges of carrying on business by co-partnerships and associations separately from the Corporation Code. The Corporation Code, as indicated hereinbefore, provides that individuals may associate themselves together and organize a "corporation" defining its powers and privileges. Among the first requirements of the law, as well as the exercise of the privilege on the part of the corporate being itself, is the necessity of selecting a corporate name. 14 Corpus Juris, page 136, Section 132 c, expresses it this way:

"(Sec. 132) c. Name and Seal of Proposed Corporation. The application, articles, or certificate must state the name of the

proposed corporation, and must state a name which may legally be assumed; and it is sometimes required that a facsimile or description of the corporate seal shall be given."

Section 4 of our new Corporation Code, Laws of Missouri, 1943, page 416, provides that:

"In order to carry out the purposes for which it is organized, each corporation shall have power:

(continuing to sub-section (1) on page 417)

"(1) To conduct its business, carry on its operations, and have offices within and without this State, and to exercise in any other state, territory, districts, or possession of the United States, or in any foreign country, the powers granted by this Act."

Sub-sections (a) and (b) of Section 4 of the new Corporation Code of this State, Laws of Missouri, 1943, page 416, provide separately, that among the powers of a corporation in carrying out its purposes, it shall have the right

"(a) To have succession by its corporate name for the period limited in its articles of incorporation or perpetually where there is no such limitation."

"(b) To sue and be sued, complain and defend in any court of law or equity."

It would be anomalous, we think, if a corporation were to be permitted to sue in its corporate name and must be sued as such, under our Code of Civil Procedure, as well as under said sub-section (b) of said Section 4, Laws of Missouri, 1943, and still be permitted to prosecute and administer its business affairs in some name other than its

Honorable Joseph N. Brown -5-

corporate name.

The information given to us in the correspondence and documents accompanying the request for this opinion indicates that the Bankers Life and Casualty Company is a foreign corporation, that is to say, an Illinois corporation.

In this connection we desire to quote a part of Section 97, Laws of Missouri, 1943, of our new Corporation Code, l.c. 462, which is as follows:

"\* \* \* A foreign corporation which shall have received a certificate of authority under this Act shall \* \* \* enjoy the same, but no greater, rights and privileges as a domestic corporation organized for the purposes set forth in the application pursuant to which such certificate of authority is issued. \* \* \*".

The statutes above referred to and quoted in part, in and of themselves we believe, preclude any corporation from substituting any other name than its corporate name in the transaction of its corporate business.

There is no statute in this State permitting the registration of a trade name with the county clerk of any county in this State.

The question of the use of a fictitious name is not involved here.

#### CONCLUSION.

It is, therefore, the opinion of this Department that there is no statute in this State permitting the registration of a trade name with the county clerk of any county in this State.

It is the further opinion of this Department that under the facts stated in your letter it is not permissible,

Honorable Joseph N. Brown -6-

under the laws of this State, for the Bankers Life and Casualty Company to transact its business under any name other than its corporate name.

Respectfully submitted,

GEORGE W. CROWLEY  
Assistant Attorney General

APPROVED:

J. E. TAYLOR  
Attorney General

GWC:ir



FILED

June 10, 1947

6/20

Honorable John E. Brooks  
Associate Judge  
Franklin County Court  
Union, Missouri

Dear Sir:

Reference is made to your inquiry of recent date, requesting an official opinion of this office, and reading as follows:

"The County Court has requested that you furnish them with a written opinion as to what authority the County Highway Engineer has with reference to the following paragraphs:

- "1. Designating, locating and relocating roads and bridges without the approval of the County Court.
- "2. Expending and contracting for supplies and equipment without first having approval of the County Court.
- "3. Employing and discharging employees of the Highway department without the approval of the County Court.
- "4. The fixing of hourly rates and salaries of County employees without the approval of the County Court.
- "5. Refusing to carry out orders of the Court pertaining to use of equipment and designating whereabouts employees shall perform duties without approval of the Court."

The five questions which you have proposed will be considered separately under appropriately numbered paragraphs corresponding with the numbering which you have accorded your questions. However, before doing so, it may be advisable to make certain general observations relating to the respective duties of the county court and the county highway engineer in the administration of the road laws of this state.

Generally speaking, the county court, as fiscal agent of the county, is charged with the disbursement of all moneys expended upon the public highways of the county. Furthermore, the General Assembly has seen fit to place upon that same body jurisdiction to establish and vacate public highways, establish ways of necessity, determine the necessity of the construction of bridges and culverts, and similar related duties.

Similarly, the General Assembly has seen fit to establish in all counties of this state, except where dispensed with by a vote of the people, the office of county highway engineer. Generally, his duties are those relating to the supervision of the construction of roads, bridges and culverts, the laying out of new locations for public roads, auditing the accounts of minor officials charged with disbursement of county moneys on roads, and other duties similar in nature. It, therefore, becomes apparent that the General Assembly has contemplated a close working relationship between the county court and the county highway engineer. The duties of the county court are more general in nature, while those of the county highway engineer are more specific.

It may be well, at the outset, to consider the effect of recent constitutional and statutory provisions affecting the office of county highway engineer. We note from the classification of counties adopted by the 63rd General Assembly that Franklin County is now of the third class and that it has some 33,868 inhabitants. Under the provisions of Section 8660, R. S. Mo. 1939, the county surveyor of counties of that size is also ex officio the county highway engineer, as appears from the following proviso found in the statute:

" \* \* \* Provided further, after January 1, 1941, that in all counties in the state which contain, or which may hereafter contain not less than twenty thousand inhabitants or more than fifty thousand inhabitants the county surveyor shall be ex officio county highway engineer, and his salary as county highway engineer shall not be less

than twelve hundred dollars per annum, nor more than two thousand dollars per annum as shall be determined by the County Court."

This proviso was held constitutional and valid in State ex rel. v. Johnson, 173 S. W. (2d) 411, 351 Mo. 293, and in the same case it was held that the county court in such counties was without authority to abolish the office of county highway engineer.

However, the 63rd General Assembly passed House Committee Substitute for House Bill No. 792, which repealed Section 8660, R. S. Mo. 1939, in its entirety. The reenactment of the statute reads as follows:

"The county court may, in their discretion, appoint the county surveyor of their respective counties to the office of county highway engineer, provided he be thoroughly qualified and competent, as required by this article; and when so appointed, he shall receive the compensation fixed by the county court, and such fees as are allowed by law for his services as county surveyor: Provided, the county surveyor may refuse to act or serve as such county highway engineer, unless otherwise provided by law. In the event that the county highway engineer cannot properly perform all the duties of his office, he shall, with the approval of the court, appoint one or more assistants, who shall receive such compensation as may be fixed by the court."

You will note that the enactment of this statute terminated the previous condition under which the county surveyor in counties of the size of Franklin County was ex officio county highway engineer.

It might be thought that the further provisions of the bill with regard to its effective date would render this portion inoperative until January 1, 1949. The statutory provision mentioned is found as Section 8659 of House Committee Substitute for House Bill No. 792, reading as follows:

"The provisions of this act shall be and become effective January 1, 1949: Provided that any part of this act which shall be necessary to remove any inconsistency with

the constitution of this state shall be and become effective July 1, 1946."

You will note that any portions of the new statute which should become effective on July 1, 1946, in order to remove any inconsistency with the Constitution of 1945, were declared to be effective on that date.

We believe that Section 8660 did become effective on July 1, 1946, by reason of the constitutional requirement found as Section 8 of Article VI, reading as follows:

"Provision shall be made by general laws for the organization and classification of counties except as provided in this Constitution. The number of classes shall not exceed four, and the organization and powers of each class shall be defined by general laws so that all counties within the same class shall possess the same powers and be subject to the same restrictions. A law applicable to any county shall apply to all counties in the class to which such county belongs."

We, therefore, believe that in counties now in Class 3 which had previously been affected by Section 8660, R. S. Mo. 1939, quoted supra, the county surveyor is no longer ex officio county highway engineer, and that before he can act as such he must be appointed by the county court under the provisions of Section 8660, as reenacted in H.C.S.H.B. No. 792, quoted supra. Also, it is not mandatory that in such counties the county surveyor be appointed to such office, as Section 8655, as reenacted in H.C.S.H.B. No. 792, provides as follows:

"The county courts of each county in this state in classes two, three and four are hereby authorized and empowered to appoint and reappoint a highway engineer within and for their respective counties at any regular meeting, for such length of time as may be deemed advisable in the judgment of the court at a compensation to be fixed by the court. The provisions of this article shall apply only to counties of classes two, three and four."

In this opinion we have assumed that there now exists a regularly appointed and qualified county highway engineer in Franklin County.

I.

Your first question deals with the authority of the county highway engineer with reference to the designation, location and relocation of roads and bridges.

Under the provisions of Section 8473, R. S. Mo. 1939, the jurisdiction has been placed upon the county court to establish all public roads except state roads. This section reads, in part, as follows:

"Applications for the establishment of all public roads, except state roads, shall be made by petition to the county court. \* \* \*"

The following sections relate to the method of giving notice, the form of the petition, and similar matters.

The word "established," used in the statute quoted, has been defined by the General Assembly in Section 8487, R. S. Mo. 1939, which reads as follows:

"The words 'established' and 'establishing,' as used in this article in relation to public roads, shall be held to embrace the locating, relocating, changing or widening of roads, and the word 'road' shall include bridges and culverts."

From the foregoing, it is apparent that in so far as the establishment of public roads is concerned, the duty rests upon the county court. However, such new road or change of old road must be approved by the county highway engineer, as appears from the following portion of Section 8662, R. S. Mo. 1939:

" \* \* \* No county court shall order a road established or changed until said proposed road or proposed change has been examined and approved by the county highway engineer.  
\* \* \* "

This provision has been held mandatory, and failure to observe it renders all proceedings relating to the establishment of roads void. In *Morris v. Karr*, 114 S. W. (2d) 962,

342 Mo. 179, the court said:

"The statute says that no county court shall make an order changing a road without first obtaining the approval of the county highway engineer, and unless we are willing to allow this provision of the law to perish by construction, it must be upheld."

Similar provisions are found with respect to the location of bridges. Section 8534, R. S. Mo. 1939, reads as follows:

"Each county court shall determine what bridges shall be built and maintained at the expense of the county and what by the road districts: Provided, that no road district shall be compelled to build a bridge which costs fifty dollars or more."

Subsequent provisions provide that such construction shall be under the supervision of the county highway engineer or, in the event the county court elects to do so, under the supervision of some other competent person.

From the foregoing, it appears that the primary duty of designating, locating and relocating roads and bridges rests upon the county court, and the duties of the county highway engineer are only ancillary to the exercise of the county court's jurisdiction in these matters.

## II.

Your second, third and fourth questions deal with the authority of the county highway engineer to contract for the disbursement of county money for road purposes, the employment and discharge of employees, and the fixing of hourly rates and salaries.

In so far as the disbursement of road moneys is concerned, the county court, as fiscal agent of the county, has the power to make all purchases of necessary supplies and equipment for road work. It is true that actual disbursements may be made through road overseers, who must account to the county court for the county money received by them for such purposes, and whose settlements may not be approved by the county court until approval has first been had from the county highway engineer.

We quote from Section 8662, R. S. Mo. 1939, reading, in part, as follows:

" \* \* \* No county court shall issue warrants in payment for road work or for any other expenditure by road overseers, or in payment for work done under contract, until the claim therefor shall have been examined and approved by the county highway engineer."

However, we do not believe that these provisions authorize the county highway engineer to contract for supplies and equipment for road work, as his duties relate only to the approval of the expenditures. There are exceptional circumstances under which the county highway engineer is authorized to enter into contracts for certain specified purposes. For instance, under Section 8523, R. S. Mo. 1939, he is authorized to contract with any owner of land adjacent to a public road for the purpose of opening ditches for drainage, or to procure necessary material for road purposes, and to pay a reasonable compensation therefor. Similarly, under the provisions of Section 8552, R. S. Mo. 1939, the county highway engineer is authorized, with the consent of one or more of the county judges, to contract with some competent person to have damaged bridges repaired. These are "cost plus" contracts and are designed to take care of emergency conditions.

With these exceptions noted, the disbursement of moneys for road building supplies and equipment rests with the county court.

We do not find that the county highway engineer has any statutory authority to employ any persons, and therefore any such hiring would not be binding upon the county court.

What has been said with respect to the hiring and discharge of employees is equally applicable to the authority of the county highway engineer to fix rates and salaries for purported employees. In the absence of statutory authorization, we do not believe that such authority exists.

### III.

Your fifth question relates to the authority of the county highway engineer to disregard orders of the county court pertaining to the use of equipment and the places upon the public

roads where work and labor are to be performed.

We believe that the duty has been placed upon the county highway engineer to make this determination. Your attention is directed to Sections 8661, 8662, 8663 and 8666, R. S. Mo. 1939. You will note that these statutes, respectively, make the county highway engineer custodian of all road tools and equipment, place upon him the duty of direct supervision over all public roads of the county, and over the road overseers and of the expenditure of all county and district funds, require him to make personal inspection of the various roads, incidentally requiring him to place roads found to be dangerous or impassable in good condition, and require road overseers to follow the plans and instructions of the county highway engineer.

These statutes, we believe, indicate that the methods to be followed, and the times and places of working public roads are to be determined by the county highway engineer. We do not find any statute authorizing the county court to make such determination.

#### CONCLUSION

In the premises, we are of the opinion that:

(1) The county highway engineer has no authority to designate, locate or relocate public roads and bridges, and such is to be done by the county court subject only to the approval of the county highway engineer.

(2) The county highway engineer has no authority to contract for supplies and equipment, to employ or discharge employees, or to fix hourly rates and salaries, except under the particular emergency conditions mentioned relating to dangerous and impassable roads and damaged or dangerous bridges.

(3) The county highway engineer has the authority to designate the time and place and method to be followed by the respective road overseers in the maintenance of public roads.

Respectfully submitted,

APPROVED:

WILL F. BERRY, Jr.  
Assistant Attorney General

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J. E. TAYLOR  
Attorney General

WFB:HR



RECORDER OF DEEDS: Not required to record notice of levy on execution under Section 1343, R.S. Mo. 1939, until paid the recording fee therefor. Section 10975, R.S. Mo. 1939, was repealed by House Bill No. 469, Missouri Laws of 1945. Consequently, recorder not required to maintain "mortgage list" as required by said Section 10975.

June 12, 1947.

FILED

Honorable Joseph N. Brown  
Assistant Prosecuting Attorney  
Greene County  
Springfield, Missouri

Dear Sir:

This is in reply to your letter dated May 15, 1947, in which you raised two questions, the first one of which involves the payment of costs for recording notice of levy on execution. Said letter reads in part as follows:

"I desire to say that the Recorder of Deeds of Greene County has propounded the following question:

"Is he required under the statute to collect the cost of recording the notice of levy on real estate on an execution?

\*\*\*\*\*

"We have advised the recorder that it is our opinion that the recording fee for recording the notice of levy on an execution could be charged by his office and later collected as other costs; however the County Auditor insists that the office of recorder of deeds must be and is on a 'cash basis.'

\*\*\*\*\*

"Our recorder has also made inquiry as to whether or not he may discontinue the keeping of the record denominated 'mortgage list' which was required under Section 10975, R.S. Mo. 1939, which was repealed by House Bill 469, Laws of 1945."

Section 13185, R.S. Mo. 1939, provides:

"The recorder shall not be bound to make any record for which a fee may be allowed by law, unless such fee shall have been paid or tendered by the party requiring the record to be made."

In commenting on this above quoted section, a former opinion of this department rendered to Honorable Charles E. Murrell, Jr., Prosecuting Attorney of Adair County, under date of January 22, 1937, said:

"Under the last quoted section of the statute, it is therefore our opinion that one desiring to have an instrument recorded in the recorder's office which is entitled to record, the required fee must first have been paid or tendered by the person presenting same for record to the recorder of deeds, and if such payment is not made or tendered as provided by Section 11566, supra, (now Section 13185, R.S. Mo. 1939) the recorder of deeds would not be liable by civil action on his official bond under Section 11564, supra, nor to the penalties under Section 11565, supra, for failure to record such instrument so presented for record."

And likewise, an opinion rendered by this department to Honorable Conn Withers, Prosecuting Attorney of Clay County, Liberty, Missouri, under date of February 4, 1938, said:

"We are of the opinion that under the Missouri statutes, supra, it would be unlawful for any recorder of deeds in Missouri to record any written instrument without charging the legal fee provided by law, \* \* \* \* \*

From the above, therefore, it may be stated generally that, as the County Auditor said, the office of recorder of deeds is on a "cash basis." The problem still remains, however, whether the office must be on this cash basis as regards the recording fee for recording the notice of levy on an execution. Section 1343, R.S. Mo. 1939, provides in part as follows:

"\* \* \* whenever an execution shall be levied upon real estate, not then charged with the lien of the judgment, order or decree upon which such execution issued, it shall be the duty of the officer making such levy immediately to file with the recorder of deeds of the city or county in which such real estate is situated a notice of such levy, showing the date and style of the execution, the date of levy, the amount of the debt and costs, and a description of the real estate levied upon, which shall be recorded and indexed in a separate volume by the recorder, in the same manner that deeds to real estate are required to be recorded and indexed in a separate volume, and the recording fee therefor shall be charged and collected as other costs; \* \* \*

C.J. Volume 53, page 1081, Sections 38 and 40, says:

"In the absence of contrary statutory provisions, the register may demand payment in advance of his fees for performing a given service."

"Mandamus will not lie to compel a register to perform a duty pertaining to his office without payment of his fee therefor in advance, even though the fee demanded is claimed to be excessive, where it appears that relator is able to pay the fee and can recover the alleged excess by ordinary action."

For the purpose of comparison and in an attempt to possibly ascertain the legislative intent as regards Section 1343, supra, it is interesting to note Section 1460, R.S. Mo. 1939, which deals with the notice of levy on an attachment. Said section says the officer shall:

"\* \* \* file in the recorder's office of the county where the real estate is situated and abstract of the attachment, showing the names of the parties to the

suit, and the amount of the debt, the date of the levy, and a description of the real estate levied on by the same, which shall be duly recorded in the land records and the recording paid for by the officer, and charged and collected as other costs; \* \* \* \* \*"  
(Underscoring ours.)

The corresponding wording in Section 1343, R.S. Mo. 1939, says the notice of the levy is to be filed with the recorder of deeds by the officer making such levy, and is to be:

"\* \* \* recorded and indexed in a separate volume, and the recording fee therefor shall be charged and collected as other costs; \* \* \* \* \*" (Underscoring ours.)

In other words, Section 1460, which in the above quoted provision is very similar to the corresponding provision of Section 1343, expressly provides that the recording fee is to be paid by the officer, and he is to charge and collect that as other costs.

In the case of Farris v. Smithpeter, 180 Mo. App. 466, the court, in referring to Section 10690, R.S. Mo. 1909, which is now Section 13398, R.S. Mo. 1939, said at l.c. 470:

"\* \* \* Section 10690, Revised Statutes 1909, expressly provides that fee bills shall issue to sheriffs, who shall collect the same, 'and if the person or persons and their sureties for costs properly chargeable with such fees shall neglect or refuse to pay the amount thereof, and costs for issuing and serving the same, within thirty days after demand of said sheriff or other officer aforesaid, the same shall be levied of the goods and chattels, moneys and effects of such persons or their sureties, in the same manner and with like effect as on an execution.' A fee bill is the proper process to collect fees in favor of officers and witnesses against the party for whom the services are rendered (Hoover v. Railroad, 115 Mo. 77, 21 S. W. 1076),

and that case quotes from Newkirk v. Chapron, 17 Ill. 343, 353, holding that a fee bill 'becomes, for this purpose, like an execution against the cost debtor.' \* \* \* \* \*

At page 471 the court continued:

"\* \* \* A fee bill does not need a judgment for its basis but it does need a proper taxation of costs.\* \* \* \* \*

In view of the fact that it has been held by this office, as pointed out above, that the recording fee must be paid or tendered to the recorder before the instrument is entitled to be recorded; and because of the analogy between Section 1343 and Section 1460 where it was expressly provided that the recording fee is to be paid by the officer and charged and collected as other costs; and because of the authority above referred to which allows the recovery of costs by officers, we feel that it is the duty of the officer to pay the recording fee when he files the notice of the levy, and the recorder of deeds is not bound to make any record of the levy on execution as provided in Section 1343, supra, until he shall have been paid the recording fee therefor.

The next question you present for an opinion is whether the recorder may discontinue the keeping of the record designated "mortgage list" which was required under Section 10975, R.S. Mo. 1939, and which was repealed by House Committee Substitute for House Bill No. 469, passed by the 63rd General Assembly.

Said H.C.S.H.B. No. 469 is to be found in Missouri Laws of 1945 at page 1782. Section 1 provides:

"That Sections 10943 to 10969, both inclusive, and Sections 10971 to 10995, both inclusive, and Sections 10997 to 11000, both inclusive, Article 2, Chapter 74, Revised Statutes of Missouri, 1939, relating to assessors and assessments of property, be and the same are hereby repealed and forty-three new sections enacted in lieu thereof, relating to the same subject matter, and to read as follows:" (Underscoring ours.)

59 C.J., page 900, says:

"An express repeal is the abrogation or annulment of a previously existing law by the enactment of a subsequent statute which declares that the former law shall be revoked and abrogated. A statute, or portion thereof, may be repealed directly by an express provision or declaration in a subsequent statute, \* \* \* \* \*

Section 10975, R.S. Mo. 1939, would be then expressly repealed by H.C.S.H.B. No. 469, Laws of Missouri, 1945. In the case of Christ Diehl Brewing Co. v. Schultz, 117 N.E. 8, the Supreme Court of Ohio said at l.c. 9:

"If the language of a statute is ambiguous and its meaning doubtful, a court, in construing such statute, will endeavor to ascertain and give effect to the intent of the law-making body which enacted it; but when the language employed is clear, unambiguous, and free from doubt, it is the duty of the court to determine the meaning of that which the Legislature did enact, and not what it may have intended to enact.

"Where an existing statute is specifically repealed, a court will not inquire whether the Legislature intended its repeal. If it be true that a statute was unintentionally or inadvertently repealed, the remedy is by legislative action, and not by judicial declaration that the General Assembly has done that which it did not intend to do.\* \* \*"

Likewise, the New York Court of Appeals, in Smith v. The People, 47 N.Y. 330, said at l.c. 338:

"If the repeal of a statute is by express and positive terms, and there is no legitimate evidence in or out of the act of an intent to qualify and restrict the operation, that is, no limitation or qualification, express or implied, the only question is as to the effect of the repeal, and the rule is that for all purposes the law repealed is as if it had never existed. \* \* \* \* \*

Although, as indicated from a reading of the cases, courts do attempt to interpret the intention of the legislature in the construction of statutes, when, as here, there is an unambiguous repeal of a particular section and nothing to indicate that such a repeal was not intended, we feel that the wording of the two above quoted cases would be applicable to our case at hand, and that Section 10975, R.S. Mo. 1939, was repealed by H.C.S.H.B. No. 469, Laws of Missouri, 1945, page 1782. It follows that the county recorder is not required to maintain a "mortgage list" as required by said Section 10975.

CONCLUSION

Therefore, it is the opinion of this department that it is the duty of the officer to pay the recording fee when he files the notice of levy on execution, such fee to be collected by the officer as other costs, and the recorder of deeds is not bound to make any record of such levy as provided in Section 1343, R.S. Mo. 1939, until he shall have been paid the recording fee therefor.

It is further the opinion of this department that Section 10975, R.S. Mo. 1939, was repealed by H.C.S.H.B. No. 469, Laws of Missouri, 1945, and consequently the county recorder of deeds is not required to maintain a "mortgage list" as required by said Section 10975.

Respectfully submitted,

Wm. C. COCKRILL  
Assistant Attorney General

APPROVED:

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J. E. TAYLOR  
Attorney General

WCC:LR

"MOTOR VEHICLES: Trucks which farmers use to transport agricultural products, livestock, or supplies to or from a farm or farms which are designed or regularly used for carrying freight and merchandise are "local commercial motor vehicles" and must contain the information on the vehicles, as required by Section 8369, Mo. R.S.A.

October 22, 1947

FILED

Honorable Herbert S. Brown  
Prosecuting Attorney  
Grundy County  
Trenton, Missouri

Dear Sir:

This is in reply to your letter of October 15, 1947, wherein you requested an opinion relative to a certain regulation for motor vehicles. Said letter reads as follows:

"I wish to request an official opinion from your office concerning the following:

"Reference is made to Section 8369, R.S., Missouri, 1939, as amended by the laws of Missouri 1943, pages 664 to 666 inclusive. You will note that Section 8369, R. S., Missouri, 1939, as amended by the laws of Missouri, 1943 at page 666 reads, in part, as follows and I quote:

"Each commercial vehicle shall prominently display in a conspicuous place on said vehicle the name of the owner thereof, the address from which such motor vehicle is operated and the weight for which said motor vehicle is licensed; provided further, that local commercial vehicle, in addition to the above information, shall prominently display on such vehicles in a conspicuous place the word 'Local'."

"Section 8367, R. S., Missouri, 1939, as amended by the Laws of Missouri, 1945, at page 1195, which is the definition of certain terms, defines a 'commercial motor vehicle' as and I quote:



"'A motor vehicle designed or regularly used for carrying (a) freight and merchandise, or (b) more than eight passengers.'

"Several farmers in this community appear to be of the opinion that the above quoted law does not require them to put the required signs on small half ton or three-quarter ton capacity trucks which they operate for their own use in and about their farm business, and which trucks they use only to carry their own produce to market and to return farm supplies to their farms.

"Therefore, the specific question on which I desire your opinion is whether or not an individual farmer is required to place the signs on his truck as required by Section 8369, R. S., Missouri, 1939, as amended, when he only uses the same for his own use, and not for hire. In this connection can it be said that any standard make light truck that is commonly used for farm purposes is a truck 'designed' for carrying freight and merchandise.

"Could you not as well say that a regular passenger car with a trunk space in the rear was designed for carrying freight and merchandise? Of course, I do not believe the law goes that far, but I wonder if the Legislature intended for every small farmer to be required to put these signs on his truck that he uses only for his own farm business.

"Your opinion as to this matter will be appreciated."

Section 8367, Mo. R.S.A., defines certain words used in the Article which includes Section 8369, to which I shall later refer, and reads in part as follows:

"Wherever in this article, or in any proceeding under this article, the following words or terms are used, they shall be deemed and taken to have the meanings ascribed to them as follows:

\* \* \* \* 'Commercial motor vehicle.' A motor vehicle designed or regularly used for carrying (a) freight and merchandise, or (b) more than eight passengers.\* \* \* \*

Section 8369, Mo. R.S.A., relates to registration, fees, etc. of motor vehicles, and reads in part as follows:

"The term 'local commercial motor vehicle' includes every 'commercial motor vehicle' as defined in Section 8367, of this act, while operating within this state and used for the transportation of persons or property:

"1. Wholly within any municipality or urban community, or

"2. Wholly within any municipality or urban community and a zone extending 25 air miles from the boundaries of any municipality or urban community, or contiguous municipality or urban community, or

"3. In making hauls not exceeding 25 miles in length, or

"4. When controlled or operated by any person or persons principally engaged in farming when used exclusively in the transportation of agricultural products or livestock to or from a farm or farms, or in the transportation of supplies to or from a farm or farms.

"Each commercial vehicle shall prominently display in a conspicuous place on said vehicle the name of the owner thereof, the address from which such motor vehicle is operated and the weight for which said motor vehicle is licensed; provided further, that local commercial vehicles, in addition to the above information, shall prominently display on such vehicles in a conspicuous place the word 'Local'."

From an examination of these two above quoted sections, we find that the term "local commercial motor vehicle" may be

applied to any vehicle which qualifies under the definition of "commercial motor vehicle" while operating within this state and used for the transportation of persons or property, if it comes within one of the four enumerated descriptions. Do these vehicles to which you refer then come within the above described category so as to constitute them "local commercial motor vehicles"? As was pointed out above through Section 8367, supra, a "commercial motor vehicle" is defined as "a motor vehicle designed or regularly used for carrying freight and merchandise \* \* \*." We think it cannot be seriously questioned that the motor vehicles to which you refer; namely, the "small half ton or three-quarter ton capacity trucks which they" (farmers) "operate for their own use in and about their farm business, and which trucks they use only to carry their own produce to market and to return farm supplies to their farms," are vehicles designed for carrying freight and merchandise. The word "freight" we think, as used herein, is not intended to include only the hauling of cargoes for hire. Webster defines "freight" as "goods or merchandise, originally as carried by sea, now also as transported by land." Since, then, the vehicles in question may be classified as "commercial motor vehicles," as defined by Section 8367, supra, we find that Section 8369, supra, says that "local commercial motor vehicle" shall be applied to every commercial motor vehicle operating within this state and used for the transportation of persons or property when used in one of the four enumerated conditions. We think it clear that the vehicles to which you refer would come within category four and were intended to be defined as "local commercial motor vehicles." It would necessarily follow then that the proviso of the last above quoted paragraph would be controlling as to such vehicles, and that on such vehicles the enumerated information must be present, along with the word "local."

We think such an interpretation as indicated above is but an application of well established principles of statutory construction as, for example, expressed in *Hannibal Trust Company v. Elzea*, 315 Mo. 485, where the court said at l.c. 500:

"\* \* \* As said by this court, en Banc, in *Grier v. Railway Co.*, 286 Mo. l. c. 534: 'The primary rule for the interpretation of statutes is that the legislative intention is to be ascertained by means of the words it has used. All other rules are incidental and mere aids to be invoked when the meaning is clouded. When the language is not only plain, but admits of but one meaning, these auxiliary rules have no

office to fill. In such case there is no room for construction.' \* \* \*"

And again at l.c. 500 the court said:

"Again, in the interpretation of statutes, words in common use are to be construed in their natural, plain and ordinary signification.\* \* \*"

CONCLUSION

It is, therefore, the opinion of this department that farmers are required to display the information as required by Section 8369, supra, on small capacity trucks which they operate for their own use in and about their own farm business, and which trucks they use only to carry their own produce to market and to return farm supplies to their farms. This being so because they are "local commercial motor vehicles," as defined by Sections 8367 and 8369, Mo. R.S.A., supra.

Respectfully submitted,

Wm. C. COCKRILL  
Assistant Attorney General

APPROVED:

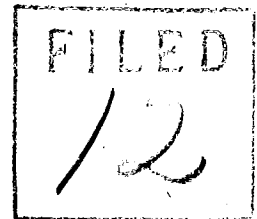
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J. E. TAYLOR  
Attorney General

WCC:LR

PAROLE: Parole authorities have power to parole convict where punishment imposed and affirmed by Supreme Court is a fine and jail sentence.

November 10, 1947



Honorable Joseph W. Brown  
Assistant Prosecuting Attorney  
Greene County  
Springfield, Missouri

Dear Mr. Brown:

Your letter of recent date requesting an opinion of this department received. The pertinent part of your letter reads as follows:

"We desire to request your opinion as to whether or not the Circuit Court or the Parole Board of the County has jurisdiction to grant a parole to a prisoner who has been convicted of a felony wherein a jail sentence was assessed which judgment was then appealed to the Supreme Court and affirmed by such Court. There seems to be only two decisions of the Supreme Court wherein this subject was under consideration. These cases are Ex Parte Ike Foister, 203 Missouri 687 and State ex rel. Gentry vs Montgomery 297 S.W. 30.

\*\*\*\*\*

"Neither of the above decisions covers the exact facts of the case in this County which was a prosecution for drunken driving. This charge as you know is a felony wherein the punishment assessed may be either confinement in the penitentiary or the county jail or a fine. The punishment assessed in the present instance was confinement in the county jail and a fine, which sentence was affirmed by the Supreme Court."

The question presented by your request is whether or not the paroling authorities of Greene County, Missouri, lose jurisdiction to grant a parole on a felony charge wherein the punishment assessed is confinement in the county jail and a fine, after the judgment and sentence of the trial court has been affirmed by the Supreme Court of the State of Missouri on an appeal.

The matter of parole being statutory, we will consider Sections 4139, 4140, 4199 and 9180, R. S. Mo. 1939, in the order named.

Section 4139, supra, provides:

"In all cases where the appeal or writ of error shall be prosecuted by the party indicted in the supreme court, and where the punishment assessed shall be imprisonment in the penitentiary, and where the judgment wherein the appeal or writ of error is prosecuted shall be affirmed, such court shall direct the sentence pronounced to be executed, and for this purpose the supreme court shall order the marshal of such court to arrest the convict, and deliver him to the proper officer of the penitentiary."

(Emphasis ours.)

The above section without qualification makes it the duty of the Supreme Court, upon affirming a judgment of a trial court, to direct the Marshal of such court to make the arrest and deliver him to the officer of the penitentiary when the punishment assessed is for a term in the penitentiary. There being no qualifications of these terms, it is apparent that the punishment must be a term in the penitentiary before the court will direct the Marshal to execute its mandate.

Section 4140, supra, provides:

"Where the supreme court shall make an order, as directed in the last preceding section, the clerk of the court shall forthwith deliver a certified copy of such order to such marshal, who shall without delay, either in person or by such assistants as the supreme court may direct, arrest such convict wherever he may be found in this state, and transport him to the penitentiary, and deliver him to the proper officer thereof."

This section doubly emphasizes the provisions of Section 4139, supra, that the Marshal, when directed by the Supreme Court to arrest the convict, upon the affirmance of the sentence and judgment of the lower court, shall deliver him to the proper officer of the penitentiary. No provision is made in either of these sections for the Marshal to be ordered to execute any order made by the affirmance of a conviction by the Supreme Court to make an arrest and deliver the convict to the officers of the county in which the conviction was had.

Section 4199, supra, provides:

"The circuit and criminal courts of this state, the court of criminal correction of the city of St. Louis and boards of parole created to serve any such court or courts shall have power, as hereinafter provided, to parole persons convicted of a violation of the criminal laws of this state."

Section 9180, supra, provides:

"In any judicial circuit in this state composed of a single county, and having two judges of the circuit court, and not more, and where the circuit court is held only at the county seat of such county, and which have, or may hereafter have, a population of not less than 60,000 inhabitants, nor more than 200,000 inhabitants, and which does not contain any city of the first class, there is hereby created a board of paroles to be known as such, which shall be composed of the judges of the circuit court of said county so composing said judicial circuit. The judge of division one of said circuit court shall be ex officio chairman of said board of paroles under this law, and the clerk of said circuit court shall be ex officio clerk of said board of paroles and said clerk shall be paid a salary of \$1,200.00 per year, to be paid monthly by the treasurer of said county. The powers and duties of said board shall be exercised and the salary of the members of said board shall be paid, pursuant to the provisions of sections 9181 to 9186, both inclusive."

It is well to consider the orders made by the Supreme Court in affirming felony and misdemeanor cases. In a felony conviction where the judgment and sentence of the trial court on appeal is affirmed by the Supreme Court of Missouri, and where the punishment assessed is imprisonment in the penitentiary, such court issues its order, through the Clerk of that court, directing the Marshal to take the body of the convict and deliver him to the Warden of the penitentiary.

Where the Supreme Court affirms a conviction of a trial court on a misdemeanor charge, when such appeal is properly before the Supreme Court, the court does not make an order directing the Marshal to make any arrest or deliver the person to any law enforcing officer, but only affirms the judgment of the trial court, and leaves the execution of the judgment to the county officials.

In this instance, we have a person convicted of a felony charge (driving a motor vehicle while intoxicated), which offense is subject to graduated punishment from a term in the penitentiary ranging down to a fine, jail sentence, or both, and presents a complex situation.

In the case of State ex rel. Gentry v. Montgomery, 317 Mo. 811 (a misdemeanor conviction), the court said, at l. c. 814, 815:

"\* \* \* When the trial court received our mandate with directions to execute the judgment, it clearly had the power to grant a parole to the defendant, for the reason that the judgment at all times, whether it be considered a judgment of the circuit court or a judgment of this court, contained our parole law as a part of the judgment. Therefore, it is of no consequence whether the judgment be considered a judgment of the circuit court or a judgment of this court at the time of its execution. While the parole law is a part of the judgment in some felony cases, the trial court loses the power to grant a parole in a felony case on affirmance of the judgment, for the reason that by Section 4095 and 4096 this court is directed to have its marshal execute the sentence pronounced. \* \* \*"

(Emphasis ours.)

Sections 4095 and 4096 referred to in the above quotation are now Sections 4139 and 4140, R. S. Mo. 1939.



In the case of Ex parte Foister, 203 Mo. 687, the court said, at 1. c. 693:

"It is very earnestly and ably argued by counsel for the petitioner that the proviso in section 2817, which provides that the court shall have no power to parole any prisoner after he has been delivered to the warden of the penitentiary, by implication confers the power upon such court to enter such order of parole before the prisoner has been delivered to the warden of the penitentiary. That section is only susceptible of one reasonable construction, and that is that it is only applicable where the proceeding is entirely confined to the circuit court. In other words, it simply means that if a defendant is convicted and held for some days before the sheriff conveys him to the penitentiary, at any time before he is delivered to the warden the circuit court may exercise the power of parole, but after the judgment and sentence has been executed and the sheriff has delivered him to the warden, then such proviso is a limitation upon such power. But that section has no application to cases pending in the Supreme Court upon appeal, where, under the plain and express provisions of the statute, it is made the duty of this court, where the judgment is affirmed, to take all necessary steps to enforce the execution of that judgment."

(Emphasis ours.)

The underscored portion of the above quotation gives the impression that the statute empowering the circuit court to parole a person convicted of a felony would not be applicable where the case is on appeal before the Supreme Court. We think, from the tenor of these cases, and the statutes, that the Supreme Court did not intend to interfere with the jurisdiction of the trial court, where the punishment imposed was that of a fine, jail sentence, or both.

We are of the further opinion that it would require the inclusion of all the elements in the statutes above quoted to remove

the parole power of the trial court in such cases, and, where the punishment as affirmed is not for a term in the penitentiary, and where the Supreme Court has not directed the Marshal of said court to make the arrest and deliver the convict to the Warden of the penitentiary, the local authorities would not be deprived of their power to parole, since the punishment as imposed and affirmed is comparable to that of the punishment imposed in misdemeanor cases and of which the trial court, or, in this instance, the local parole authorities, would have the right to parole on misdemeanor punishments after an affirmance by the Supreme Court.

Conclusion

Therefore, it is the conclusion of this department that where the Supreme Court has affirmed the sentence of conviction of one convicted of a felony, where the punishment imposed is comparable to that of the punishment for a misdemeanor, and where the Supreme Court has not directed how the sentence should be executed, that the Supreme Court does not intend to interfere with the jurisdiction of the trial court in its authority to parole; and that the trial court, or parole board, as in the instant case, would have the right to exercise its jurisdiction in granting paroles.

Respectfully submitted,

GORDON P. WEIR  
Assistant Attorney General

APPROVED:

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J. E. TAYLOR  
Attorney General

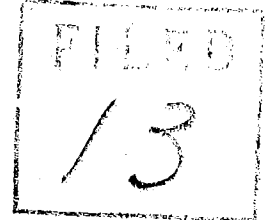
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BOARD OF PROBATION

AND PAROLE:

When requested by the Board of Training Schools, the Board of Probation and Parole or the parole officer of said Board has authority to cause arrest of persons on parole.

January 21, 1947



2/6

Mr. Donald W. Bunker  
Executive Secretary  
Board of Probation and Parole  
Jefferson City, Missouri

Dear Sir:

This will acknowledge your request for an opinion, based on the following state of facts:

"Do State Probation and Parole Officers have the power to arrest juvenile parolees?"

"State Probation and Parole Officers undoubtedly have the power to arrest adult parolees, and the attached Parole Violation Warrant is a sample of the Warrant used for that purpose."

"On July 1st, 1946 authority to parole from the State Training Schools was transferred from the Board of Probation and Parole to the Board of Training Schools under Section 8992.34 R.S.M. Co. However, lines 7 to 13, inclusive, of Section 8992.34 R.S.M. Co. states 'Said Board is hereby authorized to call upon the State Board of Probation and Parole for pre-parole investigations and for supervision of and assistance to juveniles after their release from Training Schools. Said Board of Probation and Parole is hereby authorized and it shall be their duty to furnish, when requested, reasonable services of the character herein indicated.'"

"Because juvenile parolees are supervised during the parole period by a State

Probation and Parole Officer, the Board of Probation and Parole has assumed that power to arrest is inherent in the authority to supervise parolees whether adult or juvenile."

The State Board of Probation and Parole is required to assist the Board of Training Schools in parole matters, when requested by said Board, under Section 3002.34A, Ho. R.S.A., June 1946 Pamphlet, which section is as follows:

"The board of training schools is hereby authorized to release on parole juveniles committed to institutions under its control; to impose conditions upon which such paroles are granted; to revoke and terminate such parole; and to discharge from legal custody. Release on parole shall be in accordance with rules and regulations made a matter of record by said board. Said board is hereby authorized to call upon the state board of probation and parole for pre-parole investigations and for supervision of and assistance to juveniles after their release from training schools. Said board of probation and parole is hereby authorized and it shall be their duty to furnish when requested reasonable services of the character herein indicated."

The State Board of Probation and Parole has authority to request any peace officer to arrest a person on parole by virtue of Section 3002.44, Ho. R.S.A., June 1946 Pamphlet, which section provides:

"Under orders of the board, parole and probation officers shall give supervision to persons on parole and such assistance in treatment and rehabilitation and perform such other duties as may be prescribed by the board. The board and probation and parole officers shall have jurisdiction co-extensive with the boundaries of this state and may make arrests

of persons on parole anywhere in the state in the course of their duties under this act. Upon request of the board or of any parole or probation officer, all peace officers of this state are authorized and required to make arrests and to hold a person so arrested to the order of any parole or probation officer."

Conclusion.

It is therefore the opinion of this department that when the Board of Training Schools requests the State Board of Probation and Parole to cause the arrest of a parolee, or requests general supervision of persons on parole, said State Board of Probation and Parole or parole officer of the Board would have authority to arrest or cause the arrest of such persons on parole, as provided in Section 8992.44, Mo. R.S.A., supra.

Respectfully submitted,

E. BRADY DUGAN  
Assistant Attorney General

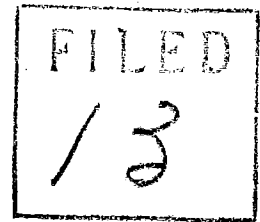
APPROVED:

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J. E. TAYLOR  
Attorney General

WED:ml

PAROLE: Parolee not allowed time while on parole as against  
Prison Term; Prison authorities cannot  
make rules to defeat the three-fourths  
RULES OF PENITENTIARY: statute.



February 4, 1947

Mr. Donald W. Bunker  
Executive Secretary  
Board of Probation and Parole  
Jefferson City, Missouri

Dear Mr. Bunker:

Your letter of recent date, requesting an opinion of this department, reads as follows:

"The Board of Probation and Parole should appreciate your interpretation of Section 8992.39 Mo. RSA with respect to the following questions:

"1) When a parole is revoked or terminated, on order of the Board of Probation and Parole, will the time that the parolee was out on parole, and prior to it's revocation, be deducted from the total sentence? This question may be stated in another way; Is parole time to be credited to the Prison or Reformatory term?

"2) With reference to Section 9086 RS Mo. 1939, and Section 8992.39 Mo. RSA, may the rules of the Prison and Reformatory include a rule to the effect that the benefit of the 9/12ths Statute will be lost in the event of a revocation of a parole, and a prisoner held to serve the maximum or 12/12ths sentence? (The inmate on parole is amenable to the orders of the Board of Probation and Parole until the expiration of the maximum sentence)."

This request presents two questions, and, for convenience we will consider them in the order presented.

1.

Section 8992.39, Laws 1945, p. \_\_\_\_\_, S.C.S.S.B. No. 347, Sec. 39, which is applicable to release on parole, reads as follows:

"The board of probation and parole is hereby authorized to release on parole any person confined in any state correctional institution, except persons under sentence of death. All paroles shall issue upon order of the board and shall be recorded. Inmates shall be considered for parole upon the application of the prisoner or upon the initiative of the board. The board shall secure and consider all pertinent information regarding each inmate, except those under sentence of death, including the circumstances of his offense, his previous social history and criminal record, his conduct, employment, attitude in the correctional institution, and reports of physical and mental examinations which have been made. Before ordering the parole of any inmate, the board shall have the inmate appear before it and shall interview him. A parole shall be ordered only for the best interest of society. A parole shall be considered a correctional treatment for any inmate and not an award of clemency. A parole shall not be considered to be a reduction of a sentence or a pardon. An inmate shall generally be placed on parole only when arrangements have been made for his proper employment or for his maintenance and care and when the board believes that he is able and willing to fulfill the obligations of a law-abiding citizen. Every inmate while on parole shall remain in the legal custody of the institution from which he was released, but shall be amenable to the orders of the board of probation and parole. Said board shall have the power and

it shall be its duty when conditions so warrant to revoke or terminate any parole, and place the offender again in the custody of the proper corectional institution. Said board may adopt such additional rules not inconsistent with the law as it may deem proper and necessary with respect to the eligibility of inmates for parole, the conduct of parole hearings, and conditions upon which inmates may be placed on parole. Each order for a parole issued shall contain the conditions thereof. All decisions of the board shall be by a majority vote."

(Emphasis ours.)

This section provides that the board of probation and parole is authorized to release on parole any person confined in the state correctional institution, except persons under sentence of death. It further provides that a parole shall not be considered to be a reduction of the sentence, or a pardon.

In the case of *Ex parte Jacobs v. Crawford*, 308 Mo. 302, the court, at l. c. 307 and 308, said:

"When Governor Major paroled petitioner, it was upon the express condition that if petitioner failed to observe the conditions of his parole or the Governor ordered his arrest and return to the penitentiary, petitioner should 'serve out the remainder of his sentence.' Was such remainder a term lessening from day to day, as petitioner continued to observe the conditions of his parole while remaining at large thereunder, or was it a fixed term? That it was intended to be a fixed term, not subject to diminution during the existence of the parole, is apparent from the fact that it was specified in the order granting the parole that petitioner was 'granted a commutation of sentence for the purpose of parole, without the benefit of the three-fourths law.' That simply meant that without waiting for the application of the



three-fourths law, the remainder of petitioner's sentence was conditionally commuted or wiped out, as of that date. There was therefore no remainder of his sentence to be served, if he observed the conditions of his parole. The term fixed for the expiration of petitioner's parole was January 1, 1919, as provided in the order paroling him. The term of ten years' imprisonment was commuted to the time already served, plus a parole, until January 1, 1919. Had the term not been commuted it would not have expired, solely under the application of the three-fourths law, until January 15, 1922. The penalty for failure to observe the conditions of the parole was that petitioner should serve the remainder of his sentence, which in effect meant that, the order commuting his sentence being conditional, it could be set aside and the then existing remainder of the sentence must be served.

"It is apparent that the Governor intended to impose, as one of the conditions of the parole, that the full unexpired sentence of petitioner should hang over him as a 'Sword of Damocles' to keep him faithful to the end of the period of parole. If the unexpired sentence conditionally commuted lessens from day to day while a paroled convict is at large under parole, one of the very greatest inducements to persuade such convict to remain a law-abiding citizen becomes less of an inducement from day to day, and he may arrive at a point where he will calculate supposed benefits accruing from his failure to remain a law-abiding citizen against the diminishing penalty for failure to live such a life.

"We think that Governor Major undoubtedly intended to impose no such daily weakening restraint. Petitioner was not entitled to a parole as a matter of right. The granting thereof was a matter of grace upon the part of the Governor. Petitioner accepted it, burdened with the condition that, if he did not

keep his parole, it might be revoked and that he would be compelled to 'serve out the remainder of his sentence.' Such condition was neither illegal, immoral nor impossible of performance. The condition was stated in the order granting the parole and petitioner is bound thereby.

"Having failed to observe the conditions of his parole, petitioner was arrested and returned to the penitentiary to serve out the remainder of his sentence. As the remainder of such sentence has not been served because petitioner is not entitled to have the time that he was at large under his parole and prior to its revocation deducted from the remainder of his sentence, his imprisonment was legal when our writ was issued and has not since become illegal."

From the foregoing it is our theory that the time spent by an inmate while outside of the penitentiary under conditional commutation or parole, and prior to the revocation of the same, does not count as a part of his sentence which he is to serve in the penitentiary.

2.

The question presented here, in short, is: Can the prison authorities make and enforce a rule which would defeat the provisions of a statute?

Section 9086, R. S. Mo. 1939, the three-fourths rule statute, reads as follows:

"Any convict who is now or may hereafter be confined in the penitentiary, and who shall serve three-fourths of the time for which he or she may have been sentenced, in an orderly and peaceable manner, without having any infraction of the rules of the prison or laws

of the same recorded against such convict, shall be discharged in the same manner as if said convict had served the full time for which sentenced, and in such case no pardon from the governor shall be required; and in all cases of first conviction of felony the civil disabilities incurred thereby shall cease at the end of two years from such discharge under the three-fourths rule, and such convict shall thereupon be restored to all the rights of citizenship: Provided, that he or she shall not have been indicted, informed against by the prosecuting or circuit attorney, or convicted of any other crime, during such period, and shall obtain a certificate to that effect from the commission, whose duty it shall be, upon proper showing, to issue the same and keep a record thereof."

The inmate is entitled to the benefit of this statute if he earns the same according to the provisions thereof.

Section 8992.39, Laws 1945, supra, provides: "Every inmate while on parole shall remain in the legal custody of the institution from which he was released, but shall be amenable to the orders of the board of probation and parole."

Such a situation presented a question to the court in the case of *Ex parte Carney*, 122 S.W. (2d) 888, wherein the court said, at 1. c. 888 and 890:

"Giving literal meaning to its unambiguous language, we think it consonant with the legislative intent to say that the statute is not susceptible to the construction that a parolee, because of his subsequent conviction while at large under parole, is to be denied the benefits of the three-fourths rule and required to serve the full term for which he was sentenced. The evident purpose of enacting the statute was to stim-

ulate and encourage a willingness on the part of convicts to voluntarily comply with the rules of the institution while undergoing punishment. Their own conduct, as reflected by the official records of the prison, is the measure by which there is either bestowed or withheld a fixed and predetermined reward for cooperation in promoting the orderly administration of prison discipline. Infractions of law while on parole carry their own punishment, as witness the second sentence of petitioner, and the resultant revocation of his parole. The provisions of the statute under scrutiny and the conditions of the parole under which petitioner was at large when convicted in Lewis County are in no sense related or interdependent."

(Emphasis ours.)

#### CONCLUSION

Therefore, it is the opinion of this department, that (1) the time of a parolee while out on parole is not deductible from his sentence; in other words, such time cannot be credited as a part of his prison term.

Further, it is the opinion of this department that (2) the rules of the penitentiary or reformatory cannot include a rule to forfeit the benefit of the three-fourths statute because an inmate violates his parole.

Respectfully submitted,

APPROVED:

GORDON P. WEIR  
Assistant Attorney General

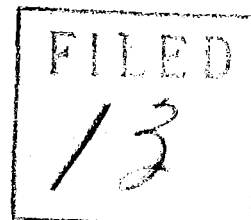
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J. E. TAYLOR  
Attorney General

GPW:CP

ORDER OF PAROLE: Order of Parole form meets requirements of  
Section 8992.39, Laws 1945, p. \_\_\_\_\_, S.C.S.S.B.  
No. 347, Sec. 39.

February 5, 1947



2/24  
Mr. Donald W. Bunker  
Executive Secretary  
Board of Probation and Parole  
Jefferson City, Missouri

Dear Sir:

Your letter of recent date, requesting an opinion of this department, reads as follows:

"The Board of Probation and Parole proposes to use the enclosed 'Order of Parole' form for the release on parole of inmates now confined in the State Penitentiary and the Intermediate Reformatory.

"In addition to the Order of Parole, a small booklet of instructions will be handed to the inmate at the time he is released on parole. A copy of those instructions is also enclosed, and it is understood that the instructions are not a part of the Order of Parole.

"The Board should appreciate your opinion as to the legality of the proposed Order of Parole form."

The Order of Parole form enclosed with your letter, reads as follows:

"ORDER OF PAROLE  
STATE OF MISSOURI

"BOARD OF PROBATION AND PAROLE

"\_\_\_\_\_, now confined in the  
\_\_\_\_\_, who was convicted and

sentenced in the county of \_\_\_\_\_  
on the \_\_\_\_ day of \_\_\_\_\_, 19\_\_, and  
received at the \_\_\_\_\_  
on the \_\_\_\_ day of \_\_\_\_\_, 19\_\_, for  
a term of \_\_\_\_\_ years, for the crime  
of \_\_\_\_\_  
which sentence expires on the \_\_\_\_ day of  
\_\_\_\_\_, 19\_\_, is hereby released  
on parole, which may be revoked without  
notice, by the Board of Probation and  
Parole, by virtue of the authority con-  
ferred by law upon said Board of Probation  
and Parole.

"It is therefore ordered that \_\_\_\_\_  
be released on the \_\_\_\_ day of \_\_\_\_\_,  
19\_\_, upon the following conditions:

"That the above mentioned recipient shall  
remain in the legal custody of the Missouri  
State \_\_\_\_\_, but shall be amen-  
able to the orders of the Board of Probation  
and Parole until the expiration of the maxi-  
mum term, or until returned to the Missouri  
State \_\_\_\_\_ by order of the  
Board of Probation and Parole.

BY THE BOARD:

\_\_\_\_\_  
Chairman

\_\_\_\_\_  
Member

\_\_\_\_\_  
Member"

Section 8992.39, Laws 1945, p. \_\_\_\_\_, S.C.S.S.B. No. 347,  
Sec. 39, reads as follows:

"The board of probation and parole is hereby  
authorized to release on parole any person  
confined in any state correctional institu-  
tion, except persons under sentence of death.  
All paroles shall issue upon order of the  
board and shall be recorded. Inmates shall

be considered for parole upon the application of the prisoner or upon the initiative of the board. The board shall secure and consider all pertinent information regarding each inmate, except those under sentence of death, including the circumstances of his offense, his previous social history and criminal record, his conduct, employment, attitude in the correctional institution, and reports of physical and mental examinations which have been made. Before ordering the parole of any inmate, the board shall have the inmate appear before it and shall interview him. A parole shall be ordered only for the best interest of society. A parole shall be considered a correctional treatment for any inmate and not an award of clemency. A parole shall not be considered to be a reduction of a sentence or a pardon. An inmate shall generally be placed on parole only when arrangements have been made for his proper employment or for his maintenance and care and when the board believes that he is able and willing to fulfill the obligations of a law-abiding citizen. Every inmate while on parole shall remain in the legal custody of the institution from which he was released, but shall be amenable to the orders of the board of probation and parole. Said board shall have the power and it shall be its duty when conditions so warrant to revoke or terminate any parole, and place the offender again in the custody of the proper correctional institution. Said board may adopt such additional rules not inconsistent with the law as it may deem proper and necessary with respect to the eligibility of inmates for parole, the conduct of parole hearings, and conditions upon which inmates may be placed on parole. Each order for a parole issued shall contain the conditions thereof. All decisions of the board shall be by a majority vote."

(Emphasis ours.)

This section provides what the board shall consider in determining the parole of an inmate. In considering the Order of Parole form as submitted with your request, we do not find anything in it

Mr. Donald Bunker

(4)

that would be inconsistent with the above statute.

CONCLUSION

Therefore, it is the opinion of this department that the Order of Parole of the State of Missouri, prepared by the Board of Probation and Parole, conforms to the requirements of Section 8992.39, Laws 1945, p. \_\_\_\_\_, S.C.S.S.B. No. 347, Sec. 39.

Respectfully submitted,

GORDON P. WEIR  
Assistant Attorney General

APPROVED:

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J. E. TAYLOR  
Attorney General

GPW:CP



LIQUOR CONTROL: Re: The bond required by Section 4960, Laws of 1945, is an indemnity bond and not a forfeiture bond.

FILED

13

April 7, 1947

Honorable Edmund Burke,  
Supervisor  
Department of Liquor Control  
State Office Building  
Jefferson City, Missouri

Dear Sir:

Your opinion request of recent date has been referred to the writer for answer. Therein you ask:

"Will you please let me have your official opinion, at your earliest convenience, as to whether the bond provided for by Section 4960, Laws of Missouri, 1945, House Bill No. 427, Sixty-Third General Assembly, is a forfeiture bond or an indemnity bond."

Section 4960, Laws of Missouri, 1945, enacted in House Bill No. 427 by the 63rd General Assembly provides as follows:

"Application for license to manufacture or sell non-intoxicating beer, under the provisions of this act, shall be made to the Supervisor of Liquor Control. Before any application for license shall be approved the Supervisor of Liquor Control shall require of the applicant a bond, to be given to the state, in the sum of Two Thousand Dollars, with sufficient surety, such bond to be approved by the Supervisor of Liquor Control, conditioned that the person obtaining such license shall keep at all times an orderly house, and that he will not sell, give away or otherwise dispose of, or suffer the same to be done about his premises, any non-intoxicating beer in any quantity to any minor, and conditioned that he will not

violate any of the provisions of this act and that he will pay all taxes, inspection and license fees provided for herein, together with all fines, penalties, and forfeitures which may be adjudged against him under the provisions of this act. Reenacted Laws 1945, p. \_\_\_\_\_, H. B. No. 427, § 1."

There has been no judicial examination or interpretation of the above quoted statute answering the specific question propounded by your request; therefore it is necessary for us to turn to the general rules of law and the analogous situations in order that we may determine the question presented to us. The Missouri Liquor Control Act deals with two subjects, that of intoxicating liquors and that of nonintoxicating liquors. In that portion of the Liquor Control Act which refers to intoxicating liquors, Section 4890, R. S. Missouri 1939, (Laws of 1933-34, Ex. Sess., P. 77, §13a), which requires a bond, was analyzed and judicially examined in the case of State vs. Wipke, 345 Mo. 283, 133 S.W. 2d 354, wherein the court held, among other things, that the bond required by that section was a forfeiture bond. Furthermore in the Wipke case, cited supra, the court specifically found that Section 4896, R. S. Missouri 1939, (Laws of 1933-34, Ex. Sess., p. 77, §19) had to be eliminated and that the bond there under discussion was governed solely by Section 4890, R. S. Missouri 1939. Therefore Section 4890, R. S. Missouri 1939, under the findings of the Missouri Supreme Court cannot be considered as pertinent to the present inquiry for no similar section is found in that portion of the Liquor Control Act relating to nonintoxicating liquor.

Section 4896, R. S. Missouri 1939, (Ex. Sess., §19, was questioned in the case of State vs. Vienup, 147 S.W. 2d 627. The Court there had before it for determination precisely the same proposition that is presented in your opinion request. At l.c. 628, the Supreme Court of Missouri, speaking through Judge Hays, in regard to the question there presented stated:

"The question for our determination therefore is this: Is the bond sued upon one of forfeiture or one of indemnity? The answer to this question must turn on the construction to be given the statute under which the giving of the bond is required and which prescribes its terms; for, under the well-settled rule in this state, any

required provisions of the condition of the bond found in the statute but omitted from the instrument itself must be read into it, and, conversely, terms which are found in the condition of the bond but not in the statute are to be disregarded. State v. Wipke, 345 Mo. 283, 133 S.W. 2d 354, and cases there cited."\*\*\*\*\*

Also in the Vienup case, cited supra, the Supreme Court at l. c. 629, specifically pointed out the fact that a difference did exist between the two sections of the statute, Section 4890, R. S. Missouri 1939, as discussed in the Wipke case, cited supra, and Section 4896, R. S. Missouri 1939, as there under discussion in the Vienup case.

"\*\*\*\*\*Section 19, however, differs materially from section 13a. It sets out in detail the condition of bonds to be given in compliance with its mandate. In particular it requires among other things that the bond so given shall be conditioned that the principal obligor will pay "all taxes, inspection and license fees provided for herein, together with all fines, penalties and forfeitures which may be adjudged against him under the provisions of this act."

In summation of the Vienup case, the court's reasoning for holding the bond required by Section 4896, R. S. Missouri 1939, to be an indemnity bond rather than a forfeiture bond is found in the following quotation:

"Recurring now to the specific provisions of Section 19: What then did the legislature mean by saying that the bond should stand as security for the payment of taxes and fees? Included among the taxes and fees so secured are, of course, those payable to the state directly, but there are also other taxes and fees "provided for herein". Section 24 of the act, Laws 1933, Ex. Sess. p. 87, provides for license charges to be fixed by and paid to counties, and section 25 of the amended Act of 1935, Laws of 1935, p. 267, Mo. St. Ann. § 4525g-29, p. 4689, provides for license

fees to be collected by counties and municipal corporations. Certainly such taxes and license fees are to be included in those specified in section 19. Assume that a licensee has breached his bond by violating some minor state regulation and has also breached it by failing to pay some local fee authorized under the act. In this situation, if the bond be construed as one of forfeiture, would the governmental unit which first sued be permitted to collect the whole amount of the bond leaving the other without remedy? Would not such a construction lead to an unseemly race between various governmental agencies for priority in obtaining and collecting judgments?

Considering the language of the act in regard to "fines, penalties and forfeitures", we think such language reasonably construed can mean only that where a fine, penalty or forfeiture is imposed upon a licensee because he has violated some term of the act or some regulation lawfully made thereunder, the amount of such fine, penalty or forfeiture may be collected from him and his surety by suit on the bond. So construed, is not the bond one of indemnity only? For consider, if a licensee be fined \$500 for a violation of the act and the state elects to collect the fine by imprisoning the defendant until it is paid, or by issuing a general fi. fa. and levying it upon his lands and chattels, only the amount of the \$500 fine plus the costs could be collected. If, however, the bond is to be construed as one of forfeiture, then the state might elect to collect the fine by suit against the surety under the bond, in which event it would recover \$2,000. Can this sort of inconsistent result have been intended by the legislature? We think not.\*\*\*\*\*

Again, we recall the provisions of § 19 which make the bond stand as security for the collection of fines and penalties which are assessed for violation of the act. See § 43 in the original act and the amendment thereto,

Laws of 1935, p. 267, Mo. St. Ann. 4525g-48, p. 4689. It is to be noted that the fines and penalties so assessed cover all violations of the act and the regulations lawfully made thereunder."\*\*\*\*\*

With the above quoted statements of the court in mind it is now well to point out that the Liquor Control Act in both portions, that portion referring to intoxicating liquors and that portion referring to nonintoxicating liquors, contains an identical statute requiring the giving of a bond by the applicant for a license. Upon reading the two statutes, Section 4896, R. S. Missouri 1939, and Section 4960, Laws of Missouri 1945, House Bill No. 427, it is obvious that there is no discrepancy or difference, even in terminology, between the two sections, other than that Section 4896 uses the term "intoxicating" and Section 4960 uses the term "nonintoxicating". In considering Section 4896, R. S. Missouri 1939, the Supreme Court came to the conclusion that that section provided for an indemnity bond. Specifically the court held:

"In conclusion, we are irresistibly forced to construe this bond as one of indemnity and not one of forfeiture. The learned trial court therefore erred in holding that it belonged to the latter class. This conclusion is not at all inconsistent with our holding in the Wipke case, supra. In that case we found it necessary to eliminate § 19 and to decide that the bond there given was governed solely by § 13a, in order to reach the conclusion that the bond there before us was one of forfeiture. Implied in that holding is the opinion that a bond governed by § 19, as this one is, would be a bond of indemnity".

As stated supra there has been no judicial interpretation of Section 4960, Laws of Missouri 1945, as to whether or not the bond required by said section is an indemnity or a forfeiture bond. However since the court in the Vienup case, cited supra, has specifically held that Section 4896, a section which is identical with Section 4960, Laws of Missouri 1945, as requiring a bond in the nature of an indemnity bond, then by analogy, it can be reasoned that the bond required under the provisions of Section 4960, Laws of 1945, would be a indemnity bond and not a forfeiture bond.

Honorable Edmund Burke

- 6 -

CONCLUSION

Upon the above stated rules and reasoning it is the opinion of this department of the State government that the bond required under the provisions of Section 4960, Laws of 1945, House Bill No. 427, is an indemnity bond and not a forfeiture bond.

Respectfully submitted,

WILLIAM C. BLAIR  
Assistant Attorney General

APPROVED:

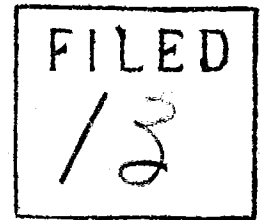
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J. E. TAYLOR  
Attorney General  
WCB:if

PROBATE COURTS:	)	Section 9417, Mo.R.S.A., applicable
SOCIAL SECURITY:	)	to all expenses incurred in proceed-
GUARDIANSHIP PROCEEDINGS:	)	ings to declare person of unsound
INSANITY:	)	mind and to appoint guardian.

May 24, 1947

6/3



Honorable L. Madison Bywaters  
Prosecuting Attorney  
Clay County  
Liberty, Missouri

Dear Sir:

We hereby acknowledge receipt of your letter of May 9, 1947, requesting an opinion from this department, which reads as follows:

"At the request of the Clay County Social Security Commission, the Probate Court instituted incompetency proceedings against the above named and he was declared incompetent on March 6, 1947, and the public administrator has been appointed as his guardian.

"Under the provisions of Section 9417, the Probate Court is given the right to waive court costs in guardianship proceedings when in the opinion of the Court the aged person is unable to assume said expense.

"The Clay County Probate Court is desirous of an opinion as to whether or not the provisions of the section aforesaid apply to the court costs incurred in the proceedings to have the person declared incompetent, as well as the court costs which will accrue in the future in the administration of the guardianship estate."

Section 9417, Mo. R. S. A., provides as follows:

"Benefits hereunder shall be delivered to the applicant in person or, in the event of his incompetency, to his legally appointed guardian, and in the case of a dependent child to the person or relative with whom he lives. All guardianship proceedings in the case of an applicant or recipient shall be carried out without fee or other expense, when in the opinion of the Probate Court, the aged person is unable to assume said expense. At the discretion of the court such a guardian may serve without bond.

"Whenever any recipient shall have died after the issuance of a benefit check to him, or on or after the date upon which said benefit check was due and payable to him, and before the same is endorsed or presented for payment by the recipient, the Probate Court of the county in which said recipient resided at the time of his death shall, on the filing of an affidavit by one of the next of kin, or creditor of said deceased recipient, and upon the court being satisfied as to the correctness of said affidavit, make an order authorizing and directing such next of kin, or creditor, to endorse and collect said check, which shall be paid upon presentation with a certified copy of said order attached to the check and the proceeds of which shall be applied upon the funeral expenses and the debts of said decedent, duly approved by the Probate Court, and it shall not be necessary that an administrator be appointed for the estate of said decedent in order to collect said benefit check. No costs shall be charged in said proceedings."

The precise question presented is whether or not the term "all guardianship proceedings," as used in the above section, includes the inquisition, the declaration that the subject is of unsound mind and incapable of managing his affairs and the appointment of a guardian, or merely refers to the actual



appointment of a guardian and the future administration of the guardianship estate.

We submit that action to have a person declared of unsound mind and a guardian appointed is generally considered as one proceeding. No line can be drawn which will separate or divide such proceeding into two parts. In some jurisdictions a proceeding to adjudge a person incompetent and appoint a guardian may be had independently of and apart from proceedings to inquire into the sanity of such person and his commitment to an institution. In these jurisdictions an independent and valid proceeding for the appointment of a guardian is not affected by a prior invalid proceeding in which the alleged incompetent was adjudged incompetent (44 C.J.S., Sec. 40, p. 102). No Missouri case has been found to support this view. On the contrary, the cases in this state hold that if the insanity inquisition judgment is void the appointment of the guardian is also void. In *Skelly v. The Maccabees*, 272 S. W. 1089, it was said, at page 1090:

"September 20, 1922, insured was adjudged insane by the probate court of Jasper county, and his wife, Beatrice Skelly, was appointed as his guardian.  
\* \* \* \* \*

"\* \* \* Insured was not present at the hearing in the probate court, but the court appointed an attorney to represent him. This, however, could not take the place of service, and there is no such contention. There can be no escape from the conclusion that the judgment of the probate court adjudging insured to be insane is absolutely void and without effect because of failure to serve notice upon insured as required by law. Said judgment, being wholly void for want of jurisdiction, is subject to collateral attack. (Cases cited.) Since the sanity inquisition judgment was void, it follows, of course, that the appointment of the guardian was also void."

We can infer from this that the insanity inquisition and the appointment of a guardian are made in the same proceeding.

We believe that it is a common practice for the terms "guardianship proceedings" and "insanity proceedings" to be used interchangeably; that both these terms refer to the insanity inquisition, the declaration that the subject is of unsound mind and incapable of managing his affairs, and the appointment of a guardian to manage said affairs. The court in the Skelly case, supra, referred to the insanity proceedings as "the guardianship proceedings." And also in the case of Shanklin v. Boyce, 275 Mo. 5, the court referred to the inquisition of insanity as "the proceedings for the appointment of his guardian." It was said at page 14:

"\* \* \* Nor is it denied that the proceedings for the appointment of his guardian were had and conducted without any notice whatever to the plaintiff and without his personal presence in the probate court at the time of the alleged inquisition. \* \* \*"

Thus it is clear that the courts recognize no distinction between the aforesaid terms, and further that when the Legislature used the term "guardianship proceedings" in Section 9417, it had reference to the entire proceeding, that is, the insanity inquisition and the appointment of a guardian. We cannot believe that the Legislature intended to limit the waiver of expenses on the part of the recipient of social security funds to the expenses incurred in the actual appointment of a guardian and to require such person to assume the costs of that part of the proceeding which went on before and resulted in a finding that said person was of unsound mind.

#### Conclusion

Therefore, it is the opinion of this department that the provisions of Section 9417, Mo. R.S.A., apply to all expenses incurred in the proceedings to declare a person of unsound mind and incapable of managing his affairs and to appoint a guardian to manage said affairs and carry out the administration of the guardianship estate in the future.

Respectfully submitted,

DAVID DONNELLY  
Assistant Attorney General

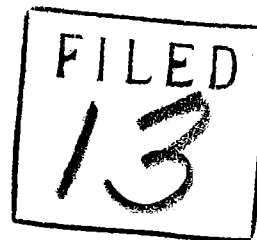
APPROVED:

J. E. TAYLOR  
Attorney General

D. EG

INTOXICANTS: Under Section 4890 R.S. Mo. 1939, territories cannot be annexed or added to another one, in order to be taken outside the scope of said section.

June 17, 1947



Mr. Robert M. Buerkle  
Prosecuting Attorney  
Cape Girardeau County  
Jackson, Missouri

Dear Sir:

Your opinion request of recent date, regarding the construction to be placed upon Section 4890, R. S. Mo. 1939, under the facts peculiar to the situation outlined in your request, reads as follows:

"My office has had several inquiries in regard to the right of citizens of the City of Cape Girardeau, Missouri, to now obtain a liquor license for the sale of intoxicating liquor by the drink. The reason that this question now arises is that Cape Girardeau in the last official census in 1940 had a population of 19,600 and last month, by special election, extended the city limits of the city so as to take into the city a considerable area. The new area brought into the city has a population which when added to the 1940 population of the City of Cape Girardeau would no doubt give the City of Cape Girardeau a population of greater than 20,000. The question has been asked me as to whether the known population of the area recently voted into the city, said population figure being arrived at by the use of the 1940 census, could be added to the last official census of the City of Cape Girardeau and thus qualify the city as a city having a population of greater than 20,000.

"The City of Cape Girardeau has long since gone over the 20,000 mark and if a census were held today would no doubt exceed 20,000 without the addition of the new area. However, of course, by Section 4890 of the 1939 Revised Statutes of Missouri 'the population of said cities to be determined by the last census of the United States

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completed before the hold of said election.' It would appear to me that this section of the statute could be construed so as to include a city in the class of Cape Girardeau which has recently or since the last census extended the city limits because now to arrive at the population of the City of Cape Girardeau you would refer to the 1940 census of the city itself and also the 1940 census of the area recently included within the city. I would be glad to have your opinion on this matter at your earliest opportunity."

Section 4890 R. S. Mo. 1939, reads in its pertinent part as follows:

"Provided, that no license shall be issued for the sale of intoxicating liquor, other than malt liquor containing alcohol not in excess of five (5%) per cent by weight, by the drink at retail for consumption on the premises where sold, in any incorporated city having a population of less than twenty thousand (20,000) inhabitants, until the sale of such intoxicating liquor, by the drink at retail for consumption on the premises where sold, shall have been authorized by a vote of the majority of the qualified voters of said city. Such authority to be determined by an election to be held in said cities having a population of less than twenty thousand (20,000) inhabitants, under the provisions and methods set out in this act. The population of said cities to be determined by the last census of the United States completed before the holding of said election.

"Provided further, that for the purpose of this act, the term 'city' shall be construed to mean any municipal corporation having a population of five hundred (500) inhabitants or more."

In construing a statute two general, but paramount, rules of construction must be given consideration and effect. It is

generally acknowledged that the primary rule in construing statutes is to ascertain and give effect to legislative intention; *Meyering v. Miller*, 51 S. W. (2d) 65, 330 Mo. 885. A second rule, and an equally important one, is that in arriving at legislative intent, laws should be interpreted to further ends of justice and public welfare, and not be given any unreasonable effect, *Bowers v. Missouri Mutual Ass'n.*, 62 S. W. (2d) 1058.

With the two rules, referred to above, in mind let us turn to the section of the statute, quoted supra, and see what the legislature did say, what tests the legislature laid down, what the reasonable construction of the statute is and what an unreasonable construction of the statute might lead to, under the facts stated in your opinion request.

In part, the statute enacted by the legislature states, that no license shall be issued for the sale of intoxicating liquor in any incorporated city having a population of less than twenty thousand (20,000) inhabitants, and more than five hundred (500) inhabitants, until the same shall have been authorized by a vote of the people. Whether or not a city has a known population is to be determined by the last census of the United States completed before the holding of said election.

The only test for determining population, announced by the statute is the last United States census. If the legislature had intended that any other test was to be used, the legislature could easily have so stated. It is a known fact that each ten years a federal census is conducted and the findings disclosed. The last federal census was conducted in the year 1940. As stated in your opinion request, at the time of the taking of that census, the census of 1940, Cape Girardeau had a population of less than twenty (20,000) thousand inhabitants. Therefore, under the statute, Section 4890, if at any time the city of Cape Girardeau had desired to sell intoxicating liquor, other than malt liquor, by the drink for consumption on the premises where sold, such desire of the inhabitants had to be declared and evidenced by a vote on that proposition. Apparently, no such decision was ever made by the inhabitants of Cape Girardeau. Subsequent to the 1940 census the city of Cape Girardeau annexes, by legal means, a contiguous strip of land containing persons, whose total population when added to the population of Cape Girardeau exceeds the statutory limit of twenty (20,000) thousand persons. At first impression, it might appear that the problem presented is whether or not such an addition or combining of populations can be made to take a city outside the limitations of the statute. However, further reflection reveals that the true problem is not one of combining populations, but of determining what the statute states as the

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procedure for obtaining intoxicants by the drink in a given community or city, and what tests are used to arrive at the conclusion. After examining the statutes, the cases, text-books and digests, the writer was unable to find any authority that would allow the two areas referred to in your letter to be combined. In other words, no authority was found for deviating from the directions of the statute. On the contrary, reason and justice make the application of the terms of the statute preferable. In the Missouri Digest Volume 13, Intoxicants, Key 30, are a number of cases dealing with approximately the same question as is presented by your opinion request. None are directly in point, but all indicate that where change in the status of a political subdivision is contemplated, concerning intoxicants, the courts of this state favor the status quo unless the contemplated change is specifically authorized by statute. In State ex rel. v. Robinson, et al, 129 Mo. Appeals 147, l. c. 158, the attitude of the court regarding the re-submission of the local option status where a city had voted dry and subsequently added territory which wished to vote upon the question again within the statutory limitation of four years, is reflected:

" \* \* \* This being true by every principle of natural justice as well as the entire analogy of American institutions, the inhabitants of the municipality are in duty bound to abide for four years the policy adopted in the election in which each and every one of its qualified voters either participated or had the right so to do, and voluntarily waived the same. And this is true notwithstanding the fact that a large number of persons have taken up their abode within the town since that time, for those persons came to Granby voluntarily and assumed the obligations of citizenship of their own volition and free will, knowing full well the state of the law on the subject. In this view, we have one set of inhabitants, those who resided there at the time of the election, impliedly accepting the law by participating, or waiving their right to participate in the election, and a second set, those who have taken up their abode there since its adoption, impliedly accepting the law by voluntarily becoming citizens of a community in which they knew full well the law obtained. \* \* \* \* \*

As stated above, the writer realizes that the case quoted from is not directly in point, but the writer does believe that the case indicates that the attitude of the courts is to follow the law literally and to never enlarge a statute by judicial

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legislation when dealing with liquor problems and if possible the courts prefer to maintain the status quo.

Turning now to the problem of whether or not the two territories, Cape Girardeau and the recently annexed land, can be combined, the writer was unable to find any direct authority either in support of such a procedure or in derogation of such a step. However, the arguments against such a procedure are to be marshalled. The only test laid down in the statute, Section 4890, for determining the population is the last federal census, not one word is stated about additional territory, natural increment by birth or movement of population or any other exception that the legislature might have expressly enacted. Certainly, no one can say that the legislature did not realize that there might be borderline cases at the time the federal census was taken and that the birth rate of the next year or two might populate the city to a total exceeding twenty (20,000) thousand inhabitants, yet not one word was stated in the statute regarding the procedure in such an event. Let us consider that if your proposal of combining two territories is to be approved what is to prevent a city of 19,999 at the time the census was taken from determining that their city is without the limits of the statute upon the birth or addition of two more persons. Yet the statute is absolutely silent regarding either possibility. What would be reasonable or just about permitting one city to propel itself outside the limitations of the statute by the addition of territory with the accompanying population yet denying to another city the recognition of its natural increment? There simply is no equality in such a situation. The legislature provided a very precise and clear method of determining whether a city with over five (500) hundred population and less than twenty (20,000) thousand population wish to permit the sale of intoxicants for consumption upon the premises where sold. Further the legislature stated clearly that the determination of the population was to be made by applying the last United States census. Legislative knowledge of territorial annexation and natural increment by birth or movement of population cannot be denied. Yet chargeable with that knowledge the legislature laid down the rule and the test, and with the attitude of the courts favoring the status quo, it is impossible for this office to legislate concerning the problem, or to read into the statute a procedure permitting a factual situation to take a city without the statutory limitations of which the legislature had knowledge but about which the legislature made no provision.

That the legislature of the state of Missouri does realize that

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changing conditions may make alterations under the law advisable is found in the language of Section 7522, R. S. Mo. 1939, wherein the legislature provided that cities of certain size and under special charters might take a census to determine certain rights under the law dependent upon population. In part, Section 7522, provides:

"Any such city may at any time, by ordinance and at the expense of the city, cause an enumeration of its inhabitants to be made, and its population ascertained, and such census, when so taken, shall have like force and effect as a state or national census to authorize such city to proceed in securing such other incorporation as its population may entitle it to under the laws and Constitution of this state, and for any other purpose that the laws may require, or have any other act or thing to be done making the population a basis thereof;  
\* \* \* \* \*

Needless to say, we believe, that that section applies to only cities of the fourth class and under special charters. Yet, with the knowledge that under certain conditions it would be advisable to permit a city to take a census, the legislature failed to provide for such a procedure in Section 4890, R. S. Mo. 1939.

Further, it is a cardinal principle of statutory construction that the expression of one thing is to the exclusion of all others. The legislature in Section 4890, R. S. Mo. 1939, stated that population was to be determined by the last United States census, no other method is provided for by said section. Applying that principle of exclusion we must conclude that the legislature contemplated only the statutory method of determining whether or not any given city came within or without the statutory limitations per its terms.

#### CONCLUSION

Therefore, this office is of the opinion that under the provisions of Section 4890, R. S. Mo. 1939, the legislature did



Mr. Robert M. Buerkle

June 17, 1947

not provide for the addition or annexation of two territories whereby the statutory limitation might be exceeded, but expressly provided that only cities having more than five (500) hundred population and less than twenty (20,000) thousand population may vote upon the proposition of liquor by the drink, and that the only test to be used is the population of the city at the time of the last United States census, regardless of subsequent addition of territory or increase in population by birth or movement. Further, that the courts favor the status quo, when dealing with intoxicants or their use.

Respectfully submitted

WM. C. BLAIR  
ASSISTANT ATTORNEY GENERAL

APPROVED:

J. E. TAYLOR  
ATTORNEY GENERAL

WCB:MA

INTOXICATING BEVERAGE: Proper to place inscription of alcoholic  
LIQUORS: content of nonintoxicating beer on neck  
label of bottle.



August 28, 1947

Mr. Edmund Burke, Supervisor  
Department of Liquor Control  
Jefferson City, Missouri

Dear Mr. Burke:

This is in reply to your letter of recent date requesting an official opinion from this department, which reads, in part, as follows:

"Some of the breweries shipping beer into the State of Missouri are making a short seven ounce bottle upon which the manufacturer's label which goes around the body of the bottle is blown into the bottle as an integral part of the bottle. Both 5% and 3.2% beer are being placed in these bottles and shipped into the State of Missouri.

"These breweries claim that it is impractical for them to have on the manufacturer's label which goes around the bottle the words 'alcoholic content not in excess of 3.2% by weight' or 'alcoholic content not in excess of 4% by volume' as provided for by Section 4994, and they contend that they should be permitted either to put this inscription on a label on the cap or on a separate label around the neck of the bottle, and not put it on the manufacturer's label around the body of the bottle.

\* \* \* \* \*

" \* \* \* May I have your official opinion as to whether or not this can be done."

Section 4994, R.S. Mo, 1939, requiring the words "Alcoholic content not in excess of 3.2% by weight," or "Alcoholic content not in excess of 4% by volume," to appear on the label of bottles containing nonintoxicating beer, provides:

"It shall be the duty of every manufacturer or brewer manufacturing or brewing any nonintoxicating beer in this state, and of every manufacturer or brewer, distributor or wholesaler, outside of this state shipping any nonintoxicating beer into this state for sale in this state at wholesale or retail, to cause every bottle, barrel, keg, and other container of such nonintoxicating beer to have on the label thereon in plain letters and figures 'alcoholic content not in excess of 3.2% by weight', or 'alcoholic content not in excess of 4% by volume'. Any beer not so labeled shall be deemed to have an alcoholic content in excess of 3.2% by weight, and the sale thereof in this state shall be subject to all the regulations and penalties provided by law for the sale of beer having an alcoholic content in excess of 3.2% by weight. Any person who shall sell any beer, regardless of the alcoholic content thereof, as nonintoxicating beer in, or out of, any bottle, barrel, keg or other container, not so labeled as herein required shall be deemed guilty of a misdemeanor."

(Underscoring ours.)

According to Section 4996 (b), Mo. R.S.A., the Supervisor of Liquor Control has the authority to make certain regulations, provided the generalities of the provisions of the Liquor Control Act are not limited. Under this authority a number of rules and regulations have been promulgated by the Supervisor. Regulation No. 6, paragraph (b) of the Rules and Regulations of the Supervisor of Liquor Control, provides as follows:

"Every manufacturer, or brewer, manufacturing or brewing any nonintoxicating beer in this State, and every manufacturer, brewer or wholesaler outside of the State,

shipping any nonintoxicating beer into this State, shall cause to be printed upon the large label around and upon the body of each bottle of such nonintoxicating beer, one of the following inscriptions: 'Alcoholic content not in excess of 3.2% by weight,' or 'Alcoholic content not in excess of 4% by volume.'

It will be noted that Section 4994, supra, requires the words "Alcoholic content not in excess of 3.2% by weight," or "Alcoholic content not in excess of 4% by volume," to be printed on the label of the bottle, no particular or specific label being indicated. However, Regulation No. 6, paragraph (b) of the Rules and Regulations of the Supervisor of Liquor Control, requires the afore-mentioned words to be printed upon the large label around and upon the body of the bottle of such nonintoxicating beer.

It is our thought that the regulation in question actually requires more than does the statute, and since we think the statute only requires that the brewers and manufacturers of nonintoxicating beer shall place on any label on the bottle of such beverage the inscription relative to alcoholic content, we therefore believe it would be proper to amend Regulation No. 6, paragraph (b) of the Rules and Regulations of the Supervisor of Liquor Control, so as to permit a brewer or manufacturer, or wholesaler, of nonintoxicating beer to place the inscription relative to alcoholic content on a label on the bottle other than the main label on the bottle.

It was undoubtedly the intention of the Legislature, in requiring the inscription regarding alcoholic content to be placed on the label of the bottle, to protect the State and the public.

We realize that if the inscription is placed on a smaller label, such as the neck label, it could not be as easily seen, and it is also true that the smaller neck label becomes detached from the bottle more easily than does the large body label.

Consequently, we believe that adequate protection of the State and the public could be achieved by requiring in the

Mr. Edmund Burke, Supervisor

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amended regulation that if the inscription regarding alcoholic content is placed on the label other than the large body label that it also be placed on the cap or crown of the bottle.

Respectfully submitted,

RICHARD F. THOMPSON  
Assistant Attorney General

APPROVED:

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J. E. TAYLOR  
Attorney General

RFT:ml

CIRCUIT CLERK: When circuit judge of third class county has approved  
COUNTY COURT appointment of deputies and assistants to circuit  
BUDGET LAW: clerk, and set salaries, county must pay such salaries,  
even though not anticipated in county budget.  
Salaries to be paid out of class 6 of county budget.

September 15, 1947

FILED

13

9/23

Honorable L. Madison Bywaters  
Prosecuting Attorney  
Clay County  
Liberty, Missouri

Dear Sir:

This is in reply to your letter of recent date, requesting an official opinion of this department, which reads as follows:

"Judge James S. Rooney has requested that I write to you for an official opinion from your department concerning the following question:

"Does a Circuit Judge have the legal authority to order the County Court to pay for extra deputy assistance or stenographical assistance in the office of the Circuit Clerk of Clay County, Missouri, such to be paid for out of either Class 4 or Class 6 of the county budget, in instances where there is not a sufficient amount set out in the Circuit Clerk's budget to take care of the same."

The procedure to be followed in providing the necessary deputies and assistants for the circuit clerk of third class counties is found in Section 4 of House Bill No. 773 of the 63rd General Assembly, found in Laws of Missouri, 1945, page 1527. Such section reads as follows:

"The circuit clerk in counties of the third class, wherein there shall be a separate circuit clerk and recorder, shall be entitled to such number of deputies and assistants to be appointed by such official, with the approval of the judge of the circuit court, as

such judge shall deem necessary for the prompt and proper discharge of the duties of his office. The judge of the circuit court, in his order permitting the circuit clerk to appoint deputies or assistants, shall fix the compensation of such deputies or assistants which order shall designate the period of time such deputies or assistants may be employed. Every such order shall be entered on record, and a certified copy thereof shall be filed in the office of the county clerk. The circuit clerk may at any time, discharge any deputy or assistant, and may regulate the time of his or her employment and the circuit court, may at any time modify or rescind its order permitting an appointment to be made."

Under the provisions of this section the determination of the necessity of such deputies and assistants, the salaries to be paid to such deputies and assistants, and the period such deputies and assistants may be employed is left entirely up to the circuit judge, and neither the necessity for such employees nor the salaries as set by the circuit judge can be inquired into by the county court.

Section 5 of House Bill No. 773 of the 63rd General Assembly provides as follows:

"All annual salaries provided in this act shall be paid out of the county treasury in monthly installments at the end of each month by warrant drawn by the county court upon the county treasury."

Such salaries, therefore, are obligations of the county and must be paid in monthly installments by the county when vouchers for such salaries are certified to the county court. While the estimate for the salaries of such deputies and assistants should have been submitted in the budget estimate of the circuit clerk for the current year, the failure of such circuit clerk to do so cannot relieve the county of the obligation to pay such salaries.

In the case of Gill v. Buchanan County, 142 S. W. (2d) 665, the Supreme Court of Missouri had before it the question of whether the failure of the county court to include the whole of a county judge's salary in its budget would preclude the recovery

of such part of the county judge's salary as was not included in the budget. The court said at l. c. 668-669:

" \* \* \* Failure to budget funds for the full amount of salaries due officers of the county, under the applicable law, which the county court must obey, cannot bar the right to be paid the balance. Instead, it must be discretionary obligations incurred for other purposes which are invalid, rather than the mandatory obligation imposed by the same authority which imposed the budget requirements. We, therefore, hold that a county court's failure to budget the proper amounts necessary to pay in full all county officers' salaries fixed by the Legislature, does not affect the county's obligation to pay them." (Emphasis ours.)

The salaries of deputy circuit clerks and assistants are not fixed by the Legislature, but the Legislature has delegated the authority to fix such salaries to the circuit judge, and, therefore, as a matter of law, the salaries of deputy circuit clerks and assistants are included in the budget, whether estimated for or not.

Section 10914, R. S. Mo. 1939, provides, in part, as follows:

"The court shall show the estimated expenditures for the year by classes as follows:

\* \* \* \* \*

"Class 6. \* \* \* Provided, however, if necessary to pay claims arising in prior classes warrants may be drawn on anticipated funds in class six and such warrants to pay prior class claims shall be treated as part of such prior funds. \* \* \*"

Under authority of this provision the salary claims of deputy circuit clerks and assistants should be paid out of class 6 funds of the county budget if there are present funds in class 6 of the budget or if funds in class 6 of the budget are anticipated.



Honorable L. Madison Bywaters

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CONCLUSION

After the circuit judge of Clay County has approved the appointment of deputy circuit clerks and assistants, and set the salaries of such deputies and assistants, the county must pay the salaries of such deputies and assistants, even though such salaries were not included in the budget estimate of the circuit clerk for the current year. Such salaries are payable out of class 6 funds of the county budget.

Respectfully submitted,

C. B. BURNS, Jr.  
Assistant Attorney General

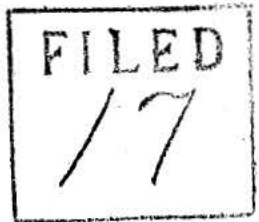
APPROVED:

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J. E. TAYLOR  
Attorney General

CBB:HR

COUNTY COURT: It is within the discretion of the county court to pay a wolf bounty up to but not exceeding ten dollars.



March 27, 1947

4/3

Honorable James D. Clemens  
Prosecuting Attorney  
Pike County  
Bowling Green, Missouri

Dear Sir:

We are in receipt of your request for an official opinion of this department, which reads:

"Your opinion is requested on the following point: Is the County Court authorized to expend public monies in payment of a wolf bounty in a sum larger than the Ten Dollar payment authorized by Section 14559?

"I am of the opinion that Section 14559 does not itself authorize a payment of more than Ten Dollars for a wolf, but desire your opinion as to whether an additional sum may be paid by the County Court independent of the authority granted by the cited section."

Under Section 14559, R.S. Mo. 1939, the county court in any county in this state is authorized to pay ten dollars for each wolf killed in such county, and reads:

"The county court of any county in this state may pay a bounty of ten dollars each for any grown coyote or wolf and three dollars each for any coyote or wolf pup which may be killed in such county, also a bounty of five dollars for each grown wild cat, and three dollars for each wild cat kitten which may be killed in such county: Provided, that each such bounty shall not be paid for any coyote, wolf, wild cat, the pups of coyotes or wolves or the kittens of wild cats which may have been raised in captivity either

within or without this state: Provided further, that a coyote or wolf pup and a wild cat kitten shall be deemed such when under ten weeks old: Provided, also, that it shall be unlawful to import into this state any such animals except for exhibition purposes and then only under permit as otherwise provided for by the statutes of this state."

You will notice the Legislature, in passing said provision, used the word "may" and not "shall", which under the rules of statutory construction indicates that the legislative intent was to leave it within the discretion of the respective county court as to whether any bounty shall be paid for killing wolves. The word "may" used in ordinary meaning carries no thought of compulsion, but is permissive and power giving and not at all compelling, discretionary, and not mandatory. (See *Lansdown v. Faris*, 66 Fed. (2d) 939, 1.c. 941; also, *State ex rel. v. Blair*, 245 Mo. 680, 1.c. 693.)

It is well established in this state that county courts are courts of statutory origin and have only limited jurisdiction. Furthermore, said county courts possess no powers, except those conferred by statute, having no common law power, and, aside from management of fiscal affairs of the county, possess no powers except conferred by statute. In *State ex rel. Chadwick Consolidated School District v. Jackson*, 84 S.W. (2d) 988, 229 Mo. App. 842, 1.c. 845, the court said:

"\* \* \* The answer to that question depends upon the statutory powers of the county court. Such court is a creature of the constitution and its powers are limited by the terms of the various statutes defining its powers. It has no common law or equitable jurisdiction. (*State ex rel. v. Johnson*, 138 Mo. App. 306, 1.c. 314, 121 S.W. 780.) In so far as the making of levies for school districts is involved, the county court has been given no supervisory powers whatever. Estimates for sinking fund and interest on bonded indebtedness of any district are made by the school board of such district. (Sections 9203, 9204, Revised Statutes 1929.) Upon receipt of such estimates it becomes the duty of the

county clerk to make the assessment against the taxable property lying within the district, if within the limits prescribed by law. (Section 9261, Revised Statutes 1929.) The board of directors in this case made an estimate of twenty-five cents on the \$100 valuation for sinking fund and a similar amount for interest. Such estimate was within the constitutional and statutory limit. It is true that at the time the estimate was made there appears to have been on hand sufficient funds belonging to the district to have retired all outstanding bonds. It was upon such state of facts the county court attempted to quash the levy and order the county collector not to collect the alleged illegal levy. There is no statutory authority for such procedure or exercise of judicial power by a county court. In fact no court is given statutory power to revise an estimate of a school board when within the legal limits allowed by law. In the case of Lyons v. School District, 278 S.W. 74, where a similar state of facts arose, the Supreme Court said: \* \* \* \* \*

Also, in State v. Corneli, 152 S.W. (2d) 83, l.c. 85 and 86, the court, in announcing the foregoing rule, said:

"We concede that the county court is created as a court of record and its jurisdiction partially fixed by the constitution. Section 36 of Article VI of the Missouri Constitution Mo.St.Ann. vests such court with 'jurisdiction to transact all county and such other business as may be prescribed by law.' But the authorities are uniform to the effect that county courts possess only limited jurisdiction. Outside the management of the fiscal affairs of the county, such courts possess no powers except those conferred by statute. State ex rel. v. Redman, 270 Mo. 465, 194 S.W. 260; State ex rel. v. Oliver, 202 Mo. App. 527, 208 S.W. 112."

CONCLUSION

In view of the foregoing decisions holding that a county court has no common law powers, but is a creature of statute and is a court of limited jurisdiction, having no authority outside the fiscal management of the county business except such authority as granted by statute, we are of the opinion that the county court may pay a bounty for killing a wolf in an amount not to exceed ten dollars. However, it is left to the discretion of the county court whether any bounty whatsoever may be paid. Under no condition can the county court pay an amount in excess of ten dollars as a bounty for killing a wolf in the absence of a statute authorizing said county court to pay a larger bounty.

Respectfully submitted,

AUBREY R. HAMMETT, Jr.  
Assistant Attorney General

APPROVED:

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J. E. TAYLOR  
Attorney General

ARH:LR

MAGISTRATE COURTS: no. Magistrate Courts have authority  
AUTOMOBILES: to suspend or revoke license on  
misdemeanor conviction.

FILED

April 30, 1947

5/20

Honorable James D. Clemens  
Prosecuting Attorney  
Pike County  
Bowling Green, Missouri

Dear Sir:

This acknowledges your request, which is as follows:

"I would like to have your opinion  
upon the following question:

"Is a Magistrate authorized to  
suspend or revoke the driver's  
license of a person convicted be-  
fore him for the violation of  
statutory provisions regulating  
the operation of motor vehicles?"

"I sense a conflict between Sections  
8459 (b) Mo. R.S.A., which appears  
to grant the privilege of revocation  
to all courts except Justice of the  
Peace courts, and Section 656.1 Laws  
1945, which provides that the word  
'justice' shall be deemed to refer  
to 'magistrate.'

"A defendant now stands charged in  
this county with operating a motor  
vehicle without a driver's license.  
His driver's license was suspended  
previously by a magistrate. For this  
reason, I would appreciate having  
your opinion at the earliest possible  
date."

Replying thereto, we understand your inquiry to be  
based upon the following facts: A person's driver's license

has been suspended by a magistrate; thereafter, and while the same was under the magistrate's judgment suspended, the person continued to drive his car during the suspension and has been arrested and awaits trial for operating his automobile without a driver's license.

In order to answer your question it is necessary to consider several statutes. Section 656.1, Mo. R.S.A., page 12 of the Pocket Part (Laws 1946), is as follows:

"Whenever, in any statute, the word 'justice' (referring to justice of the peace) or the words 'justice of the peace' appear, said word or words shall hereafter be deemed to include and refer to 'magistrate,' unless there be something in the subject or context repugnant to such construction."

By its terms, the word "magistrate" is substituted where theretofore statutes enacted stated the "justice of the peace" had certain duties.

Section 8460, Mo. R.S.A., says "The Commissioner shall forthwith revoke the license" of the person upon receiving the record of the final conviction where the crime has been any one of the three following, to wit: (1) Manslaughter, etc., resulting from operation of a motor vehicle; (2) Driving same under influence of liquor or narcotics; (3) A felony in the commission of which a motor vehicle is used. The commissioner has no discretion where the offense comes within any one of the above three classes. It becomes his mandatory duty to revoke the license upon receipt of the record of final conviction.

Section 8465, Mo. R.S.A., provides that if a person drives a motor vehicle on the highways while his license is suspended, he is guilty of a misdemeanor. The statute says:

"Any person whose operator's, registered operator's or chauffeur's license, or driving privilege as a nonresident, has been canceled, suspended or revoked as provided in this article, and who drives any motor vehicle upon the highways of

this State while such license or privilege is canceled, suspended or revoked, shall be guilty of a misdemeanor."

Section 8459, Mo. R.S.A., Subdivision (a), prescribes the duty of the Court, when the defendant has been convicted of an offense for which it is the mandatory duty to revoke his license, to require the surrender of all the defendant's "State licenses, certificates or badges then held" by the defendant, and they, along with the record of conviction, shall be by the Court forwarded to the commissioner. Said Subdivision (a) deals with offenses arising to the dignity of felonies such as those described in Section 8460, supra, but does not deal with misdemeanors.

Subdivision (b) of Section 8459 first prescribes the duties of the Court "having jurisdiction over offenses committed under this article," etc., and they "shall forward to the commissioner a record of the conviction of any person in said court for a violation of any of said laws," and such Court, except the justice of the peace court (magistrate), etc., shall have the power of suspending or revoking the license, etc., and shall tell the commissioner about it. The latter part of Subdivision (b) deals with the duties of the justice of the peace courts and courts of criminal correction, and states they "shall forward to the commissioner a record of the conviction \* \* \* for a violation of any of said laws," and may recommend suspension or revocation of the license and the commissioner may, but is not required to, act accordingly.

It appears that prior to enactment of the magistrate's bills the justice of the peace court did not have power to suspend or revoke the license of a violator although such court did have the power to convict where the violation was a misdemeanor.

Section 8455, Mo. R.S.A., prescribes a list of acts which are misdemeanors, such as knowingly possessing a suspended driver's license. Such a crime could have been prosecuted before the justice of the peace courts prior to the enactment of the magistrate law, but the justice of the peace could not have suspended or revoked the license and could only forward the record to the commissioner and recommend suspension or revocation.



The first part of said Subdivision (b) of Section 8459 states: "Every court having jurisdiction over offenses" committed in three ways, to wit, (1) under this article, (2) under any statute regulating operation of motor vehicles on highways, and (3) any felony in the commission of which a motor vehicle is used. While justices of the peace had authority under the law to try misdemeanor cases involving a violation of the Driver's License Law, they could, with reference to suspending or revoking the license, go no further than recommending the same to the commissioner, and Section 656.1, supra, confers no greater rights on the magistrate court than the justice of the peace court had.

The next inquiry is, do the magistrate courts have greater power than the justice of the peace courts in this respect, and, if so, why and where is it stated.

Senate Bill No. 193 was enacted by the 1945 Legislature pursuant to the provisions of the new Constitution (See Sections 18, 19, 20 and 21 of Article V of the 1945 Constitution), and by the terms of said bill it took effect on January 1, 1947. Section 1 thereof provides as follows:

"Magistrates shall have concurrent original jurisdiction with the circuit court, coextensive with their respective counties in all cases of misdemeanors, except in cities having courts exercising exclusive jurisdiction in criminal cases, or as otherwise provided by law."

By the terms of said law, which became effective in Pike County on January 1, 1947, magistrate courts have concurrent original jurisdiction with the circuit courts as to misdemeanors in their county.

Senate Bill No. 193, by said quoted provision, confers no greater powers upon magistrate courts than had been conferred theretofore upon justice of the peace courts by Section 3804, R.S. Mo. 1939. Under the latter section justice of the peace courts had "concurrent original jurisdiction" over misdemeanors in such counties as Pike, and it would seem to follow that magistrate courts do not have any enlarged or greater jurisdiction over misdemeanors in counties such as Pike County than justice of the peace courts formerly had.

Honorable James D. Clemens -4-

Conclusion.

It is our opinion that the magistrate court in such counties as Pike County, Missouri, does not have authority to suspend or revoke a driver's license when the defendant has been convicted of a misdemeanor.

Yours truly,

DRAKE WATSON  
Assistant Attorney General

APPROVED:

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J. E. TAYLOR  
Attorney General

DW:ml

COUNTY ASSESSORS: Section 15 provides that the record owner of real property must be notified when the assessor increases the valuation of the property.

November 1, 1947



Honorable George R. Clark  
Assessor of Jackson County  
Kansas City, Missouri

Dear Mr. Clark:

This is in reply to your letter of October 28, 1947, in which you requested an opinion from this department, reading as follows:

"I am anxious to have an opinion rendered by your office regarding the following situation:

"For instance, the Assessor raises a piece of property for the year 1946 from \$20,000 to \$30,000 valuation, and so notifies said taxpayer by a letter. The taxpayer appeals this valuation to the County Board of Equalization. The Board reduces this figure to \$25,000 for the year 1946.

"This officer realizes he is not bound by the action of the Board of Equalization in 1946, and he values the above said property for \$30,000 for the year 1947, which is the same figure he had assessed it for the prior year.

"Because of the Board of Equalization reduction, is the Assessor required, for the year 1947, to again send a notice to said taxpayer?"

Your request calls for an interpretation of the applicable sections, which we set out below:

Section 10, Laws of Missouri, 1945, page 1785, reads, in part, as follows:

" \* \* \* After receiving the necessary forms the assessor or his deputy or deputies shall, except in the City of St. Louis, between the first day of January and the first day of June, 1946, and each year thereafter, proceed to make a list of all real and tangible personal property in his county, town or district, and assess the same at its true value in money in the manner following, to wit:  
\* \* \*"

Section 15, Laws of Missouri, 1945, page 1787, reads as follows:

"Whenever any assessor shall increase the valuation of any real property he shall forthwith notify the record owner of such increase, either in person, or by mail directed to the last known address; every such increase in assessed valuation made by the assessor shall be subject to review by the county board of equalization whereat the land owner shall be entitled to be heard, and the notice to the landowner shall so state."

Section 44, Laws of Missouri, 1945, page 1798, reads as follows:

"Every person who thinks himself aggrieved by the assessment of his property may appeal to the county board of equalization, in person, by attorney or agent, or in writing."

When the County Board of Equalization reduced the assessed valuation for the year 1946, that action had the effect of setting the value of the property at \$25,000. Section 15, Laws of Missouri, 1945, page 1935, reads, in part, as follows:

" \* \* \* Second, they shall reduce the valuation of such tracts or parcels of

land or of any tangible personal property which, in their opinion, has been returned above its true value as compared with the average valuation of all the real and tangible personal property of the county.  
\* \* \*

When the assessor raises the value on the property for the year 1947 to \$30,000, he is, within the meaning of Section 15, increasing the valuation of the property. Therefore, he should notify the owner of the increase by proper notice, in order that the property owner may be able to assert the right of appeal given him by both Section 15 and Section 44. To hold otherwise would mean that the right of appeal given the property owner by these sections might be withheld.

Conclusion.

It is the opinion of this department that Section 15 provides that the record owner of real property must be notified when the assessor increases the valuation of the property. This is so even though the assessor assesses the property at the same figure as last year, but which figure was reduced by the County Board of Equalization on appeal.

Respectfully submitted,

JOHN R. BARTY  
Assistant Attorney General

APPROVED:

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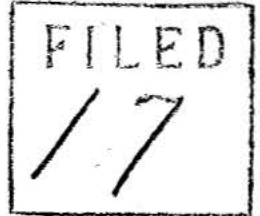
J. E. TAYLOR  
Attorney General

JRT:ml

REAL ESTATE BROKERS:

A person who is not engaged in the real estate business, who does not advertise or hold himself out as a real estate broker, and who, in a single transaction obtains a buyer of real estate for another for a promised compensation, is not a real estate broker within the meaning of the Missouri Real Estate Commission Act.

December 4, 1947



Honorable James D. Clemens  
Prosecuting Attorney  
Pike County  
Bowling Green, Missouri

Dear Sir:

We have received your letter of Nov. 20, 1947, which is as follows:

"The opinion of your office is requested in the following matter:

"A local resident who is a farmer and trader is not licensed as a real estate broker or salesman as provided by Sections 8300.1-.18. This man has assisted a woman in the sale of her farm, and now claims that she agreed verbally to pay him a 5% commission for the sale of the farm. The woman had written the trader saying that she would appreciate anything he could do for her in finding a buyer. The woman is old and in poor health, the trader is aggressive and is threatening suit against the woman for a commission.

"Section 8300.17 provides a penalty for a violation for the other parts of the Section, but a question arises as to whether the trader's actions are in violation of the law. Section 8300.3 defines a broker or salesman as one who offers to buy or sell the real estate of others, but that section in its last clause excludes any person who does not hold himself out to the public as a real estate dealer, and who might, occasionally, offer to sell real estate. Your opinion is requested as to whether 8300.3 applies to the facts outlined."

Section 1 of the act creating the Missouri Real Estate Commission (Laws of 1941, page 424, Section 8300.1, Mo. R.S.A.) provides that:

"\* \* \* it shall be unlawful for any person, copartnership, association or corporation, foreign or domestic, to act as a real estate broker or real estate salesman, or to advertise or assume to act as such without a license first procured from the Missouri Real Estate Commission."

Section 3 of the act, as amended (Laws of 1945, page 1421), defines a real estate broker as a person who "advertises, claims to be or holds himself out to the public as a real estate broker or dealer and who for a compensation or valuable consideration, as whole or partial vocation, sells or offers for sale, buys or offers to buy, exchanges or offers to exchange the real estate of others; \* \* \* nor shall this act apply to any person who does not advertise or hold himself out to the public as a real estate broker or dealer and who might, occasionally, buy or offer to buy, or sell or offer to sell, or rent or lease or offer to rent or lease any real estate, or to loan or offer to loan money secured by real estate."

Section 16 of the act provides that no person "engaged in the business or acting in the capacity of a real estate broker" may maintain an action for the recovery of compensation for services rendered in buying or selling real estate without alleging that he was a licensed real estate broker or salesman at the time the cause of action arose.

Section 17 of the act provides that violation of any provision of the act shall be a misdemeanor.

There are no reported cases covering the applicability of the statute to the situation which you have presented. However, the statute does expressly exempt from its provisions a person who does not "advertise or hold himself out to the public as a real estate broker or salesman and who might, occasionally, buy or offer to buy, or sell or offer to sell real estate." The act does include persons who act in such capacity "as whole or partial vocation," but this provision must be considered in connection with the exception of the person who negotiates an occasional transaction, otherwise the occasional transaction exemption would be meaningless.



In the situation which you present, the person who assisted in the transaction was requested to do so by the owner of the real estate. There is no indication in the information which you have presented that he held himself out to the public as a real estate dealer. You describe him as "a farmer and trader," but have not indicated that he has engaged in other real estate transactions similar to this, and for the purposes of this opinion, we have assumed that he has not. In the absence of such other transactions and of a holding of himself out to the public as a real estate dealer, this is, we feel, a situation to which the exemption of an occasional transaction was intended to apply.

The statutes in other jurisdictions covering the licensing of real estate brokers and salesmen differ considerably. None has been found with the identical language of the Missouri definition. However, as a general rule, even where there is no express exemption applicable to an occasional transaction, the courts have held that, in the absence of holding out or advertising as a real estate broker, a person who, for a promised compensation, finds a purchaser in a single transaction is not a broker within the meaning of the statute, and is not required to obtain a license. In the case of *Noll v. Mastrup*, 233 Ia. 1176, 11 N.W. (2d) 367, the court held that the Iowa statute does not include a farmer and dealer in livestock who, in an isolated transaction, procures a purchaser of real estate for another. To the same effect are the cases of *Young v. Kidder*, 33 N.W. 654, 275 Pac. 98; *Sheppard v. Hulseberg*, 171 Ia. 659, 131 So. 840; *Schwartz v. Weiner*, 94 Colo. 251, 30 Pac. (2d) 1110. In some states the statute expressly provides that a single transaction shall constitute one a broker, and decisions under such statutes are not relevant here. *Verona v. Schenley Farms*, 312 Pa. 57, 167 Atl. 317, *Massie v. Dudley*, 173 Va. 42, 3 S.E. (2d) 176.

#### CONCLUSION

A person who is not engaged in the real estate business, who does not hold himself out as a real estate broker, and who, in a single transaction, obtains a buyer of real estate for another for a promised compensation is not a real estate broker within the meaning of the Missouri Real Estate Commission Act, and we are of the opinion that, in the situation which you have presented, the person who obtained the purchaser was not required to have a license as a real estate broker, and is not subject to prosecution for failure to obtain such license.

Respectfully submitted,

APPROVED:

ROBERT R. DELBORN  
Assistant Attorney General

J. E. TAYLOR  
Attorney General

RRW:LR



TAXATION AND REVENUE: Sec. 8527 of H.C.S.H.B. 784 of 63rd General Assembly held constitutional in so far as it directs return of portion of road and bridge tax to special road districts.

January 13, 1947

FILED

18

Honorable Joe W. Collins  
Prosecuting Attorney  
Cedar County  
Stockton, Missouri

Dear Sir:

Reference is made to your inquiry of recent date, requesting an official opinion of this office, and reading as follows:

"I am writing you for an opinion on the following:

"Our county is a 4th class one operated by the county court.

"Section 12a of Article X of the Constitution of Missouri provides in part that the county court may levy an additional tax, not exceeding 35¢ on each \$100 assessed valuation, all of such tax to be collected and turned in to the county treasury to be used for road and bridge purposes.

"Section 8527 of house bill 784 in part provides that the county court may levy an additional tax, not exceeding 35¢ on each \$100 assessed valuation, all of such tax to be collected and turned in to the county treasury, where it shall be known and designated as 'The Special Road and Bridge Fund' to be used for road and bridge purposes and for no other purpose whatever; provided, however, that all that part or portion of said tax which shall arise from and be collected and paid upon any property lying and being within any Special Road District shall be paid into the county treasury and 4/5th of such

part or portion of said tax so arising from and collected and paid upon any property lying and being within any such special road district shall be placed to the credit of such special road district from which it arose and shall be paid out to such special road district upon warrants of the county court in favor of the commissioner or treasurer of the district as the case may be.

"I would desire an opinion as to the validity of the proviso of said section of said house bill. May the county court keep the 35¢ levied as under the Constitution or must it turn over the 4/5ths as provided in the house bill. Our county court would like to know if the house bill is in conflict with the Constitution."

Section 12a of Article X of the Constitution of 1945, referred to in your letter, reads, in part, as follows:

"In addition to the rates authorized in section 11 for county purposes, the county court in the several counties not under township organization, the township board of directors in the counties under township organization, and the proper administrative body in counties adopting an alternative form of government, may levy an additional tax, not exceeding thirty-five cents on each hundred dollars assessed valuation, all of such tax to be collected and turned in to the county treasury to be used for road and bridge purposes. \* \* \*"

Section 8527 of H.C.S.H.E. No. 784 of the 63rd General Assembly, referred to in your letter, reads, in part, as follows:

"In addition to other levies authorized by law, the county court in counties not adopting an alternative form of government and the proper administrative body in counties adopting an alternative form of government, in their discretion may levy an additional tax, not exceeding thirty-five cents on each one hundred dollars assessed valuation, all of such tax to be collected and turned into the

county treasury, where it shall be known and designated as 'The Special Road and Bridge Fund' to be used for road and bridge purposes and for no other purpose whatever; provided, however, that all that part or portion of said tax which shall arise from and be collected and paid upon any property lying and being within any special road district shall be paid into the county treasury and four-fifths of such part or portion of said tax so arising from and collected and paid upon any property lying and being within any such special road district shall be placed to the credit of such special road district from which it arose and shall be paid out to such special road district upon warrants of the county court, in favor of the commissioners or treasurer of the district as the case may be; \* \* \* (Emphasis ours.)

The question, then, which your inquiry squarely presents is whether or not the statutory enactment of the 63rd General Assembly is in conflict with the quoted constitutional provision or is a valid exercise of legislative authority.

May we say, at the outset, that this section has not been the subject of any litigation, so far as we have been able to determine. Such being the case, a presumption of validity and constitutionality attends the legislative enactment until such time as it be held otherwise by a competent judicial tribunal. We quote from *State ex rel. v. Southwestern Bell Tel. Co.*, 352 Mo. 715, 1. c. 724, wherein the Supreme Court quoted approvingly the following from *Barker v. St. Louis County*, 340 Mo. 986, 104 S. W. (2d) 371:

"There is no better settled law in our state than the rule that courts will not hold a statute to be unconstitutional unless it contravenes the organic law in such a manner as to leave no doubt of its unconstitutionality \* \* \*"

We think that an analogous situation to that presented in your inquiry is found in several cases arising under the Constitution of 1875. Section 22 of Article X of the Constitution of 1875 read as follows:

"In addition to taxes authorized to be levied for county purposes under and by virtue of section 11, article X of the Constitution of this State, the county court in the several counties of this State not under township organization, and the township board of directors in the several counties under township organization, may, in their discretion, levy and collect, in the same manner as State and county taxes are collected, a special tax not exceeding twenty-five cents on each \$100 valuation, to be used for road and bridge purposes, but for no other purpose whatever; and the power hereby given said county courts and township boards is declared to be a discretionary power."

For a portion of the period during which the Constitution of 1875 and the quoted constitutional provision was in effect, there existed Section 10482, R. S. No. 1909, as amended, Laws of 1913, page 669, reading, in part, as follows:

"Section 10482. Special road and bridge fund. -- In addition to the levy hereinbefore authorized to be made, the county courts of the several counties of this state, other than those under township organization, may, in their discretion, levy and collect, in the same manner as state and county taxes are collected, a special tax not exceeding twenty-five cents on each one hundred dollars valuation, to be used for road and bridge purposes, but for no other purpose whatever, and the same shall be known and designated as 'the special road and bridge fund' of the county: Provided, however, that in counties in this state in which a special road district exists, or shall exist, or where special road districts exist, or shall exist, as provided for by the laws of this state in article VI of chapter 102 of the Revised Statutes of Missouri, 1909, all that part or portion of said taxes herein mentioned and provided for which shall arise from and be collected and paid upon any property lying and being within such special road district, or districts, shall, by said county courts, be apportioned to such special road district, or districts, from which said tax was collected,

and shall, when collected, upon written application by the commissioners of such special road district, or districts, be paid to said commissioners of such special road district, or districts, by said county courts, by warrants drawn upon the county treasurer, payable to said commissioners, or the treasurer of said special road district, or districts; and all said sums of money so apportioned to said special road district, or districts, and so paid over to the commissioners thereof, or the treasurer thereof, shall be used and expended by said special road district, or districts, by the commissioners thereof, for road and bridge purposes, but for no other purpose whatever, and the county court shall apportion to all other road districts all taxes collected from property in such districts." (Emphasis ours.)

Subsequent to the enactment of this statute, the County Court of Randolph County refused to pay over to the Moberly Special Road District the funds derived from taxes on property located in such special road district. A mandamus action was brought to require such disbursement of the funds, the cause ultimately being decided by the Supreme Court of Missouri, in State ex rel. v. Burton et al., Judges, 266 Mo. 711. The following quotation from the opinion is, we think, germane to the question at hand:

"The constitutionality of section 10482, Revised Statutes 1909, as amended (Laws 1913, p. 669), providing for the apportionment by county courts of taxes collected for road purposes within certain special road districts, is assailed by defendants on various grounds. It is first contended that this statute violates section 22 of article 10 of the State Constitution. It will be recalled that this section provides in addition to taxes authorized to be levied for county purposes (under Sec. 11, art. 10, Constitution), that the county courts of the several counties, not under township organization, and the township board of directors in counties having township organization, may levy and collect as State and county taxes are collected, a special tax of not more than twenty-five-cents on each one

hundred dollars' valuation, to be used for roads and bridges, but for no other purpose whatever, and the power thus conferred on the county courts and township boards is declared to be discretionary.

"Three limitations, two express and one implied, say defendants, are found in this section; the first is as to the rate, the second as to the application of the tax when collected, and the third (which defendants say is implied) that the tax must be expended under the direction of the county court over the entire county.

"As to defendants' contention in regard to the first and second limitations, there is no question, the Constitution in this regard being express and unequivocal. As to the third, it may be conceded as a general proposition that under section 36 of article 6 of the State Constitution county courts are created for the transaction of county business and express jurisdiction is given them in this regard, but it must be borne in mind, despite this provision, that our organic law is not like the Federal Constitution, a grant of power, but is simply a limitation upon power which the Legislature otherwise possesses. (McGrew v. Railroad, 230 Mo. 496; State ex rel. v. Sheppard, 192 Mo. 497; State ex rel. v. Warner, 197 Mo. 650; Glasgow v. Rowse, 43 Mo. 479.) Broadly stated, therefore, the Legislature may enact any law which does not contravene the Federal or State Constitution, and in its interpretation, the courts will hold it valid unless its unconstitutionality is manifest and exists beyond a reasonable doubt. (State v. Buente, 256 Mo. 227; Board of Com. v. Peter, 253 Mo. l.c. 530; Harris v. Bond Co., 244 Mo. 664; State ex rel. v. County Court, 128 Mo. 427.) The admitted implied existence of the third limitation renders it necessary for same to be so clear and unmistakable as to leave no other reasonable construction than that insisted upon by defendants, otherwise their contention cannot be maintained. (Board of Com. v. Peter, 253 Mo. l. c. 530.)

"It is only upon the assumption that the entire business of the county must be conducted by the county court and that the Legislature cannot provide otherwise, that any basis can be found for defendants' contention as to the third limitation. No words in the section authorize it. Consequently it is not such a clear and unmistakable implication as would, under the rule, authorize an affirmative conclusion as to its existence in harmony with defendants' contention, but on the contrary, it is simply an inference. Constitutional provisions cannot be construed by inferences, especially when it is sought by such construction to render a legislative enactment invalid. In thus construing the section of the Constitution under consideration, we are not unmindful of the fact that it contains restrictive language, but the purpose of this language is unmistakable and is expressly limited to the amount of the levy on each \$100 valuation, and the purpose for which the tax is to be used, and not to the officials or body corporate by which it is to be expended. We are not impressed, therefore, with the soundness of defendants' reasoning in so construing section 22, article 10, of the Constitution, as to confine the disbursement of the taxes therein authorized to the county courts of the respective counties, the effect of which would be to render invalid section 10482, Revised Statutes 1909, as amended.

"A fitting supplement to what has been said, and one of the primary principles underlying the system of taxation, is the fact that the inherent power to tax and to appropriate taxes is vested in the Legislature (Art. 10, Constitution) and may be exercised within its discretion when not violative of an express provision of the Federal or State Constitution. (Hann. & St. J. R. Co. v. State Board, 64 Mo. 294.) The comprehensiveness of this power, in the absence of the restrictions indicated, extends to the determination of the time, the amount, the nature and the purpose for which the tax is to be levied. (In re Sanford, 236 Mo. 1. c. 684; 37 Cyc. 724, and cases.) The

legislative power to tax being inherent, the creation of agencies or instrumentalities for the levy, collection and disbursement of such taxes follows as a necessary consequence, and hence the right of the Legislature to enact a law delegating, in this case, the disbursement of the taxes collected to a board of commissioners of a special road district, is not an improper exercise of such power."  
(Emphasis ours.)

In view of the similarity found in the language incorporated in the constitutional and statutory provisions which were in effect at the time this case was decided, as compared with the language in the Constitution of 1945 and the statute now under consideration, we believe that a similar conclusion would be reached by the court. Further, we are cognizant of the statutes relating to the usage to be made of funds received by the commissioners of special road districts, such statutes requiring that the funds be expended for road and bridge purposes exclusively. Consequently, the tax, although raised on a county-wide basis, would yet be used for the public purposes for which the levy is authorized if placed in the hands of the commissioners of the various special road districts. Therefore, no diversion could take place in the use of the funds from the purpose for which they were raised. We, therefore, reach the conclusion that the enactment of Section 8527 of H.C.S.H.B. No. 784 of the 63rd General Assembly is not violative of the constitutional provision found as a part of Section 12a of Article X of the Constitution of 1945.

#### CONCLUSION

In the premises, we are of the opinion that Section 8527 of H.C.S.H.B. No. 784 of the 63rd General Assembly is constitutional, and that the county court must, in accordance with its provisions, place to the credit of each special road district found in its county the taxes arising upon the property found in each of such special road districts by virtue of the provisions of Section 12a of Article X of the Constitution of 1945 and Section 8527 of H.C.S.H.B. No. 784 of the 63rd General Assembly.

Respectfully submitted,

WILL F. BERRY, Jr.  
Assistant Attorney General

APPROVED:

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J. E. TAYLOR  
Attorney General

WFB:HR



ELECTIONS: Cou y hospr'tal.

FILED

18

February 13, 1947

2/13/47

Honorable Clyde E. Combs  
Prosecuting Attorney  
Barton County  
Lamar, Missouri

Dear Sir:

This is in reply to your letter of recent date, requesting an official opinion of this department, and reading as follows:

"As prosecuting attorney of Barton County I request the opinion of your office in the following matters:

I.

"In February 1946 Barton County, under the authority of Sections 15192 and following, R. S. No. 1939, voted a \$100,000 bond issue for a county hospital, said bonds to be retired from the proceeds of a one and one-half mill tax for such purposes. Five trustees were appointed and later elected and bonds authorized by the special election have been issued. This election was held and action taken thereunder in anticipation of a federal grant being issued to the county to aid in the construction of the county hospital. At the present time the trustees and county officials are of the opinion that it will be at least two years before any aid from the federal government can be expected in this project. They are now desirous of calling another special election for the issuance of another \$100,000 in hospital bonds so that the county can proceed with the construction of the hospital without federal aid, this new bond issue to be retired with an additional one-half mill tax.

"In examining the matter I find that Sections 15192, 15193, 15194 and 15195 have been reenacted by the Laws of 1945, and that Sections 15196 and 15197 have been repealed. There is no provision in the reenacted statutes setting out the procedure to initiate the calling of a special election nor giving the required notice necessary for said election, nor the type of ballot to be used therein. Also, there is no limitation as to the amount of the tax as was set out in old Section 15192, with the exception of the constitutional limitation as set out in Article 6, Section 26b.

"The last completed assessment in Barton County showed the assessed valuation to be over \$13,000,000 and the only outstanding indebtedness of the county at the present is the above mentioned hospital bond issue of \$100,000.

"I request your opinion as to the manner in initiating the calling of a special election on the proposed bond issuance, the required notice to be given thereof, and whether or not there is any provision in the law making the proceeding for the issuance of another \$100,000 for the erection of a county hospital unlawful.

2.

"At the present time petitions are being distributed and signed in the county under the provisions of Sections 10376.1 and 10376.2 to initiate a special election to submit a proposal of an annual distribution of the capital of the liquidated county and township school funds. Should the necessary petitioners be obtained, I request the opinion of your office on the question that if the required notices of this election and the election for the issuance of county hospital bonds as set out above be separately given, but integrated so that the date of the special election on each issue would fall on the same day, whether there is any provision of the law making it unlawful for the special election in this matter and the matter set out above to

be held on the same day and thus save the added expense of two special elections on different days."

Section 15192 of House Bill No. 756 of the 63rd General Assembly provides as follows:

"The county courts of the several counties of this state are hereby authorized, as provided in this Article, to establish, construct, equip, improve, extend, repair and maintain public hospitals, and may issue bonds therefor as authorized by the general law governing the incurring of indebtedness by counties. Provided that in all cases where proceedings for the issuance of county bonds have been initiated to the extent that petitions required by existing law have been circulated and filed with the county court containing the signatures of the requisite number of qualified petitioners and an order by the county court has been made pursuant thereto calling an election and fixing the date thereof under any statute repealed hereby, such election shall be held and the results thereof canvassed and certified pursuant to the statutes under which such proceedings were initiated, and if two-thirds of the qualified voters of the county voting thereon at such election shall vote in favor of incurring such indebtedness and of issuing bonds therefor, such bonds may be issued, sold and delivered under the provisions of the statute pursuant to which such proceedings were initiated, and such proceedings and such bonds so issued, shall be valid; or where the issuance of such bonds has been authorized at an election held prior to the effective date of this act, such bonds may be issued, sold and delivered under the provisions of the statute pursuant to which such proceedings were initiated."

That part of Section 15192 of House Bill No. 756 reading, "and may issue bonds therefor as authorized by the general law governing the incurring of indebtedness by counties," refers to House Committee Substitute for House Bill No. 749 of the 63rd General Assembly.

Section 3292 of House Committee Substitute for House Bill No. 749 provides that any county, by vote of two-thirds of the qualified electors voting thereon, may become indebted in an amount exceeding in any year the income and revenue provided for such year plus any unencumbered balances from previous years, provided such indebtedness shall not exceed five per centum of the value of taxable tangible property therein.

Section 3294 provides that before incurring any indebtedness under the provisions of Section 3292, the county shall provide for the collection of an annual tax sufficient to pay the interest and principal of the indebtedness within twenty years.

Section 3295 provides that any number of qualified electors of the county, not less than one per cent or 300, whichever is greater, as determined by the vote for governor in the county in the last election at which a governor was elected, may present a petition for such election. The county court then orders the election for the purpose set forth in the petition, specifying the time, place and purpose of the election.

Section 3296 provides that the clerk of the court shall give two weeks' notice of the election, such notice to state the time and purpose of the election and the amount of indebtedness to be incurred.

Section 3297 provides the form of the ballot.

Sections 3298 to 3300b provide for the action to be taken by the county court in case two-thirds or more of the qualified voters of such county vote for the incurring of such indebtedness.

These provisions are found in Missouri Revised Statutes Annotated, Sections 3292 to 3300b, inclusive.

From the above set out provisions of House Committee Substitute for House Bill No. 749, it is clear that the petition for the election must be signed by not less than one per cent or 300 taxpayers of the county, whichever number is greater, and that the notice required for such election is two weeks.

Since the provision for holding this election in a county is for incurring indebtedness for county purposes, the additional indebtedness necessary for the erection of a hospital may be incurred at such election. There is no prohibition in these or any other statutes against this procedure.

Further, we find that in the case of State ex rel. Holman v. Trimble, 316 Mo. 1041, 1. c. 1044, the Supreme Court of Missouri said:

" \* \* \* No question is raised as to the regularity of the proceeding by which the county hospital was established and bonds voted for the erection of the hospital. Trustees were properly elected, and were in charge of the hospital and its property. On August 20, 1919, the hospital trustees met with Mr. Bell, the architect, and opened bids for the construction of the hospital. The county had already voted a one-half mill tax. Bonds had already been regularly issued in the sum of \$75,000 for building the hospital. It was found that the bids for the entire work exceeded the amount of the bonds, and another election was had and an additional half-mill tax was voted, and \$37,500 in bonds were issued, making a total of \$112,500 available for building the hospital."

Although the legality of the second election was not questioned in the above quoted case, the court upheld the legality of all the proceedings in the case, and by such action upheld the validity of the second bond issue for the securing of additional money which was found to be necessary for the erection of a hospital.

We find no statutory prohibition against holding the election for the additional hospital bonds and the election for annual distribution of school funds on the same day. Section 3295 of House Committee Substitute for House Bill No. 749 specifically provides that the election for the incurring of the indebtedness may be a special election, or it may be held on the day of any primary or general election authorized to be held by the laws of this state. This department has held that the election for voting for or against the annual distribution of the capital school fund may be held on the day of a primary election. Since either of these elections may be held on a primary election day, there is no reason why both elections cannot be held on the same day, as special elections. The holding of both elections on the same day, in all probability, would result in the participation of more voters of the county in both elections than if each election were held separately, and the greatest participation by the voters in elections is held by the courts to be the intent of the election laws of this state.

CONCLUSION

It is the opinion of this department that the proceedings for voting additional bonds for the county hospital of Barton County are governed by the provisions of House Committee Substitute for House Bill No. 749; that the petition for such election must be signed by not less than one per cent or 300 qualified electors of such county who are taxpayers, whichever number is greater; that two weeks' notice of the election is required, and that the proceedings for the election and issuance of such additional bonds to build the hospital are valid and legal.

It is further the opinion of this department that such election for voting additional bonds for the construction of a county hospital may be held on the same day as an election to vote for or against the annual distribution of the county capital school funds.

Respectfully submitted,

C. B. BURNS, Jr.  
Assistant Attorney General

APPROVED:

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J. E. TAYLOR  
Attorney General

CBB:HR

Manufacturer's License: A person who quarries and crushes stone and sells same is a merchant and not a manufacturer. A person who makes cheese is a manufacturer.

Merchant's License:

June 24, 1947



Mr. Frank Collier  
Prosecuting Attorney  
Mountain Grove, Missouri

Dear Sir:

This department is in receipt of your request for an official opinion which reads as follows:

"I have been asked by the County Court of Wright County to request your department for an opinion on the following:

"A resident of Douglas county operates a lime crusher in Wright County. The stone is quarried by his employees, and crushed in his machinery. In addition to selling lime, he sells crushed rock. The machinery and equipment is worth some \$40,000, and he sells an enormous amount of both lime and crushed stone.

"A cheese company, a corporation, operating in various counties, has a plant in Mountain Grove, where they buy whole milk and process it into cheese.

"Are the above, or either of them, subject to the provisions of Section 11342.1? If not, what is the proper section for levying a tax against these concerns?"

Laws of Missouri 1945, page 1954 (Section 11342.1 M.S.A.) provides in part as follows:

"All manufacturers in this state shall be licensed and taxed on all raw material and finished products, as well as all the tools, machinery and appliances used by them, in the same manner as is or may be

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June 24, 1947

provided by law for the taxing and licensing  
of merchants; \* \* \* \* \*

(Underscoring ours)

A manufacturer is defined in Section 4, Laws of Missouri 1945,  
page 1855 (Section 11342.4 M.S.A.) as follows:

"Every person, company or corporation who  
shall hold or purchase personal property  
for the purpose of adding to the value  
thereof by any process of manufacturing,  
refining, or by the combination of dif-  
ferent materials, shall be held to be  
a manufacturer for the purposes of the  
foregoing section."

We take up your two questions in the order that they are  
presented in your request to determine whether a person or  
corporation who quarries stone and operates a lime and stone  
crusher, or operates a cheese factory is a manufacturer within  
the meaning of the above two quoted sections.

I.

A person operating a stone quarry and a stone crusher  
is not required to obtain a manufacturer's license.

The weight of authority appears to be that the quarrying, crush-  
ing, or grading of stone, without further alteration of the  
nature of the product, does not constitute "manufacturing,"  
within the meaning of tax statutes. The reasons assigned for  
this rule are generally the same in effect--no new or dif-  
ferent article is produced by the process, the product still  
being stone after such operations, though in altered shapes  
and sizes.

38 C. J., page 987 states:

"Quarrying is not manufacturing, neither  
is crushing of stones in and of itself a  
manufacturing process, unless it results  
in the production of a new and different  
article. \* \* \* \* \*

In Iowa Limestone Co. v. Cook, 211 Iowa, 534, 233 N. W. 682,  
the court, holding that a company engaged in the business of  
blasting limestone from a natural deposit and crushing and



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screening it to merchantable sizes, after which it was loaded and shipped directly to purchasers, was not a "manufacturer," within the meaning of a statute imposing a tax upon manufacturers, said: "The appellant (the company), under the record, does nothing that in any way changes the character of the natural product with which it deals. It simply takes stone from the natural quarry and breaks it into smaller pieces. The material is large stone taken from the quarry, and it is small stone when broken; but nothing whatever is added to or taken from this product by the process of crushing. The process does not change the product into a new or different article, having any new or distinctive name or character."

So, in *Leeds v. Maine Crushed Rock & Gravel Co.*, 127 Me. 51, 141 A. 73, machinery used in excavating and hoisting sand and gravel from a pit, hauling and grading it, and crushing the larger rocks, was held not to be "machinery employed in any branch of manufacture," within the meaning of a statute exempting from taxation machinery so employed, since "application of labor to an article either by hand or mechanism does not make the article necessarily a manufactured article. To make an article manufactured, the application of the labor must result in a new and different article with a distinctive name, character, or use."

In *Schumacher Stone Co. v. Tax Commission*, 134 Ohio St. 529, 18 N. E. (2d) 405, machinery used in crushing and screening limestone into various merchantable sizes without the application of any act or process to change the form of appearance of the broken pieces of stone, each grade being designated according to size and use, mostly for road construction but also for other minor purposes, was held not to be assessable as personal property used in manufacturing. The court pointed out that originally no one would have claimed that the process of crushing and screening stone for road purposes was manufacturing, and intimated that the use of modern machinery to obtain the same result did not render the process a "manufacturing."

Cases holding to the same effect are *People ex rel. Tomkins Cove Co., v. Saxe* (1916) 162 N.Y.S. 408; *Commonwealth v. John T. Dyer Quarry Company*, (1915) 250 Pa. 589, 95 A. 797; *Wellington v. Belmont* (1895) 164 Mass. 142, 41 N. E. 62; *Graff v. Minnesota Flint Rock Co.* (1920) 147 Minn. 58, 179 N. W. 562.

The only case to the contrary is *Rockcastle County v. W. J. Sparks Co.* (1928) 222 Ky. 606, 1. S. W. (2d) 1050 in which the court said:

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"\* \* \* \* By the process in question its shape, size, and adaptability are essentially changed, and the native rock is converted into an article suitable for use as road material. In our opinion this is manufacturing."

In view of the above authorities we believe it is apparent that a person who quarries and crushes rock is not a manufacturer within the meaning of Laws of Missouri 1945, page 1954 so as to require such person to obtain a manufacturer's license.

However, we believe that a person who quarries and crushes rock and sells the same must obtain a merchant's license in view of Section 11304, Laws of Missouri 1945, page 1838 (Section 11304 M.S.A.) which provides in part as follows:

"No person, corporation, copartnership or association of persons shall deal as a merchant without a license first obtained according to law; \* \* \* \* \*

A merchant is defined as in Section 11303, Laws of Missouri 1945, page 1838 (Section 11303 M.S.A.) as:

"Every person, corporation, copartnership or association of persons, who shall deal in the selling of goods, wares and merchandise at any store, stand or place occupied for that purpose, is declared to be a merchant. Every person, corporation, copartnership or association of persons doing business in this state who shall, as a practice in the conduct of such business, make or cause to be made any wholesale or retail sales of goods, wares and merchandise to any person, corporation, copartnership or association of persons, shall be deemed to be a merchant whether said sales be accommodation sales, whether they be made from a stock of goods on hand or by ordering goods from another source, and whether the subject of said sales be similar or different types of goods than the type, if any regularly manufactured, processed or sold by said seller."

June 24, 1947

Therefore a person quarrying and crushing stone and selling the same item at wholesale or retail must obtain a merchant's license.

II.

A person or corporation operating a cheese factory must obtain a manufacturer's license.

Applying the definition of a manufacturer given in Laws of Missouri 1945, page 1855, supra, and the rules laid down in the cases above we believe that a person or corporation who buys whole milk and processes it into cheese must obtain a manufacturer's license.

Cheese is defined in Section 14098, Laws of Missouri 1945, page 83 as:

" \* \* \* \* the product made from the separated curd obtained by coagulating the casein of milk, skimmed milk, or milk enriched with cream. The coagulation is accomplished by means of rennet or other suitable enzyme, lactic fermentation or by a combination of the two. The curd may be modified by heat, pressure, ripening ferments, special molds, or suitable seasoning. \* \* \* \* \* "

The Missouri Dairy Law recognizes the status of cheese as a manufactured article when it provides in Section 14128, Laws of Missouri 1945, page 83 (Section 14128 M.S.A.) that:

"No person, firm, corporation, or association shall offer or expose for sale, sell, exchange, or deliver to a consumer any Cheddar cheese, washed curd cheese, soaked curd cheese, Colby cheese, cheese blends, processed cheese, cheese food compounds, or cheese spreads in which any of the foregoing named varieties of cheese are included, unless such cheese had been either:

"(1) Manufactured from milk or milk products pasteurized as defined in Section 14098 (15) herein; or

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"(2) Subjected to a heating treatment equivalent to cheese pasteurization during the process of manufacture."

We find no cases dealing with the question of whether the processing of cheese is equivalent to the manufacturing of the same but we believe the decisions relating to butter would be highly persuasive in arriving at a correct conclusion.

38 C. J., page 982 states:

"While the pasteurization of milk has been held not manufacturing, butter is said to be a manufactured product."

In *Party v. Boomhower Grocery Co.*, 164 N.Y.S. 775, the court said:

"Butter is an article which is more naturally and properly classified with those that are manufactured. In common parlance the housewife does not prepare but "makes" butter. The producer and consumer alike speak of butter as an article made or manufactured rather than as something which is prepared as by canning or other similar process. It is brought into existence by a mechanical process."

Therefore, we believe that a person or corporation who buys whole milk and processes it into cheese must obtain a manufacturer's license.

#### CONCLUSION

It is therefore the opinion of this department that a person or corporation who quarries and crushes rock is not a manufacturer but a merchant and must obtain a merchant's license. It is further the opinion of this department that a person or corporation buying whole milk and processing it into cheese is a manufacturer and must obtain a manufacturer's license.

Respectfully submitted

APPROVED:

ARTHUR M. O'KEEFE  
Assistant Attorney General

J. E. TAYLOR  
ATTORNEY GENERAL

*Copied  
7/23*

TAXATION: County court has no authority to change the  
COUNTY COURT: valuation of property returned by assessor.  
COUNTY BUDGET: County court may apportion class four demands of  
the budget if there is not sufficient revenue to  
pay all such demands.

July 15, 1947

FILED

18

Honorable Joe W. Collins  
Prosecuting Attorney  
Cedar County  
Stockton, Missouri

Dear Sir:

This is in reply to your letter of recent date wherein  
you request an official opinion from this department on the  
following statement of facts:

"This month the Cedar County Assessor  
turned in his books to the County Clerk.  
The County Clerk made an abstract of his  
records and mailed them in to the Tax Com-  
mission. The County Court would like to  
know if it is its duty to approve or dis-  
approve the books or if it has any duty  
to perform in regard thereto.

"The assessments were not high enough to  
raise the revenue anticipated by the County  
Court in making its budget. The County  
Court thinks the tangible personal property  
is assessed too low and would like to know  
how to get it raised.

"If the taxes are not raised to meet the  
needs of the County as anticipated, the  
County Court would also like to know if  
it should revise its budget as there would  
not be enough money to pay County officials  
in full."

The first part of your request goes to the authority of  
the county court to approve or disapprove the tax books of  
the county assessor when he returns such books to that body.

Under Section 7 of Article VI of the Constitution of  
Missouri, 1945, it is the duty of the county court to manage  
all county business as prescribed by law. Since the duties  
of the county court are only those which are prescribed by  
statute, we must refer to the statutes for the answer to your

question. In the case of Lancaster vs. County of Atchison, 180 S.W. (2d) 706, the court, in referring to the foregoing principle, said at l.c. 708:

"The county courts are not the general agents of the counties or of the state. Their powers are limited and defined by law. These statutes constitute their warrant of attorney. Whenever they step outside of and beyond this statutory authority their acts are void.' \* \* \* "

Referring to the statutes to ascertain the duties of the county court in respect in approving or disapproving the tax books of the assessor, we find that Section 39, Laws of Missouri 1945, page 1796, reads as follows:

"The assessor, except in St. Louis City, shall make out and return to the county court, on or before the 31st day of May in every year, a fair copy of the assessor's book, verified by his affidavit annexed thereto, in the following words, to wit:

" . . . . ., being duly sworn, makes oath and says that he has made diligent efforts to ascertain all the taxable property being or situate, on the first day of January last past, in the county of which he is assessor; that, so far as he has been able to ascertain the same, it is correctly set forth in the foregoing book, in the manner and the value thereof stated therein, according to the mode required by law.

"The clerk of the county court shall immediately make out an abstract of the assessment book, showing aggregate footings of the different columns, so as to set forth the aggregate amounts of the different kinds of real and tangible personal property and the valuation thereof, and forward the same to the State Tax Commission. Upon failure to make out and forward such abstract to the State Tax Commission on or before the twentieth day of June, the clerk shall, upon conviction be deemed guilty of a misdemeanor."

From an examination of this section, it will be seen that the county court has nothing to do but accept the books of the assessor when they are returned by that officer. The court neither approves or disapproves these books. When the books are returned to the county court, this section requires the clerk to make out the abstract of the books and forward it to the State Tax Commission. Section 11003, Laws of Missouri 1945, page 1776, authorizes county boards of equalization to "raise the valuation of all tracts or parcels of land and all tangible personal property as in their opinion have been returned below their real value." However, the value of a class of property may not be reduced or increased below or above that fixed by the State Tax Commission. Trust Co. vs. Schramm, 269 Mo. 489. As provided for in said Section 39, hereinbefore quoted, the county clerk forwards the abstract of the assessment book to the State Tax Commission. The State Tax Commission was set up and created by H.C.S.H.B. No. 528 of the 63rd General Assembly, Laws of Missouri 1945. Under Section 15 of this act, Laws of Missouri 1945, page 1810, the Tax Commission equalizes real and tangible property among the several counties in the state. Under the first subdivision of this section, it is provided that "it shall add to the valuation of each class of the property, real or tangible personal, of each county which it believes to be valued below its real value in money such per centum as will increase the same in each case to its true value." The Tax Commission, under this act, seems to have general supervision over taxing officers and over the assessment of taxes. Sub-section 9 of said Section 15, Laws of Missouri 1945, page 1813, provides as follows:

"At least one member of the Commission, or some duly authorized representative, shall officially visit the several counties of this State at least once in two years and inquire into the methods of assessment and taxation and ascertain whether assessing and revenue officers are faithfully discharging their duties as required by law and are diligent in enforcing the laws pertaining to the general property tax."

From an examination of the various statutes relating to the assessment and collection of taxes, we fail to find where the county court has any authority to approve or disapprove the assessment books or assessments made by the county assessor. Since there is no such authority conferred on the county court by statute, then applying the rule announced in the

Lancaster case, supra, that body would have no authority to approve or disapprove the books of the county assessor or to raise or lower the valuations placed on property by that officer.

Again referring to the State Tax Commission act, it would seem that that body would be the one to which the county court should petition for raising the assessment of all the property of a class in the county. The Tax Commission, under the first sub-section of Section 15, supra, would have authority to make such a raise if the facts justified it.

On your last question, you suggest that if the taxes are not raised to meet the anticipated demands of the county that the court would like to know if it would be authorized to revise its budget so that there would be enough money to pay county officials in full.

We refer you to the county budget law, Article 11, Chapter 73, R. S. Mo. 1939, together with the amendments thereto, made in Laws of Missouri 1941, page 650. Referring to the budget act, it will be noted that the General Assembly has provided that claims against the county be classified in six different classes. It further appears from this act that all the claims in a class shall be paid before claims in the next class below it are paid. In other words, moneys must be apportioned and set apart, sufficient for the payment of class one claims before provisions are made for the payment of class two claims. This same principle applies to all of the classes of demands.

From an examination of Section 10912 of the budget act, it appears that the lawmakers contemplated such a contingency as has occurred in your county with respect to the payment of the salaries of officers. The portion of this section applicable to such a contingency reads as follows:

"\* \* \* If for any year there should not be sufficient funds for the county court to pay all the approved estimates under class 4, after having provided for the prior classes, the county court shall apportion and appropriate to each office the available funds on hand and anticipated, in the proportion that the approved estimate of each office bears to the total approved estimate for class 4."



This provision in said Section 10912 is a case in which the county budget may be revised. Under these circumstances, a county court is required to pay class one and two claims out of county revenue, class three claims out of road funds, and then officers' salaries are paid out of class four. Of course, if there is not enough revenue available to pay any of class four claims, there is no statutory authority for paying the officers. If, however, there is some revenue to pay class four demands but not enough to pay them in full, then under the provisions of Section 10912, supra, the amount of funds available is apportioned to the officers in proportion to the amount budgeted to that office.

#### CONCLUSION

Therefore, it is the opinion of this department that the county court does not have any duty or authority to approve or disapprove the tax books when the assessor returns them to that body.

It is further the opinion of this department that the county court does not have any authority to lower or raise any valuations returned by the assessor but that that body would have authority to request the State Tax Commission to adjust the assessments so that the property in said county is assessed at its true value.

We are further of the opinion that if the revenue of the county is not sufficient to pay class four demands that the county court may apportion and appropriate to each office the available funds on hand and anticipated for that class of demands in the proportion that the approved estimate of each office bears to the total approved estimate for class four demands.

Respectfully submitted,

TYRE W. BURTON  
Assistant Attorney General

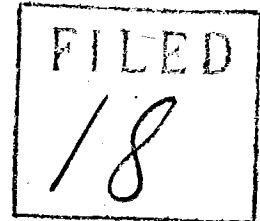
APPROVED:

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J. E. TAYLOR  
Attorney General

TWB:VLM

MAGISTRATES: No fees accrued to magistrate court when judge thereof grants temporary injunction. No record made in magistrate court of such proceeding.



October 9, 1947

10/17

Honorable Clyde E. Combs  
Prosecuting Attorney  
Barton County  
Lamar, Missouri

Dear Mr. Combs:

This is in reply to your letter of October 3, 1947, requesting an opinion from this department, which reads as follows:

"Do any fees accrue to the Magistrate Court when a Judge thereof issues a temporary injunction in a matter pending in the circuit court when the circuit Judge is absent from the county and court is not in session, and if so, in what manner are they paid? Also, what record should be made by the Magistrate Clerk in his office in such cases.

"The above refers to injunctions obtained in the Magistrate Court under the provisions of Sections 1662 and 1663, Revised Statutes of Missouri 1939, as amended by the laws of 1945."

Section 1661, Mo. R.S.A., which provides that injunctions may be granted by the judges of magistrate courts, is as follows:

"Injunctions may be granted by the circuit court or judge thereof in vacation, and by the magistrate court or any magistrate thereof in vacation."

It is further provided in Section 1662, Mo. R.S.A., that a judge of the magistrate court can grant said injunctions only when the circuit court is not in session and the judge thereof is absent from the county. Said section reads:

"Before an injunction shall be granted by the magistrate court or any magistrate, the applicant shall produce satisfactory evidence that there is not then any circuit court in session nor any judge of the circuit court within such county."

The procedure by which an injunction is obtained is found in Section 1663, Mo. R.S.A., which provides as follows:

"Before any party shall be entitled to the injunction herein provided, he shall have filed in the circuit court, or in the office of the clerk thereof, having jurisdiction of the suit, his petition setting forth his cause of action; and when the injunction shall be granted by the circuit judge in vacation, or the magistrate court or judge thereof in vacation, it shall be in writing, signed by the judge aforesaid granting the same, and returned together with the bond, to the office of the clerk of the circuit court wherein such petition shall have been filed, and become a part of the record in said cause; and shall be enforced as an injunction of the circuit court."

It will be noted that the petition must be filed in the circuit court, and when the injunction prayed for is granted by the circuit judge in vacation or by the magistrate court or judge thereof in vacation, said injunction must be returned, together with the bond, to the office of the circuit clerk where it becomes a part of the record in said cause and is enforced as an injunction of the circuit court. The injunction bond is, of course, also approved and filed in the circuit court. Section 1672, R.S.Mo. 1939.

The above procedure is followed even though said injunction is granted by a judge of the magistrate court. It is, therefore, apparent that said proceeding is one solely within the cognizance of the circuit court and is in no instance a proceeding of the magistrate court. A judge of the magistrate court is authorized to grant said injunction only when the circuit court is not in session and the judge thereof is absent from the county. And even in such case said judge proceeds

on a petition filed in the circuit court, and when an injunction is granted and signed by said judge it is returned to the circuit clerk's office where it becomes a record of the circuit court and is enforced as an injunction of the circuit court. Injunctions granted by judges of the magistrate court are temporary injunctions and a part of the cause filed in the circuit court. In the case of State v. Corneli, 152 S.W. (2d) 83, we find this stated at page 86:

" \* \* \* Neither the county court nor the circuit court can grant an injunction until a petition has been filed in the circuit court, which was not done in this case. The Act of 1939 does not, either expressly or impliedly, enlarge the power of county courts with reference to injunctions."

Also, in the case of Missouri Electric Power Co. v. City of Mountain Grove, 176 S.W. (2d) 612, the court said at pages 615 and 616:

"Section 22, Article VI, Constitution of Missouri, provides that the circuit court shall have 'exclusive original jurisdiction in all civil cases not otherwise provided for.' Respondents contend that the phrase 'not otherwise provided for' is to be construed as, not otherwise provided for in this constitution, and respondents urge that, there being no provision of the constitution giving jurisdiction to county courts to grant injunctions, the exclusive jurisdiction to grant injunctions must be and remain in the circuit courts. \* \* \* Sections 1661, 1662 and 1663, supra, do not, as we have stated, purport to give to county courts jurisdiction of injunction suits. The county court cannot grant a temporary injunction until a petition is filed in the circuit court. State ex rel. Association for Convalescent Crippled Children v. Corneli, supra. Injunctions which may be granted by the circuit judge in vacation, or by the county court or judges thereof in vacation, are

temporary injunctions. \* \* \* The temporary injunction so granted was returnable to ( and is to be 'enforced as an injunction of the circuit court.' Section 1663, supra; State ex rel. Association for Convalescent Crippled Children v. Corneli, supra."

(Section 22 of Article VI of the 1875 Constitution is now Section 14 of Article V of the 1945 Constitution, and contains the same provision with respect to civil jurisdiction; Sections 1661, 1662 and 1663 are substantially the same as those in the 1939 statutes, except that magistrate courts have been substituted for county courts.)

The above conclusion is in line with the general plan of the lawmakers in authorizing judges of the magistrate court to act in certain instances in the absence of the circuit judge (see, for example, Section 20 of Article V of the Constitution and Section 11 of Senate Bill No. 94 of the 64th General Assembly).

In view of the foregoing, we believe that no fees accrue to the magistrate courts in injunction proceedings. Under the provisions of Section 23 of Senate Bill No. 94 of the 64th General Assembly a fee of \$5.00 is allowed the magistrate in each civil proceeding instituted in his court. Injunction proceedings are instituted in the circuit court and the required fees are paid into that court. The judge of the magistrate court is authorized merely to act in place of the circuit judge in injunction proceedings in certain instances.

With respect to the records of such proceedings, it is expressly provided that when a judge of the magistrate court grants an injunction the same shall be returned to the office of the circuit clerk wherein the petition was filed and become a part of the record in said cause. The fact that said injunction is a temporary restraining order and made a part of the record of the cause in the circuit court eliminates the necessity of any record of the same in the magistrate court.

Conclusion.

It is, therefore, the opinion of this department that no fees accrue to the magistrate court when a judge thereof grants a temporary injunction when the circuit court is not in session and the circuit judge is absent from the county, and, further, that no record should be made by the magistrate clerk of such proceeding.

Respectfully submitted,

DAVID DONNELLY  
Assistant Attorney General

APPROVED:

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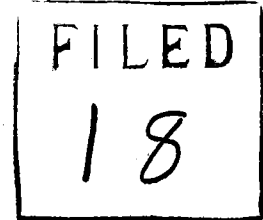
J. E. TAYLOR  
Attorney General

DD:ml

SPECIAL ROAD DISTRICTS: Special road district formed in county  
TOWNSHIP ORGANIZATION: not under township organization under  
provisions of Arts. 10 or 11, Chap. 46,  
R.S.A., is not automatically dissolved  
when county votes in township organiza-  
tion, but such road district is not en-  
titled to any part of taxes received by  
county or township under provisions of  
Sec. 8527, Laws 1945, p. 1478, or Sec.  
8820, H.B. 42, 64th General Assembly.

October 13, 1947

Honorable Frank Collier  
Prosecuting Attorney  
Wright County  
Mountain Grove, Missouri



Dear Sir:

This is in reply to your letter of recent date, requesting  
an official opinion of this department, which reads as follows:

"As prosecuting attorney of Wright County,  
I request the opinion of your office on  
the following:

"For many years prior to the adoption of  
township organization in Wright County the  
Mansfield Special Road District existed in  
Pleasant Valley Township of said county.  
Since the adoption of township organiza-  
tion, 1920, the road district has continued  
to operate and exist under the former or-  
ganization.

"The question arises as to whether the adop-  
tion of township organization in the county  
automatically dissolved the special road  
districts that existed in the county at the  
date thereof, or whether they must be dis-  
solved as other districts are provided for.

"It has been contended that the district was  
automatically dissolved, and that the of-  
ficers of the district, as well as of the  
township are violating the law in collecting  
and disbursing funds."

There is no provision in Chapter 101, Mo. R. S. A., the  
chapter on township organization, which provides for the dissolu-  
tion of a special road district organized in a county not under

township organization when such county votes in township organization.

A method of dissolution of the "eight mile" special road districts in counties not under township organization is provided for in Section 8706, Mo. R. S. A., which is for resubmission after the expiration of four years after formation of the district, upon the petition of fifty resident taxpayers. The county court then holds an election for voting for or against dissolution of the district.

Section 8707, Mo. R. S. A., provides the method of including in the tax levy money needed to pay the principal and interest on bonds that any such road district has issued, if such district is dissolved.

The method for dissolution of "benefit assessment" special road districts in counties not under township organization is provided in Sections 8730 and 8731, Mo. R. S. A. Section 8730 provides the method of dissolution upon the application of any owner of land within the road district, and Section 8731 provides the method for dissolution upon the petition of the owners of a majority of the acres of land within such road district.

Section 8732, Mo. R. S. A., provides that such dissolution shall not invalidate or affect any right accruing to the road district or to any person, or invalidate any contract with regard to such road district.

Section 8733, Mo. R. S. A., provides for the appointment of a trustee for the road district by the county court when such road district is dissolved.

Sections 8734 and 8735, Mo. R. S. A., provide for the duties of the trustee and for the final settlement of such trustee.

Since Chapter 101, Mo. R. S. A., contains no provision for the dissolution of a special road district formed in a county not under township organization when such county does vote to become a county under township organization, and the Legislature has provided statutory methods for dissolution of the "eight mile" and "benefit assessment" special road districts in counties not under township organization, it is our opinion that the mere fact that in Wright County, in 1920, township organization was adopted did not in and of itself dissolve a special road district which was in existence prior to such time.

In the case of State ex rel. v. Thompson, 315 Mo. 56, the Supreme Court of Missouri had before it a case involving an "eight



mile" special road district, that is, one formed under what is now Article 10, Chapter 46, Mo. R. S. A., and the court said, l. c. 68:

"The road district, in this case is, in the broad sense, a municipal corporation, a political subdivision of the State, with power to impose general taxes to carry out the purpose for which it exists. \* \* \*

"The district here exists in perpetuity, or until disorganized by legislative act. \* \* \*"

In the case of State ex rel. v. Burton, 266 Mo. 711, the Supreme Court had before it a case involving a "benefit assessment" special road district formed in a county not under township organization under the provisions of what is now Article 11, Chapter 46, Mo. R. S. A., and the court said, l. c. 722-723:

"The power of the Legislature in the creation of municipalities and public corporations of every description is not only absolute but unlimited in the absence of constitutional inhibitions. In the presence of this power we must presume that in the creation of the special road districts the Legislature deemed them necessary, expedient and in the public interest. Thus formed, authority exists as a necessary consequence of legislative power, to provide means for their perpetuation or maintenance or their change or abolition, as in the wisdom of the Legislature seems best."

From the opinions in the cases above quoted we believe that it is clear that such special road districts do continue their existence until dissolved in the manner provided for by the statutes of this state, above pointed out.

However, it is our further opinion that the special road district in Wright County, whether an "eight mile" district or a "benefit assessment" road district, is not entitled to the road taxes collected under the provisions of Section 8527, Laws of Missouri, 1945, page 1478, four-fifths of which taxes are allotted to the "eight mile" road district by Section 8691, Laws of Missouri, 1945, page 1494, and to the "benefit assessment" road district in counties not under township organization by Section 8715, Laws of Missouri, 1945, page 1496.

Section 8527, Laws of Missouri, 1945, page 1478, provides, in part, as follows:

"In addition to other levies authorized by law, the county court in counties not adopting an alternative form of government and the proper administrative body in counties adopting an alternative form of government, in their discretion may levy an additional tax, not exceeding thirty-five cents on each one hundred dollars assessed valuation, all of such tax to be collected and turned into the county treasury, where it shall be known and designated as 'The Special Road and Bridge Fund' to be used for road and bridge purposes and for no other purpose whatever; Provided, however, that all that part or portion of said tax which shall arise from and be collected and paid upon any property lying and being within any special road district shall be paid into the county treasury and four-fifths of such part or portion of said tax so arising from and collected and paid upon any property lying and being within any such special road district shall be placed to the credit of such special road district from which it arose and shall be paid out to such special road district upon warrants of the county court, in favor of the commissioners or treasurer of the district as the case may be; \* \* \* "

We are enclosing a copy of an official opinion of this department rendered under date of July 18, 1947, to R. E. Moulthrop, in which we hold that no levy under authority of Section 8527, Laws of Missouri, 1945, page 1478, may be made by the county court in a county under township organization.

Section 8820 of House Bill No. 42 of the 64th General Assembly, which bill became effective September 10, 1947, provides, in part, as follows:

" \* \* \* except that amounts collected within the boundaries of road districts formed in accordance with the provisions of Article 18, Chapter 46, Revised Statutes of Missouri, 1939, shall be paid to the treasurers of such road districts; \* \* \* "

It is clear, then, that under the provisions of Section 8820, in counties under township organization, the money arising from the thirty-five cent tax provided therein shall be paid only to the treasurers of special road districts formed under the provisions of Article 18, Chapter 46, Mo. R. S. A., and such tax money cannot be paid to road districts organized under the provisions of Articles 10 or 11, Chapter 46, Mo. R. S. A.

#### CONCLUSION

It is the opinion of this department that a special road district organized in Wright County under the provisions of Articles 10 or 11, Chapter 46, Mo. R. S. A., prior to the adoption of township organization in such county in 1920, was not dissolved by the adoption of township organization by Wright County.

It is further the opinion of this department that none of the taxes authorized to be levied by Section 8527, Laws of Missouri, 1945, page 1478, or Section 8820 of House Bill No. 42 of the 64th General Assembly, can be turned over to such road district.

Respectfully submitted,

C. B. BURNS, JR.  
Assistant Attorney General

APPROVED:

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J. E. TAYLOR  
Attorney General

*2 to Smith*  
PROBATE COURT:  
INDIGENT INSANE:  
COUNTY BUDGET:

County is liable for fees accruing in Probate Court in indigent insane hearings. Such fees, when not included in county budget, should be paid out of class 5 or class 6 of such budget.

November 13, 1947

FILED

18

Honorable Joe W. Collins  
Prosecuting Attorney  
Cedar County  
Stockton, Missouri

Dear Sir:

This is in reply to your letter of recent date, requesting an official opinion of this department and reading as follows:

"Our Probate Judge has filed a certificate that the records in his office show \$82.00 fees have accrued in indigent insane cases since January 1, 1947 and that said fees are due his office and properly chargeable to Cedar County, Missouri, and requests payment of said fees.

"Would you please advise if these fees are properly chargeable against Cedar County.

"The County Budget for this year did not provide for payment of these fees. If they are properly chargeable against Cedar County, may they be paid although not budgeted for, and if paid, out of what class of expenditures under our budget law."

We are enclosing official opinions of this department rendered under date of January 16, 1947, to Gordon J. Massey, and February 3, 1947, to Emory C. Medlin, which we believe answer your question with regard to the payment of fees in the Probate Court in indigent insane cases since January 1, 1947.

The fact that the County Court failed to include in its budget an item for such payment does not relieve the county of its duty to make such payment. In the case of Gill v. Buchanan

County, 142 S. W. 665, the Supreme Court of Missouri, in discussing the question of whether or not Buchanan County was liable to pay a county judge his full salary, even though not budgeted by the county court, said, l. c. 668:

"To properly accomplish that purpose, mandatory obligations imposed by the Legislature and other essential charges should be first budgeted, and then any balance may be appropriated for other purposes as to which there is discretionary power. Failure to budget funds for the full amount of salaries due officers of the county, under the applicable law, which the county court must obey, cannot bar the right to be paid the balance. \* \* \*"

Under the holding of this case it is clear that the failure to budget an expense for which the county is liable does not relieve the county of its duty to make such payment.

The payment of the fees which have accrued in the indigent insane cases should be made out of funds provided in class 5 or class 6 of the county budget.

#### CONCLUSION

It is the opinion of this department that Cedar County, Missouri, is liable for the payment of the fees which have accrued in the Probate Court in indigent insane cases since January 1, 1947. Payment of such fees should be made out of class 5 or class 6 funds in the county budget.

Respectfully submitted,

C. B. BURNS, Jr.  
Assistant Attorney General

APPROVED:

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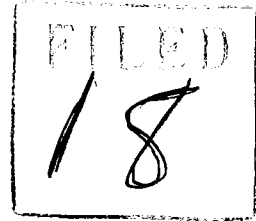
J. E. TAYLOR  
Attorney General

CBB:HR

CRIMINAL LAW: Construing Section 4420, H. B. 117, passed  
PROSECUTING ATTORNEYS: by the 64th General Assembly relative to  
failure to support minor children.

December 16, 1947

Honorable Clyde E. Combs  
Prosecuting Attorney  
Barton County  
Lamar, Missouri



Dear Sir:

This will acknowledge receipt of your request for an opinion which reads as follows:

" As prosecuting attorney of Barton County  
I would like to have the opinion of your  
office on the following question:

"In January 1946 the wife of a resident  
of this county obtained a divorce from  
him. The decree awarded the care, custody  
and control of a minor daughter to the wife.  
Today the local representative of the Social  
Security department was in my office to  
determine whether or not any action could be  
taken under Section 4420 as amended for  
abandonment and failure or refusal to support  
or provide for wife and children- penalty-  
evidence required. It was very questionable  
in my mind whether or not this action could  
be maintained against the husband for his  
failure or refusal to support said minor child  
when no support money was granted or mentioned  
in the decree and the wife at the present time  
has the sole care, custody and control of said  
child under said decree.

"The local Social Security office was informed  
by a state officer that this action could be  
maintained and the mother and child, who are  
at the present time receiving compensation  
under the ADC program, could be withdrawn from  
the rolls by the Social Security Department. The  
mother would not cooperate in any action taken.

"In considering Section 4420 as amended and in  
examination of the cases thereunder, a grave doubt

is raised in my mind as to whether or not under the circumstances as related above it could be said that the father had either failed or refused to contribute to the maintenance of the child 'without good cause.'

"Since it is quite evident that the Social Security office intends to place the burden of a decision in this matter directly on the shoulders of the different prosecuting attorneys in the State I would appreciate an opinion from your office as to the applicability of the criminal statutes to a situation of this kind, and an opinion of your office as to whether or not the provisions of the above section could be enforced under the circumstances as above outlined."

The 64th General Assembly repealed Section 4420 and enacted in lieu thereof Section 4420 in House Bill No. 117, which became effective on September 10, 1947, and reads:

"If any man shall, without good cause, fail, neglect or refuse to provide adequate food, clothing, lodging, medical or surgical attention for such wife; or if any man or woman shall, without good cause, abandon or desert or shall without good cause fail, neglect or refuse to provide adequate food, clothing, lodging, medical or surgical attention for his or her child or children born in or out of wedlock, under the age of sixteen years, or if any other person having the legal care or custody of such minor child, shall without good cause, fail, refuse or neglect to provide adequate food, clothing, lodging, medical or surgical attention for such child, whether or not, in either such case such child or children, by reason of such failure, neglect or refusal, shall actually suffer physical or material want or destitution; or if any man shall leave the State of Missouri and shall take up his abode in some other state, and shall leave his wife, child or children in the State of Missouri and shall, without just cause or excuse, fail neglect or refuse to provide said wife, child or children with adequate food, clothing, lodging, medical or surgical attention, then such person shall

be deemed guilty of a misdemeanor; and it shall be no defense to such charge that some person or organization other than the defendant has furnished food, clothing, lodging, medical or surgical attention for said wife, child or children and he or she shall, upon conviction, be punished by imprisonment in the county jail not more than one year, or by fine not exceeding one thousand dollars (\$1,000) or by both such fine and imprisonment. No other evidence shall be required to prove that such man was married to such wife than would be necessary to prove such fact in a civil action." (Underscoring ours).

The foregoing enactment practically follows Section 4420, R. S. Mo. 1939, with the following exception, that the 64th General Assembly added that portion that is underscored. So it is not difficult to determine just what the 64th General Assembly was attempting to do when it repealed Section 4420, R. S. Mo. 1939 and enacted in lieu thereof Section 4420, supra. The purpose of the enactment was to place the burden on a father to support his minor children and it is no longer an excuse or a valid defense for the father to claim that some corporation, relative or other individual is adequately supporting his minor children and therefore he is relieved of that responsibility. We think it is no secret that the Division of Welfare in this state to a great extent was responsible for the enactment of Section 4420, supra, as passed by the 64th General Assembly. Too many time applications for aid to dependent children were filed and approved because, under the law in effect at that time, if a husband was not even living at home but merely separated from his wife and failed to support his minor children, the Division of Welfare could not reject the application for aid. As the law now reads, under the foregoing enactment, a father can no longer shift this responsibility upon the state or anyone else.

The facts stated in your request present a little different picture. In the instant case a divorce was granted and we assume that the wife instituted proceedings for said divorce. However, that is not of great importance except in rare instances. At any rate, the court granted the divorce and gave custody and control of a minor daughter to the wife. There was no mention in the decree of maintenance or support money for the minor child. The wife has filed an application for aid to dependent children and is now receiving such aid. Furthermore, the Division of Welfare is about to remove them from the roll and suggests that you commence prosecution under Section 4420 against the father for failing to support his minor child. You also mention the fact that the mother will not cooperate in such prosecution.



In view of the recent enactment by the 64th General Assembly, namely Section 4420, supra, we are of the opinion that it is definitely the duty and responsibility of the husband and father to support this minor child even though the court did not require him to support said child under the decree of divorce. In *Allen v. Allen*, 226 App. 822, l.c. 823, 47 S. W.(2d) 254, the court held that it was mandatory upon a court to make an order touching alimony and maintenance and so holding, said:

"The statute (sec. 1355) says that when divorce is adjudged, the court shall make such order touching the alimony and maintenance of the wife as from the circumstances shall be reasonable and proper; that the court may decree alimony pending the suit 'where the same would be just.' The plain terms of the statute evidence legislative intent that upon rendition of decree of divorce in favor of the wife, it is the mandatory duty of the court to make an order touching the alimony and maintenance of the wife. (*Griffith v. Griffith*, 180 S. W. 411; *Stark v. Stark*, 115 Mo. App. 436, 44.)"

Also see *Robinson v. Robinson*, 268 Mo. 703, 186 S. W. 1032, wherein the court held that the lower court, in granting a divorce, not only has authority but should make suitable provisions for support of any minor children. We are not familiar with the facts in this case at the time of the granting of the divorce. It is possible that at that time no provision for the support of this minor child was made because the mother was able to provide adequate support. Furthermore, it is possible that conditions are now different, if so, there is nothing to prevent the mother requesting the court to modify its decree and provide for maintenance and support for said minor child. In *Kelly v. Kelly*, 329 Mo. 992, l.c. 999, the court said:

"The divorce statutes of this state and other states generally (9 R. C. L. 484, sec. 299; 19 C. J. 341) provide that the divorce court shall, when a divorce is granted, make such orders touching the care, custody and maintenance of the minor children as is reasonable, and may, on application of either party make such alterations thereof as may be proper from time to time (Sec. 1355, R. S. Mo. 1929), and may review any order or judgment in that respect (Sec. 1361, R. S. 1929).

This statutory remedy inheres in the court granting the divorce and gives it a continuing power and jurisdiction to enforce in favor of the wife the husband's duty to support his minor children. It is now the settled law that this remedy by ancillary procedure in the divorce case and court is available to the divorced wife in all cases, whether the divorce court at the time of granting the decree exercised its power in this respect or not, or exercised it in part only by awarding the custody of the children to the wife but without any provision for their support. (Robinson v. Robinson, 268 Mo. 703, 709; Laumeier v. Laumeier, 308 Mo. 201; Shannon v. Shannon, 97 Mo. App. 119; Robinson v. Robinson, 168 Mo. App. 639, affirmed in 268 Mo. 703; 14 Cyc. 811; 19 C. J. 352, 357, citing Missouri cases, and 359.)"

All the decisions hold that the power of the circuit court to modify its orders touching on maintenance of minor children only ceases upon the children reaching majority. (See Kelly v. Kelly, 329 Mo. 992, 47 S. W.(2d) 762; Thornton v. Thornton, 221 Mo. App. 1199, 2 S. W.(2d) 821.) The law is well established in this state that notwithstanding the fact the court in a divorce action awards to the wife custody of any minor children with no provision made for their support the duty remains with the father to support said minor child. In Keller v. St. Louis 152 Mo. 596, 1. c. 601, a suit was brought for damages for injury to a minor child. The suit was instituted by the mother. At that time the father was living but the father and mother were divorced and the court had given the custody of said minor child to the wife. The sole question presented in the case was whether the wife could maintain said action. The court after a very thorough discussion, said at 1. c. 601:

"It follows then, that as the duty of supporting the child was not transferred by the decree to the mother, it still remained with the father--and as the right to the services of the child rests upon the duty to support, the right of action in this case is in him, and not in the plaintiff, and can not be maintained by her. The judgment of the circuit court will therefore have to be, and is reversed."

Also in Kelly v. Kelly, supra, l.c. 998, will be found another well-reasoned decision wherein the court finally said:

"We find that practically all the case law and text writers agree that in case a divorce is granted to the parents and the custody of the minor children is awarded to the wife with no provision made in the decree for their support, the duty and obligation of the husband and father to support his minor children remains as at common law, although he is deprived of their custody. (19 C.J. 354; Biffle v. Pullam, 114 Mo. 50, 54; Keller v. St. Louis, 152 Mo. 496; Bennett v. Robinson, 180 Mo. App. 56; Viertel v. Viertel, 212 Mo. 562, 576; Meyers v. Meyers, 91 Mo. App. 151, 155; Gallion v. McIntosh, 8 S. W.(2d) 1076; Robinson v. Robinson, 268 Mo. 703, 709; Lukowski v. Lukowski, 108 Mo. App. 204, 209; La Rue v. Kempf, 186 Mo. App. 57, 66; Seely v. Seely, 116 Mo. App. 362; Robinson v. Robinson, 168 Mo. App. 639, 644; Winner v. Chucart, 202 Mo. App. 176.)

"In Biffle v. Pullam, 114 Mo. 50, 54, this court said: 'In case of a divorce in which the custody of the children is awarded to the wife, and provision is not made for their support out of the property of the husband, he still remains liable for their support. (2 Bishop's New Work on Marriage, Divorce & Separation, secs. 1210, 1221, 1222 and 1223.)'"

In view of the foregoing statutory provisions and decisions, certainly the husband is not relieved of supporting his minor children. This is true even if the court granting the divorce decree failed to provide for maintenance and support of such minor children, it is his duty to support said children at all times until they reach majority.

We believe, under the facts stated in your request, that for failure to support his minor daughter the father is subject to prosecution under Section 4420, supra, enacted by the 64th General Assembly. It is no excuse that aid for dependent children is now being furnished said minor child or that any other corporation or individual may be assisting in the support of such minor child. Similar situations have arisen in several counties, and

on numerous occasions the prosecuting attorneys, upon conferring with the father, informing him of the law and his duty under said law, have been able to correct such conditions. The mere fact that the wife is unwilling to cooperate in such prosecution will not, in our opinion, prevent prosecution, providing you can obtain sufficient evidence to support said prosecution. We believe that you can probably obtain other evidence to justify prosecuting this father, such as the testimony of the social workers who visited the home and who have first-hand information as to the financial status surrounding this case, the written application filed by the mother for aid to dependent children and possibly evidence introduced by the written application filed by the mother for aid to dependent children, and possibly others in the neighborhood familiar with such conditions. Of course, the sufficiency of the evidence to support such a charge is a matter for your determination.

#### CONCLUSION

We are of the opinion that the father of this minor child, under facts stated in your request, is responsible under the law for her support, this is true even though she may be receiving some support from other sources and for failure to support such child he is liable to prosecution under Section 4420, supra. Provided, of course, that you can obtain sufficient evidence that he is not supporting said child. We believe this is possible because the social workers who have visited in the home should have information as to the financial conditions and income in the home as well as the application for aid to dependent children which may disclose important facts relating thereto. There is a possibility that you may obtain information of other persons having such knowledge.

Respectfully submitted,

AUBREY R. HAMMETT, JR.  
Assistant Attorney General

APPROVED:

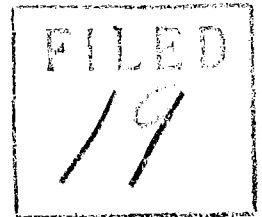
J. E. TAYLOR  
Attorney General

ARR:mw

ROADS & BRIDGES:  
SPECIAL ROAD DISTRICTS:

Territory of extended special road districts must be included in an area twelve miles square.

February 18, 1947



Honorable Phil H. Cook  
Prosecuting Attorney  
Lafayette County  
Lexington, Missouri

Dear Mr. Cook:

This will acknowledge your request for an official opinion regarding the extension of the Odessa Special Road District in Lafayette County, as provided in Section 8708, R. S. Mo. 1939. This section is contained in Article 10, Chapter 46, which pertains specifically to what is commonly characterized as "eight mile special road districts".

Section 8708 in part provides:

"\* \* \* Any special road district extended under the provisions of this section may be extended so that after such extension it shall not be more than twelve miles square."

After carefully studying the diagram of the proposed extension, which you submitted with your letter, it appears that if the road district was extended as proposed it would extend ten miles in one direction and in excess of twelve miles in the other direction, however, it would only contain a hundred and twenty square miles. The question then proposed is whether or not the road district in question could be extended as contemplated, and fall within the statutory limits as indicated in Section 8708, supra, which says that after the extension of any special road district it shall not be more than twelve miles square.

The same problem could exist in the initial organization of an eight mile road district, for Section 8673, R. S. Mo. 1939 provides that territory not exceeding "eight miles square" may be organized into a special road district. An area eight miles square would contain sixty-four square miles, but, for example, could a special road district be organized under the provisions of Section 8673 possessing the dimensions of being thirty-two miles long and two miles wide? We believe not because such territory could not be contained within an area eight miles square.

A careful research fails to disclose that the appellate courts

of this state have ever ruled on the precise question at hand, therefore we must ascertain the intent of the lawmakers from the language used in the statute and give to such language its plain and rational meaning. *Donnelly Garment Company v. Keitel*, (Mo. Sup.) 193 S. W. (2d) 577.

The plain wording of Section 8708, supra, specifically states that an extended special road district shall not be more than twelve miles square and, while such an area would contain 144 square miles, it cannot be said that a special road district could be extended, regardless of its dimensions, so long as it didn't include more than 144 square miles. The statute by expressly limiting the boundaries of extended special road districts by one means exclude their boundaries being limited by another means. Thus, the expression of one limitation is the exclusion of another.

It has been held that the proceedings prescribed by statute for the organization of special road districts must be scrupulously followed. *State ex inf. Gentry v. Hughesville Special Road District of Pettis County*, 319 Mo. 1246, 6 S. W. (2d) 594. We believe that the same rule would apply for the extension of special road districts, and that a special road district could not be extended beyond the physical limitations prescribed in the statute.

In the case at hand, if the special road district was extended as proposed and illustrated it would be physically impossible for it to be encompassed by an area twelve miles square.

#### CONCLUSION

Therefore, it is the opinion of this department that a special road district extended under the provisions of Section 8708, R. S. Mo. 1939, must possess such dimensions as to permit its inclusion within an area not more than twelve miles square.

Respectfully submitted,

APPROVED:

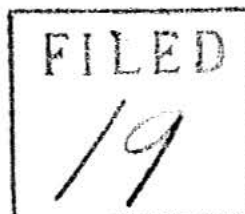
RICHARD F. THOMPSON  
Assistant Attorney General

J. E. TAYLOR  
Attorney General

RFT:mw

CONSERVATION COMMISSION: Construing House Bill No. 317, known  
as the Motor Vehicle Safety Responsibility  
MOTOR VEHICLES: Act, passed by the 63rd General Assembly,  
as it applies to employees of the Con-  
servation Commission.

March 25, 1947



Conservation Commission  
Jefferson City, Missouri

Attention: Mr. I. T. Bode, Director

Gentlemen:

This will acknowledge receipt of your request for an  
opinion, which reads:

"The matter of this department complying  
with the Motor Vehicle Safety Responsi-  
bility Act has been given a good deal of  
consideration by us. We are in doubt  
about the following items: whether or  
not the provisions of that Act requiring  
operator permits of various types apply  
to this department, and, if so, what type  
of permit is required.

"In order to understand our situation, I  
am offering the following explanations of  
the driving of automotive equipment for  
this department under several different  
classifications.

"(1) We have a small group of employees  
to whom are assigned official state owned  
automobiles, which are driven by them  
throughout the state in the course of their  
work. These automobiles are not on the  
road day in and day out all day long. Their  
use is more or less intermittent.

"(2) We have a group of persons who are not  
assigned official automobiles but who occa-  
sionally drive one of these cars, if they  
are available, in order to save us the cost  
of paying mileage on private cars.

"(3) We have a considerable group of official  
trucks of various types assigned to the  
Forestry Division. These trucks include fire

fighting equipment and operate on our own state owned areas and also on fire protection and forest management work on cooperative areas with forest owners. Naturally, in the fire protection work and in the forest management work these trucks are on the general highways a good part of the time. The balance of the time they are operated on entirely state owned land. Also, during the fire season these trucks are driven by different individuals, depending upon the emergency nature of the situation, so that the trucks are not necessarily assigned to one particular driver.

"(4) We have another group of trucks assigned to the Fisheries Section which are used in connection with our fisheries work at our hatcheries and on state owned areas in hauling supplies for them and also are used in distribution and the making of fisheries surveys. These trucks, of course, are operated on the highways of the state, and while they are usually assigned to a particular driver, there are many times during the year when it is necessary to assign other drivers to them, including men who may have been employed for only a temporary rush period.

"(5) We have a group of official trucks which are operated on the refuge areas. These trucks operate possibly 90 per cent of the time within the refuge areas, but occasionally it is necessary to use them for trips for supplies and other matters of business outside of the refuge. These trucks are not necessarily driven by one particular man at all times.

"I have had an opportunity to review the opinion given the Highway Patrol with regard to their cars, and I believe that most of the driving done by their men falls into a different classification than that outlined above.

"We would like to have your opinion with regard to the application of this Act to our department."



Under date of September 26, 1946, this department rendered an official opinion to Colonel Hugh H. Waggoner, Superintendent, Missouri State Highway Patrol, construing House Bill No. 317, passed by the 63rd General Assembly, and known as the Motor Vehicle Safety Responsibility Act; also, Sections 8445 and 8443, R.S. Mo. 1939, insofar as said provisions apply to State Highway Patrolmen.

It is the writer's understanding that you have a copy of said opinion. Therefore, for the sake of brevity, this opinion shall be considered more in the nature of a supplementary opinion to the one rendered to Colonel Waggoner.

As stated in the foregoing opinion, the type of license required for different employees depends upon the facts in each individual case and the particular type of employment.

In reading the foregoing opinion, we believe it holds that an employee, operating a state-owned motor vehicle that is regularly assigned to said employee and operates said motor vehicle in the course of, or incidental to, his employment, but whose principal occupation is not that of operating said motor vehicle, shall be required to apply for a registered operator's license. However, this does not apply to those employees who only temporarily use said motor vehicle and not in the course of, or as an incident to, their employment.

#### CONCLUSION

Therefore, it is the opinion of this department that employees of the Conservation Commission coming within numbers (1) and (4) of your request are required to take out a registered operator's license, as provided in Section 8443, Revised Statutes of Missouri 1939, subdivision (f-1) thereof, since such employees regularly operate motor vehicles belonging to said Commission and assigned to them, and said motor vehicles are operated as an incident to said employment, but whose principal occupation is not the operating of such motor vehicles.

Those employees of the Conservation Commission coming within number (2) of your request need not take out any license other than the regular driver's license required of the operator of any motor vehicle, since no motor vehicles are regularly assigned to such employees said motor vehicles are not operated in the course of

or as an incident to their employment and they are not employed primarily to drive said motor vehicles.

It may be that employees coming within your request numbers (3) and (5) should take out a registered operator's license. However, this depends upon the facts in each individual case. If such employees regularly operate motor vehicles belonging to the Conservation Commission in the course of or as an incident to their employment, but whose principal occupation is not the operation of such motor vehicle, then they should have a registered operator's license. This is true even though said motor vehicles are not regularly assigned to such employees, since the statute does not specifically require said motor vehicles be assigned to any one individual.

It is the further opinion of this department, as held in the opinion rendered to Colonel Waggoner, that the provisions of House Bill No. 317, passed by the 63rd General Assembly, are applicable to all employees of the Conservation Commission of the State of Missouri.

Respectfully submitted,

AUBREY R. HAMMETT, Jr.  
Assistant Attorney General

APPROVED:

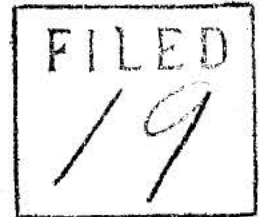
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J. E. TAYLOR  
Attorney General

ARH:LR

CONSERVATION COMMISSION: Land classified as Forest Crop Land for  
25 years under House Bill No. 1006, passed  
FOREST CROP LAND: by the 63rd General Assembly, will auto-  
matically be removed from such classifica-  
tion thereafter.

April 18, 1947



Conservation Commission  
Jefferson City, Missouri

Attention: Mr. I. T. Bode  
Director

Gentlemen:

This will acknowledge receipt of your request for an  
opinion, which reads:

"One of the prospective applicants for  
classification of his land as Forest Crop  
Land under the provisions of House Bill  
1006 of the 63rd General Assembly has  
raised a question. We would like to have  
your opinion in order to advise this man  
with regard to the question. The question  
is, 'In the event that the owner's land is  
classified as Forest Crop Land for a period  
of 25 years, will his land be automatically  
removed from classification at the end of  
the 25 years provided he meets all of the  
conditions attending to classification?'

"The point which worried this individual  
was the thought that even though the land  
would not be subject to yield tax after  
25 years that it might still be considered  
as Forest Crop Land and this might be con-  
sidered by some individual as a lien upon  
the property.

"It is my thought that the intent of the  
Act was very definitely to terminate the  
classification of the land as Forest Crop  
Land at the end of 25 years. Your opinion  
in this matter will be appreciated."

The primary rule of statutory construction is to ascertain  
and give effect to the lawmakers' intent, which should be done  
from the words used, if possible. See City of St. Louis v. Pope,

126 S.W. (2d) 1201, 344 Mo. 479; Artophone Corporation v. Coale, 133 S.W. (2d) 343, 345 Mo. 344.

House Bill No. 1006, passed by the 63rd General Assembly, referred to in your request, deals with the establishment of what is called and defined under the act as "forest crop lands." Certain land, upon application of the owner, may be classified as forest crop lands, and when so classified by the Conservation Commission, the owner thereof is partially relieved of paying taxes against said land. Furthermore, the various political subdivisions wherein said lands are located, become the recipients of the payment of partial taxes against said land from funds appropriated by the Legislature to partially compensate them for taxes on lands so classified under the act.

There are several provisions under House Bill No. 1006, supra, which clearly indicate that such lands when classified cannot be classified for a period to exceed 25 years and may be removed under such classification sooner in case of violation of the provisions of the act or rules and regulations pertaining thereto, or by voluntary request of the owner thereof. Section 6 of said act specifically allows the owner of such lands when classified to receive partial relief from taxation of said lands during a period not to exceed 25 years in any instance, and reads:

"Any lands approved and classified by the Commission as forest crop lands as defined in this act shall receive partial relief from taxation, as hereinafter provided, during a period or periods of time not to exceed 25 years in any instance."

Under Section 8 of the act it provides that during the time such lands are classified they shall be assessed in a certain manner, and furthermore, that when timber is cut on such lands, said timber shall be subject to a graduated yield tax and the rate shown therein is provided for a period not to exceed 25 years, and reads:

"During the time any such lands are classified as forest crop lands under this Act they shall be assessed for general taxation purposes at \$1.00 per acre and taxed at the local rates of the county wherein the lands are located."

Furthermore, Section 11 provides in part that land so classified shall be continued so long as proper forest conditions and practices are maintained and for such periods of time as do not exceed the provisions of this act, and further provides that the Commission may cancel such classification for violations of the provisions of said act, and, in such case, the land covered by said classification shall be taxed as other lands. Said section reads in part:

"When any lands have been so classified the classifications shall be continued as long as proper forest conditions and practices are maintained and continued thereon, and for such periods of time as do not exceed the provisions of this Act.  
\* \* \* \* If the Commission find the provisions of this Act are not being complied with, it shall forthwith cancel the classification of such lands, sending notice of such cancellation to the assessor, the county clerk of the county in which the land is situated and to the owner of such lands. Such lands shall thereafter be taxed as other lands."

Section 11a of said act prescribes the procedure to be followed if the owner of land under such classification desires to remove his land from the classification, and reads in part:

"\* \* \* The collector shall keep all records of all taxes due on said forest lands so that in the event the owner of such lands may desire to remove his land from the forest class, he may do so by paying all of the taxes carried against the land based on the assessment plus a penalty equivalent to 5% interest thereon, less taxes paid as set up by Section 8. Whenever this is done by the owner such land shall automatically be dropped from the forest crop land class."

In addition to the foregoing, all that is required of the owner of classified land when said classification has been cancelled, is that he shall make certain specified reimbursements. This provision is set out in Section 12 of said act, and reads:

"When a classification shall have been cancelled the owner of such lands shall make reimbursement to the state in a manner as the Director of Revenue shall prescribe for the reimbursement which was paid by the State to the county in lieu of taxes on this land while so classified as forest crop land. This payment shall not be in excess of two cents per acre per year. This tax shall be in addition to any annual tax or yield tax which may have been paid or may be collected."

Furthermore, under the Constitution of Missouri, 1875, we doubt if such an act would be constitutional. However, the Constitution of Missouri, 1945, contains a provision that does permit such legislation, and said provision specifically grants the Legislature the authority to encourage forestry and the rehabilitation of obsolete, decadent and blighted areas, provide partial relief from taxation of such lands, and further limits such relief to a period to time not exceeding 25 years. Section 7, Article X, Constitution of Missouri, 1945, reads:

"For the purpose of encouraging forestry when lands are devoted exclusively to such purpose, and the reconstruction, redevelopment and rehabilitation of obsolete, decadent or blighted areas, the general assembly by general law, may provide for such partial relief from taxation of the lands devoted to any such purpose, and of the improvements thereon, by such method or methods, for such period or periods of time, not exceeding twenty-five years in any instance, and upon such terms, conditions, and restrictions as it may prescribe."

In view of the foregoing provisions, unquestionably owners of land classified by the Conservation Commission under House Bill No. 1006, supra, may cancel said classification as hereinabove provided prior to the period for which said lands are classified. However, under any circumstances, the law specifically prohibits such land being classified for a period to exceed 25 years.

CONCLUSION

Therefore, it is the opinion of this department that land classified under House Bill No. 1006, passed by the 63rd General Assembly, for a period of 25 years will automatically be removed from any further classification in the absence of further agreements executed by and between the landowner and the Conservation Commission.

Respectfully submitted,

AUBREY R. HAMMETT, Jr.  
Assistant Attorney General

APPROVED:

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J. E. TAYLOR  
Attorney General

ARH:LR

DEPARTMENT OF BUSINESS AND  
ADMINISTRATION.

: Effect and meaning of Senate Bill  
: No. 348 passed by the 63rd General  
: Assembly on the duties and liabili-  
: ty of the Department of Business and  
: Administration, and the duties and  
: responsibility of his subordinates.

April 23, 1947

FILED

4/30

Honorable Bert Cooper  
Director  
Department of Business and Administration  
State Office Building  
Jefferson City, Missouri

Dear Mr. Cooper:

This will acknowledge your letter requesting an opinion from this Department defining the terms and interpretation of sub-section (c) of Section 4 of Senate Committee Substitute for Senate Bill No. 348, with reference to the questions raised in your letter.

Your letter is as follows:

"Would you please give me your interpretation of subsection (c), Section 4, page 3, S.C.S.S.B. 348, with reference to the following questions:

"1. Is it mandatory that the Director of the Department of Business and Administration procure the items listed, or can he designate the Division heads to continue to do their own procurement, if it seems more economical to the State for them to do so, in as much as all items over \$50 must be purchased through the Procurement Division, whether purchasing is done by Director or Division heads?

"2. In case the Director of the Department of Business and Administration does not meet this requirement, would his bondsmen be liable, since there is no apparent shortage of funds or financial loss to the State resulting from his



failure to do so?

"3. In case you hold that the Director of the Department of Business and Administration must procure the items named in the law, would the requirement be met if he checked the requisitions and approved or rejected them? If approved, could he designate the Division head as his agent to purchase items where the bill amounted to less than \$50?

"4. In case the Director of the Department of Business and Administration disapproved all or part of the items in the requisition, is his decision final or does the Division head have the right of appeal? If so, to whom?

"5. Would, in your opinion, the Director of Business and Administration be required to keep a set of books covering the appropriations of all divisions, showing commitment and balance on hand in each fund for each of the Divisions, in as much as this record is kept by the Division, by the Comptroller and by the Auditor, and would be purely a duplication of effort?

"Your ruling on this particular section is pertinent to and will clarify the meaning of a similar section in S.C.S.S.B. 297. Mr. M. E. Morris, as well as myself, is much interested in your reply.

"I would greatly appreciate a reply at your earliest possible convenience."

It will be necessary, we think, to discuss and construe other sections of said Senate Bill No. 348, as well as sub-section (c) of Section 4, of said Senate Bill No. 348, in arriving at a reasonable construction of the intent of the Legislature in enacting said bill, and its ultimate directive effect upon the Department of Business and Administration and the different divisions thereof, respecting their duties and powers.

Section 4 of said Senate Bill No. 348 is as follows:

"Section 4. It shall be the duty of the director of the department of business and administration and he shall have power, except as to the public service commission, to:

"(a) Investigate, assemble, develop and study information regarding the structure and operation of the divisions in the department of business and administration and recommend to the head or heads of the divisions such changes, if any, in administrative practices, and recommend to the General Assembly such changes, if any, in the law as in the opinion of the director will result in coordination of the work of the divisions in the department and in greater efficiency and economy.

"(b) Prepare, with the cooperation of the various divisions included in the department, estimates included in the department, estimates of the requirements for appropriations for the department and for each division in the department.

"(c) Procure, on requisition of the heads of the various divisions, either through the purchasing agent or by other means authorized by law, supplies, materials, equipment, or contractual services for the department and for each division in the department.

"(d) Prescribe, as far as practicable, a central system for payroll and accounting for the several divisions in the department.

"(e) Recommend to the heads of the several divisions in the department cooperation with each other in the use of employees, land, buildings, quarters, facilities and equipment, and to this end the heads of the respective divisions in the department are empowered, subject to the approval of the director, to cooperate with each other in the use of employees, land, buildings, quarters, facilities and equipment.

"(f) Prepare and submit to each regular session of the general assembly and to the governor a report of the activities of the department, including the activities of each division in the department, which report shall be in lieu of any report now required by law for any department or office, the powers and duties of which are by this act vested in a division in the department."

The particular query of your letter, in which you submit five different and distinct questions to be answered is directed to the effect of sub-section (c) of said Section 4 of Senate Bill No. 348.

We will discuss and construe said sub-section (c) of said Section 4 accordingly, as it provides the basis for the questions to be answered in the five several paragraphs of your letter.

Your first question is, whether it is mandatory that the Director of the Department of Business and Administration under said sub-section (c) shall procure the items listed in requisitions from the departmental heads, or whether he may delegate such power and authority to the different heads themselves.

We believe it is necessary here to repeat the preamble, or introductory part, of said Section 4 and said sub-section (c) to intelligibly consider these questions submitted. Said preamble and said sub-section (c) are, respectively, as follow:

"Section 4. It shall be the duty of the director of the department of business and administration and he shall have power, except as to the public service commission, to:

\* \* \* \* \*

"(c) Procure, on requisition of the heads of the various divisions, either through the purchasing agent or by other means authorized by law, supplies, materials, equipment, or contractual services for the department and for each division in the department."

Other sections of said Senate Bill No. 348 and sub-sections of Section 4 must be carried along, we believe, with the construction of said sub-section (c) as bearing upon the question as to whether the terms of said preamble of Section 4 and sub-section (c) are mandatory or directory.

There is no provision in said Senate Bill No. 348 declaring a penalty against the Director of the Department of Business and Administration, or which renders

his actions illegal or void as a consequence of failure to comply literally with the terms of said sub-section (c) of said Section 4 of Senate Bill No. 348, which there should be in order for said section, or any part thereof, to be mandatory.

The rule of construction of whether a statute, or any part thereof, is mandatory or directory is stated in 59 C.J. 1072, Section 630, as follows:

"A mandatory provision in a statute is one, the omission to follow which renders the proceeding to which it relates illegal and void, while a directory provision is one the observance of which is not necessary to the validity of the proceeding; \* \* \* ".

The preamble to said Section 4 of said Senate Bill No. 348, states, as is hereinabove quoted, "It shall be the duty of the director \* \* \* ". This phrase is stated in 59 C.J. 1087, to have the following import and meaning:

"\* \* \* So the phrase 'it shall be the duty' is ordinarily merely directory.  
\* \* \* ".

There is no Missouri case that we can find construing the phrase above quoted from 59 C.J. 1087. The case of County Commissioners vs. Meekins, 50 Md. 28, was a case in which there was a question before the Supreme Court of Maryland, whether the Legislature of that State had enacted laws strictly according to the requirements of the Constitution of the State. In holding that the statute, with respect to saying "it shall be the duty of the General Assembly," was directory and not mandatory, the Supreme Court of Maryland, l.c. 45, said:

"\* \* \* Neither is a law inoperative and void, because it is not enacted in Articles and sections as directed by the 29th section of Article 3, of the Constitution. This section of the Constitution, so far as it was intended to be mandatory, uses language apt and appropriate for that purpose. In the first part of the section it is provided that

the laws passed by the General Assembly shall embrace but one subject, and that shall be described in their titles; that no law shall be revived or amended by its title only; that no law shall be construed by reason of its title to grant powers, &c., and so down to where it comes to provide for the amendment of laws already in existence, and for the enactment of original laws, when the mandatory language is changed, and provision is then made that 'it shall be the duty of the General Assembly.' &c. This is merely directory, and while in the passage of the Acts of 1870, ch. 449, and 1878, ch. 160, the Legislature may have failed to discharge the duty imposed upon it, the Acts themselves are valid."

The question of when a statute is to be construed as mandatory, or merely directory, was before our Supreme Court in Bane in the case of State ex rel. vs. Brown, 33 S.W. (2d) 104. The Court in its opinion, l.c. 107, distinguishing between a mandatory provision and a directory provision of a statute, which we believe is pertinent here, and decisive of the question, said:

"A mandatory provision is one the omission to follow which renders the proceeding to which it relates illegal and void, while a directory provision is one the observance of which is not necessary to the validity of the proceeding. Directory provisions are not intended by the legislature to be disregarded, but where the consequences of not obeying them in every particular are not prescribed the courts must judicially determine them. There is no universal rule by which directory provisions in a statute may, in all circumstances, be distinguished from those which are mandatory. In the determination of this question, as of every other question of statutory construction, the prime object is to ascertain the legislative intention as disclosed by all the terms and provisions of the act in relation to the subject of legislation and, the general object intended to be accomplished. Generally speaking, those pro-

visions which do not relate to the essence of the thing to be done and as to which compliance is a matter of convenience rather than substance are directory, while the provisions which relate to the essence of the thing to be done, that is, to matters of substance, are mandatory.' 25 R.C.L. Sec. 14 pp. 766, 767."

Again, our Supreme Court had before it the question of whether a statute was mandatory or merely directory in its terms in the case of *State vs. Bird*, 244 S.W. 938. That was a case where the question arose whether the signing by the county superintendent of schools of plats to be posted for a proposed consolidation of school districts was mandatory or merely directory. It appears that the county superintendent overlooked signing the plats. In holding that the statute providing that the county superintendent should sign such plats was directory and not mandatory, the Court, l.c. 939, said:

"Under a more general rule, this construction may be sustained, in that, if a statute merely requires certain things to be done and nowhere prescribes the result that shall follow if such things are not done, then the statute should be held to be directory. The rule thus stated is in harmony with that other well-recognized canon that statutes directing the mode of proceedings by public officers are to be held to be directory and are not to be regarded as essential to the validity of a proceeding unless it be so declared by the law. *State v. Cooke*, 14 Barb. (N.Y.) 259. By this we mean that if a fair consideration of the statute shows that, unless the Legislature intended compliance with the proviso to be essential to the validity of the proceedings, which nowhere appears, then it is to be regarded as merely directory. *People v. Thompson*, 67 Cal. 627, 9 Pac. 833; *Kenfield v. Irwin*, 52 Cal. 164; *Westbrook v. Rosborough*, 14 Cal. 180; *Jones v. State*, 1 Kan. 273."

It would be reasonable to conclude, we think, that since there is no other clause or sentence in said Section 4 of said Senate Bill No. 348 making Section 4, or the results of the authority therein directed to be used, invalid, if not carried out precisely as stated, and under the above cited authorities, distinguishing between mandatory and directory statutes, sub-section (c) of Section 4 of said Senate Bill No. 348 is directory and not mandatory.

This, we trust, will answer the first question in your request for this opinion.

Your second inquiry as included in the copy of your letter hereinabove made, is as to the liability of the director's bond in case the director does not do the procuring (purchasing, we assume is meant) of the supplies, materials, equipment or contractual services for the Department, himself, but delegates such duties to each division head in the Department, where there would occur no financial loss to the State.

Under the title of bonds, which would include official bonds, 11 C.J.S., Section 57, page 432, as to the amount and extent of liability of a bond, states the following text:

"The object of a penalty in a bond is to limit the obligation of the signers, and in the absence of a condition extending his liability a surety cannot be held liable for more than the penal sum named. Also, the liability of a surety on a statutory bond cannot be enlarged by implication beyond its terms and its statutory office.

The liability on a bond under early common law is stated in 11 C.J.S., page 508, Section 130, as follows:

"Under the early common law plaintiff, in an action on a bond, whether it was made to secure the performance of covenants or agreements or whether it was to be void on the performance of conditions named in it which the obligor was not otherwise bound to perform, if entitled to a recovery, was entitled to the penal sum, \* \* \*".

This rule has been modified by statutes so that the measure and amount of recovery is confined to the actual damages proven. 11 C.J.S., page 509, states this text:

"The measure of compensatory damages for breach of a bond is determined by the principles applicable to contracts generally, as stated in the title Damages Secs. 73-79, 17 C.J. p 847 note 60 et seq; \* \* \*".

11 C.J.S., page 510, respecting bonds to secure compliance with law, states the following text:

"Where a statute requires the execution of a bond to the state, or to the United States, for a fixed penalty, conditioned for a compliance with the laws in the respects named therein, the penalty named in the bond is the measure of damages for its breach, or rather is a punishment inflicted by the sovereign for the violation of a pledge to observe its law, unless the statute under which the bond is given or the bond itself, read in the light of the statute, indicates a less or different measure. It has been held, however, that such bonds are to be considered like any other penal bond, and that only the actual damages caused by the breach can be recovered by the state, \* \* \*".

The question of the amount of recovery on a penal bond was before our Supreme Court in the case of Barnes vs. Webster, 16 Mo. 258. In holding that only such actual damages as are occasioned by breach of a bond may be recovered, the Court, l.c. 263, 264, said:

"By the common law, when a bond was given for the payment of money, with a defeasance to be void upon the performance of a collateral undertaking, if there was a breach of the condition, the whole penalty



was forfeited and might be recovered in an action on the bond. Courts of chancery, however, whose province it was to relieve against forfeitures, would restrain the collection of the penalty and compel the plaintiff to receive such damages as he had actually sustained. The statute of 8 and 9 of William III, dispensed with the necessity of resorting to chancery, by requiring the plaintiff to set out the breaches and show the damages occasioned thereby. Judgment was entered for the penalty, and a memorandum was endorsed on the execution, that it might be discharged by the payment of the damages assessed and the costs. \* \* \*".

Our Supreme Court had the same question before it in the case of State ex rel. Ford vs. Ellison, 287 Mo. 683. The Supreme Court again said that only actual damages may be recovered for the breach of a bond. The Court's language, l.c. 693, 694, in so holding, is as follows:

"\* \* \* The rule has never been recognized in this State that the obligee upon the breach of a condition was entitled to a judgment for the full penalty of a bond when a less sum was actually due. As was said in Burnside v. Wand, 170 Mo. l.c. 560: 'Our law is opposed to forfeitures. It has ever been considered unconscionable to demand the full penalty when a lesser sum is actually due. Hence, it has ever been the law in our State that in suits upon penal bonds the obligor can discharge himself by paying what is really due with interest and cost, and thereupon the cause is discontinued.' "

It would, therefore, be prudent and safe, we think, to conclude that since the terms of said Section 4 of said Senate Bill No. 348, hereinabove noted, are directory merely,

and, as it is assumed, there would follow no loss or damage to the State for the failure of the Director to actually procure or purchase the supplies, materials, etc., but instead, delegated that authority and the performance thereof to the division heads in his Department, there would be no liability on the Director's bond. We believe the above properly answers your second question.

This brings us to question three in your letter requesting this opinion as to whether the statute would be sufficiently complied with if the Director of the Department of Business and Administration checked the requisitions of the division heads in the procurement of necessities for the operation of the Department, and approved or rejected them.

We believe that it would be necessary for the Director of the Department of Business and Administration to carefully check the requisitions made by his subordinates in the procurement of any necessities for the Department. We believe that prudence and safety, to avoid loss and possible liability under his bond, would require that the Department heads keep a strict record of their actions and requisitions in procuring and purchasing items for the several Departments, and that reports thereof be periodically, and at reasonably frequent times, made to the Director, the same to be kept by him in properly indexed and systemized files, so that he may at all times have a check upon the actions of his subordinates, and have such data ready for filing consolidated reports to be made to the Governor and the Legislature as required in sub-section (f) of said Section 4 of said Senate Bill No. 348.

We believe that the observance of the above suggested precautions and measures will meet the requirements of said sub-section (c) of said Section 4 of Senate Bill No. 348. We do not see the necessity or advisability of designating a division head as the agent of the Director, as suggested in question three of your letter. All division heads in your Department are, both in effect, and authority, the "agents" of the Director. The Director of the Department of Business and Administration, is, by the terms of said Senate Bill No. 348, the over-all authority in the Department, and it seems that the intent of the Legislature was that the division heads should be, and are to be, considered as the agents of the Director of the Department. We believe, in keeping with their responsibility to the Director of the Department, and with his authority

over the actions of the division heads, the Director would have ample authority to authorize the division heads to purchase items where the bill amounted to less than \$50.

We believe this will answer question three in your letter.

The next question you submit is in paragraph four of your letter whether, in case the Director of the Department of Business and Administration disapproves all or any part of the items submitted in a requisition of a division head, his decision shall be final, or does the division head have the right of appeal? And, if so, to whom would he appeal?

Senate Bill No. 348 creates no right of appeal by the division heads from any order or decision by the Director of Business and Administration.

The right of appeal is purely statutory. If the statute does not provide for the right of appeal from any decision or action of a Court, administrative body, or any other public entity, there is no right of appeal. 3 C.J. 316, states the rule as follows:

"The proceeding by appeal was entirely unknown to the common law. It is of civil-law origin, and was introduced therefrom into courts of equity and admiralty. Consequently, the remedy by appeal in actions at law, and in this country in equity also, is purely of constitutional or statutory origin, and exists only when given by some constitutional or statutory provision.

\* \* \* "

Our Supreme Court has ruled upon the principle that an appeal may only be had when provided by constitutional or statutory authority in many cases. One case is the case of Foster vs. Sayman, 257 Mo. 305. The Court, l.c. 308, 309, in sustaining its long established rule that appeals are purely statutory, said:

"It is a minor premise to this discussion that appeals are wholly creatures of the statute, and that the

right of appeal does not exist except where expressly given. This is fundamental, or if not fundamental well-settled, \* \* \*".

Senate Bill No. 196 passed by the 63rd General Assembly does provide in Section 10 (a) and 10 (b) that any person aggrieved by the decision of an administrative body against him in a "contested case" may appeal, or have the decision reviewed by the proper Courts, unless some other provision for judicial review is provided by statute. The terms of Senate Bill No. 196 would not apply here.

We have seen that said Senate Bill No. 348 does not itself provide for an appeal from any order or decision of the Director of the Department of Business and Administration.

We take it that it will not be asserted that if a division head in the Department of Business and Administration should disagree with his chief on the question of procurement or purchase of supplies, materials or equipment for his division, it could not be properly called a "contested case". It might be an honest difference in opinion, but the opinion and decision of the Director of the Department of Business and Administration should, and would, control. There is no provision for an appeal from his decision provided in said Senate Bill No. 348, or elsewhere, as we view the situation.

This, then, brings us to the last question submitted in paragraph five of your letter, whether the Director of Business and Administration is required to keep a set of books covering the appropriations of all divisions, showing commitments and balance on hand in each fund for each division, inasmuch as this record is kept by the several divisions, by the Comptroller and Auditor.

We do not find any direct authority or requirement in said Senate Bill No. 348 requiring such a set of books to be kept by the Director of the Department of Business and Administration. We think this question is reasonably, or at least partially, answered in the reply herein to your question three. Inasmuch as your letter states that the divisions, the Comptroller and the Auditor keep such records showing the commitments, balance on hand in fund for each of the divisions, we do not believe that it

is required by the law, or that it is necessary for your Department to keep a general, separate, individual set of books. We refer again to the suggestions in this opinion in answer to your question three that reports of their activities should periodically be made by the division heads to the Director of the Department of Business and Administration, in part to supply the necessary facts for him to keep a proper check on the several divisions, and for the purpose of making his reports to the Governor and the Legislature as is provided in sub-section (f) of said Senate Bill No. 348.

It appears that it was the intention of the Legislature for the Director of the Department of Business and Administration, and the division heads, all employees, assistants, clerks and others, to co-operate in the administration of this Department, both as to the question of the saving of expense, and for the efficiency of the administration of the Department itself. Therefore, it appears that the terms of Senate Bill No. 348 which you have asked us to construe are directory and not mandatory, and that compliance with the terms of said Senate Bill No. 348 will be properly met as we have sought to outline them hereinabove.

#### CONCLUSION.

It is, therefore, the opinion of this Department:

1) That the terms and provisions of sub-section (c) of Section 4 of Senate Bill No. 348, are not mandatory, but directory.

2) That in case the Director of the Department of Business and Administration does not personally procure and purchase the supplies and necessary equipment for the divisions of his Department, there would be no liability on his bond, if there was no loss to the State by his so doing.

3) That it would comply with the requirements of said sub-section (c) of said Section 4 if the Director of the Department of Business and Administration checked the requisitions made by the divisional heads and approved or rejected such requisitions, as the case might require, and that when a requisition is approved, he may delegate

Honorable Bert Cooper

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to the division heads the authority to purchase items amounting to less than \$50.

4) That in case the Director of Business and Administration disapproves all, or a part of the items, in any requisition from any division head, his decision would be final, and there would be no appeal from his decision.

5) That it is not required in said Senate Bill No. 348 that the Director of Business and Administration keep a separate set of books covering appropriations of the several divisions, commitments, and balance on hand in each fund for any of the divisions since, as it is said, such records are kept by each division relating to its own activities, by the Comptroller and by the Auditor.

Respectfully submitted,

GEORGE W. CROWLEY  
Assistant Attorney General

APPROVED:

J. E. TAYLOR  
Attorney General

GWC:ir

DEPARTMENT OF BUSINESS AND ADMINISTRATION : Duties of Director of the Department  
: of Business and Administration in  
: making consolidated report to the  
: Legislature and to the Governor of  
: the activities of the divisions in  
: his Department under sub-section  
April 29, 1947 (f) of Section 4 of Senate  
Bill No. 348.

Honorable Bert Cooper  
Director  
Department of Business and Administration  
Jefferson City, Missouri

5/1  
FILED  
19

Dear Mr. Cooper:

This will acknowledge your letter requesting the opinion of this Department on the terms and effect of sub-section (f) of Section 4 of Senate Bill No. 348. Your letter is as follows:

"Would you please give me your interpretation of paragraph 'f' Section 4, pages 3 and 4 of Senate Committee Substitute for Senate Bill 348, passed by the Sixty-third General Assembly? The following questions are of immediate concern to us:

"1. Does the consolidated report made by the Director of Business and Administration, as required by the aforesaid law, exempt each of the divisions of the department from all other reports here-to-fore required by the law? For example: Is the Commissioner of Finance relieved from the requirements of Section 7884, 1939 Statutes and the requirements of the other statutes pertaining to the subject, if any? Again, is the Superintendent of the Division of Insurance exempt from the requirements of Sections 5792, 5797 and 15005 and other statutes pertaining to the same subject, if any?

"2. May the consolidated report of the director of the Department of

Business and Administration be published in sections, each covering a division? If so, what form would you suggest?"

The preamble in said Section 4 of said Senate Bill No. 348, and said sub-section (f) of said Section 4, are as follow:

"Section 4. It shall be the duty of the director of the department of business and administration and he shall have power, except as to the public service commission, to:

\* \* \* \* \*

"(f) Prepare and submit to each regular session of the general assembly and to the governor a report of the activities of the department, including the activities of each division in the department, which report shall be in lieu of any report now required by law for any department or office, the powers and duties of which are by this act vested in a division in the department."

Your letter is directed in particular to the interpretation by this Department of the question whether the consolidated report required to be made, and which no doubt will be made, under said sub-section (f), exempts each of the divisions of the Department of Business and Administration from making all other reports required to be made by such departments of State government before Senate Bill No. 348 was enacted, and which departments have been included in the Department of Business and Administration. You ask the direct question whether the Commissioner of Finance is relieved from making the report required in Section 7884, R.S. Mo. 1939, and if the Superintendent of the Division of Insurance is exempt from making the reports by that Department heretofore required by Sections 7884, 5792, 5797 and 15005, R.S. Mo. 1939.

Sub-section (f) of said Section 4 of said Senate Bill No. 348, provides for what we believe you very aptly



designate as a "consolidated" report to each regular session of the General Assembly, and to the Governor, of the activities of the Department, including the activities of each division thereof, which report shall be in lieu of any report now required, that is to say, that was required before the enactment of said Senate Bill No. 348, by law from any Department or office, the powers and duties of which are by said Senate Bill No. 348 vested in the Department of Business and Administration. We construe and interpret such terms of said sub-section (f) as relieving all of the divisions now included in the Department of Business and Administration from making such reports as are provided for in Sections 7884, 5792, 5797 and 15005, R.S. Mo. 1939, and that such reports as they may make under the rules and regulations established by the Department of Business and Administration should be made directly to the Director of that Department instead of independent reports to the Governor and the Legislature as are provided in said named sections. The Legislature, in enacting said Senate Bill No. 348, intended, we believe, that such reports as are required of the Director of the Department of Business and Administration should not be a duplication, as such, of separate reports formerly required by divisions of administration now placed within the one department of Business and Administration, under the terms of said Section 4, and sub-section (f) thereof, but that one comprehensive report concerning all divisions shall be made by the Director of the Department of Business and Administration to the Governor and the Legislature.

Said Section 7884, R.S. Mo. 1939, provides that the Commissioner of Finance shall preserve all records of his department and make a report to the Governor by December 1, of each year.

Said Section 5792, requires an annual report by the second Monday of February in each year, or soon thereafter, to the Legislature, if in session, and if not, to the Governor, containing a general accounting of the activities and business of his department for the previous year.

Said Section 5797, R.S. Mo. 1939, provides that the Superintendent of Insurance shall make an accounting, upon proper vouchers, for all money transactions, and report the same; after the same have been audited by the State Auditor, in the annual report required of him by said Section 5792.

Said Section 15005, R.S. Mo. 1939, we think, has no particular bearing upon the question here being considered. That section merely provides that in addition to the annual report--we assume that the report required by Section 5792, and named in said Section 15005 as "The Missouri Insurance Report" is meant--such additional information shall be included, necessary to supply factual information for the publication of the "Missouri and State Publications", under Article 2, Chapter 120, R.S. Mo. 1939. However, regardless of to whomsoever such departmental reports were required to have been made to State officers or for any purpose, we believe they are submerged in and superseded by the terms of said Senate Bill No. 348 requiring the consolidated report to be made under sub-section (f) of Section 4 thereof, to the Governor and to the Legislature. Otherwise they would be duplications of the reports undoubtedly required to be made under sub-section (a) to the Director of the Department of Business and Administration by the heads of the divisions of such Department.

Sub-section (f) of Section 4 of Senate Bill No. 348 provides that the reports by the Director of the Department of Business and Administration to the General Assembly and to the Governor "shall be in lieu of any report now required by law for any department or office, the powers and duties of which are by this act vested in a division in the department". This, we believe, indicates that it was the intention and purpose of the Legislature in enacting said Senate Bill No. 348, and in particular, that part of said sub-section (f), just quoted, to repeal the requirements of the statutes in this State, to-wit: Sections 7884, 5792, 5797 and 15005, R.S. Mo. 1939, and any other section providing for such reports previous to the enactment of said Senate Bill No. 348, because they would be, and are, in conflict therewith, and that insofar as those enumerated sections, requiring such separate reports from departments, the powers and duties of which are, by said Senate Bill No. 348 vested in the Department of Business and Administration are, by implication, repealed.

If, then, the powers to be exercised, and the duties to be performed, by the divisions of such department are placed by said Senate Bill No. 348 in the Department of Business and Administration --and they are so placed by Sections 7, 8, 9, 10, 11, 12, and, likewise, future assignments of any department or agency in this State that are placed within the authority of the Department of Business

and Administration, as is provided in Section 13 -- then the consolidated report provided for in sub-section (f) of Section 4, would necessarily be in lieu of divisional reports heretofore required of any of them, to the Governor or the Legislature before the passing of said Senate Bill No. 348.

We do not mean to be understood as construing said Section 4 of said Senate Bill No. 348 as not requiring reports from the several divisions of the Department of Business and Administration to the Director of that Department. We think such divisional reports must be made, and be filed, indexed and preserved, for the purpose of making the consolidated report by the Director required in sub-section (f) showing the activities of each division in his department.

Section 6 of said Senate Bill No. 348 specifically exempts the Public Service Commission from the control or supervision of its proceedings and affairs, by the Department of Business and Administration, in the following paragraph of said Section 6, to-wit:

"The public service commission, as now established by law, shall be continued and constitute a division in the department of business and administration, but the director of the department of business and administration shall have no supervision, authority, or control, over the actions or decisions of the public service commission. \* \* \*".

It will be seen, therefore, that the Department of Business and Administration shall have no authority whatever over the Public Service Commission, or its affairs.

The second question submitted in your letter is whether the consolidated report of the Director of the Department of Business and Administration may be published in sections, each covering a division.

Our view of the question is that, not only may the consolidated report of the Director be published in sections, each section covering a division, but we believe that under sub-section (a) of Section 4 in order for the Director of the Department of Business and Administration to "Investigate, assemble, develop and study information regarding the structure and operation of the divisions in the department of business and administration and recommend

to the head or heads of the division such changes, if any, in administrative practices, and recommend to the General Assembly such changes, if any, in the law as in the opinion of the director will result in coordination of the work of the division in the department and in greater efficiency and economy" it would be imperative that he have, periodically, comprehensive reports from the division heads from which he could perform the duties required of him in said sub-section (a), and from which he may make a clear and understandable consolidated report as is so required in said sub-section (f).

The divisional reports made must, we believe, necessarily be each in a separate section from all other division reports, because they would each be reporting the activities of a different business, at different costs and expense, and on wholly unrelated subjects. They, therefore, could not well be, in the interest of clarity in reporting such activities, and in accuracy in showing the efficiency of the methods of the performance of such divisional activities, should not be intermingled. We believe they should be published separately and in sections, as you suggest, in your consolidated reports to the Governor and the Legislature as sub-section (f) of said Section 4 requires.

Your letter suggests that this Department indicate the form to be used in the consolidated report to the Legislature and the Governor in event your reports are published in sections.

As we have observed hereinabove, division heads of the several divisions composing the Department of Business and Administration should make separate reports to the Director of the Administration, setting forth the activities and records and facts pertaining to the particular division making the report. If this be a proper procedure, and we believe it is, it would be necessary for the Director of the Department to require each division head to keep a strict record of that department's actions, requisitions, and other activities in procuring and purchasing items for each department, and that reports thereof, be periodically made to the Director, and that the Director keep in a properly indexed and systemized file the separate reports showing the records of each division, so that he may not only have a check upon the activities of each division, but that he may consolidate such reports into his own report to the Legislature, and the Governor, as the case may require, under sectional divisions and sub-heads in the report but all to be published in one volume. The observation of these suggestions, we believe, will comply with the terms of said sub-section (f) of said Section

Honorable Bert Cooper      -7-

4, and permit the Department of Business and Administration to publish in sections, the activities of each division.

CONCLUSION.

It is, therefore, the opinion of this Department:

- 1) That the consolidated reports required to be made by the Director of Business and Administration covering the activities of the divisions in such Department, under sub-section (f) of Section 4 of Senate Bill No. 348, to the Legislature and to the Governor, supersede and take the place of reports formerly required to be made by such departments as are now included as divisions of the Department of Business and Administration, and that any section of the statutes of this State, particularly Sections 7884, 5792, 5797 and 15005, R.S. Mo. 1939, insofar as they conflict with the provisions of said sub-section (f) of Section 4, Senate Bill No. 348, are, by implication, repealed, respecting the reports provided for in said enumerated sections.
- 2) That Section 6 of Senate Bill No. 348 specifically exempts the Public Service Commission, as now established by law, from any authority, supervision or control over the actions or decisions of the Public Service Commission by the Department of Business and Administration.
- 3) That the consolidated report of the Director of the Department of Business and Administration may be published in sections under separate divisional sub-heads in said consolidated reports, but to be published in one volume.

Respectfully submitted,

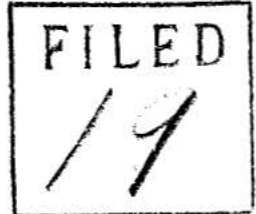
GEORGE W. CROWLEY  
Assistant Attorney General

APPROVED:

J. E. TAYLOR  
Attorney General

GWC:ir

SEMINARY FUND: Investment of Seminary Fund is under exclusive  
SCHOOLS: control of Board of Curators. State Treasurer  
STATE TREASURER: liable on bond only if investment is not legal.



September 30, 1947

10-6  
Mr. Leslie Cowan, Secretary  
University of Missouri  
Columbia, Missouri

Dear Mr. Cowan:

This department is in receipt of your request for an official opinion which reads as follows:

"I am instructed by the Board of Curators to request your opinion as to whether or not the Board of Curators is the only body to make investments of the State Seminary Fund. This request is made with the knowledge of and the cordial consent of the State Treasurer, Mr. Winn. The request arises from a question in Mr. Winn's mind regarding one section of a law passed by the 63rd General Assembly referring to the handling by him of the Seminary funds.

\* \* \* \* \*

"The new State Constitution separates the Public School Fund from the Seminary Fund and provides for distinct management of the two funds which were previously under the supervision of a single board. Article 9, Section 6, of the Constitution provides that the Seminary Fund shall be

' . . . securely invested by the Board of Curators of the State University . . . '

"The 63rd General Assembly, in revising the statute law to conform to the new Constitution, enacted a law (Senate Bill #210) containing provisions relating to the management of the Seminary Fund. Section 4 of this act specifies that the Board of Curators shall be the Commissioners of the Seminary Fund and that all monies and funds held in such fund or received by it, except the interest on the same, shall be invested by the said Commissioners. However, Section 12 of the same law in reciting the duties of the State Treasurer reads,



Sept. 30, 1947

'...for all property or money received under this Article by the State Treasurer, he and his sureties shall be responsible for the safekeeping, investment, reinvestment and disbursement of the same on his official bond.'

"This reference to investment and reinvestment in Senate Bill #210 has caused Mr. Winn, the State Treasurer, some concern and he has raised a question with us in regard to the responsibility for the investment of the monies in the State Seminary Fund. There are now funds available for investment and the Board of Curators is anxious to do its duty."

Section 6, Article IX of the Constitution of Missouri 1945 provides as follows:

"The proceeds of all certificates of indebtedness due the Seminary Fund, the net proceeds of all sales of lands granted to the state for the benefit of the State University with its several divisions, as provided by law, and all gifts, grants, bequests, or devises to said Seminary Fund for the benefit of the University, and not otherwise appropriated by the terms of any such gift, grant, bequest or devise, shall be paid into the state treasury, and securely invested by the board of curators of the State University and sacredly preserved as a Seminary Fund, the annual income of which shall be faithfully appropriated for maintenance of the State University, and for no other uses or purposes whatsoever." (Underscoring ours)

Section 4, Laws of Missouri 1945, page 1634 provides:

"The Board of Curators of the University of the State of Missouri shall be the commissioner of the Seminary Fund and all monies and funds held in such fund, or received by it, except the interest on the same, shall be invested by the said commissioners in registered bonds of the United States or the State of Missouri, bonds of school districts of the State of Missouri, or bonds or other securities, payment of which are fully guaranteed by the United States, of not less than par value." (Underscoring ours)

Sept. 30, 1947

Under the Constitution and the statute quoted above the duty of investing the Seminary Fund is imposed upon the Board of Curators of the University of Missouri. However, Section 12, Laws of Missouri 1945, page 1634, provides that:

"For all property or money received under this article by the State Treasurer, he and his sureties shall be responsible for the safe keeping, investment, reinvestment and disbursement of the same on his official bond." (Underscoring ours)

The question then is presented as to what responsibility the Treasurer has in regard to the investment and reinvestment of the Seminary Fund.

There can be no question that under the Constitution the exclusive right to invest the Seminary Fund is placed in the Board of Curators, and this exclusive control of the fund cannot be exercised or interfered with by any other officer or board so long as the Board of Curators follows the Constitution and the statutes relating to said fund. The duties of the Treasurer in regard to said fund are given in Section 11, Laws of Missouri 1945, page 1634, as follows:

"It shall be the duty of the State Treasurer: First, to receive and safely keep all bonds, stocks or money which shall, from time to time, be paid into the State Treasury on account of the Seminary Fund, or the income thereof; second, to pay all warrants lawfully drawn by the Auditor on such fund or income; third, to exhibit to the Board of Curators, quarter-yearly, such accounts and reports as they may require, relating to the Seminary Fund in the power of the Treasurer to exhibit; fourth, to exhibit to the Legislature, at each regular session, exact accounts of all receipts and expenditures on account of the Seminary Fund or income, and a report of all such information as may be in his power relating to such fund and property dedicated to the use of the University."

From the above section it will be seen that the Treasurer has the duty to receive and safely keep the Seminary Fund and to disburse the same, for which duties he is responsible on his official bond under Section 12. Further, he has the duties to exhibit the



Sept. 30, 1947

accounts to the Board of Curators and the Legislature. Nowhere is he given the duty or the right specifically or inferentially to control the investment of the fund. What then is the meaning of the provision that the Treasurer "shall be responsible for the \* \* \* \* \* investment, reinvestment" of the Seminary Fund.

The nearest case that we have been able to find dealing with this question is that of State v. Grand Forks County, 71 N.D. 355, 300 N.W. 827, in which the State of North Dakota sued a county of that state to recover taxes collected by the county treasurer and which taxes had not been paid over to the state as required by law. The taxes had been collected by the county treasurer and deposited in a county depository which had failed. The court pointed out that the county treasurer in collecting the tax did so as the person designated by law to make the collection, and not as the agent of the county and at no time were such funds subject to county control. However, the state pointed out that there was a statute which provides as follows:

"Each county is responsible to the state  
for the full amount for the tax levied  
for state purposes."

We quote at length the court's answer to this contention, because we believe it is especially apropos to the present situation. The court said, l.c. 830:

" \* \* \* \* \* Ordinarily the word responsible connotes a conditional rather than unconditional liability. It is a word which is commonly used to describe the relationship of executors, guardians and other trustees to property which has been placed in their charge. Trustees are responsible for trust property but they cannot be made liable for any loss or depreciation of the fund intrusted to them so long as they 'keep themselves strictly within the line of duty, and exercise reasonable prudence, care and diligence.' 65 C.J. 819. The Century Dictionary comments upon the use of this word, as follows: 'With regard to the legal use of the word, two conceptions are often confused--namely, that of a potential condition of being bound to respond or answer in case a wrong should occur and that of the actual condition of being bound to respond because a wrong has occurred. For the first of these responsible is properly used, and for the second liable.'

Sept. 30, 1947

Webster's New International Dictionary, 2nd Ed., defines 'responsible' as 'Liable to respond; likely to be called upon to answer; accountable; amenable.' In *Thomas v. Mahan et al.*, 4 Me. 513, the court said: 'The expression "holden to account for," means, not merely to "render an account of," but, "to be responsible for;" it stands in opposition to the right of appropriation to one's own use and benefit.'

"Giving to the word 'responsible' its ordinary meaning, we think that section 2183, supra, imposes a condition of potential liability or accountability upon counties for state taxes and that a county's duty to account may be met by showing that the county officers have adhered strictly to the statutory directions of the State Legislature and have acted with honesty, prudence and diligence. \* \* \* \* \*

(Underscoring ours)

In line with the reasoning of the above opinion we believe the responsibility of the State Treasurer for the investment and reinvestment of the Seminary Fund is limited to seeing that the Board of Curators, who have the exclusive duty to invest the funds, follows strictly the statutory directions and that they account honestly and legally. So long as the Board of Curators follows the law relating to the investment of the fund then no liability incurs upon the Treasurer. However, if the Board of Curators invests the funds in private bonds which they are forbidden to do under Section 4, Laws of Missouri 1945, supra, and if the Treasurer releases money from the Seminary Fund to pay for such bonds he would be liable upon his official bond.

#### CONCLUSION

It is, therefore, the opinion of this department that the investment of the Seminary Fund is under the exclusive control of the Board of Curators of the University of Missouri, and the State Treasurer is liable upon his official bond only if the Board of

Mr. Leslie Cowan

September 30, 1947

Curators in making such investments does not follow the statutory directions of the Legislature, and the Treasurer disburses moneys of the Seminary Fund in payment of such illegal investments.

Respectfully submitted

ARTHUR M. O'KEEFE  
Assistant Attorney General

APPROVED

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J. E. TAYLOR  
Attorney General

BARBER BOARDS: The State Board of Barber Examiners is not empowered to require of apprentices or students qualifications additional to those in Section 10134, R.S. Mo. 1939.

October 16, 1947

FILED

19

Honorable James V. Conran  
Prosecuting Attorney  
New Madrid County  
New Madrid, Missouri

Dear Sir:

This is in reply to your letter of October 3, 1947, requesting an opinion from this department, reading as follows:

"We are finding that a goodly number of the young GI returning to this part of the State are anxious to become barbers. For quite some time, we have not had enough barbers down here to supply the demand.

"In attempting to become apprentices they run into a very stringent interpretation of the law by the State Barber Board. The Section that appears to apply is number 10134, R. S. Mo. 1939.

"As we interpret this, it is only necessary for a licensed barber to put an apprentice to work and file with the Board the name and age of said apprentice along with a remittance of \$5.00 for registration. The Board seems to require an application to become an apprentice and qualifications satisfactory to them, from the apprentice, which does not appear to be the intent of the Statute. If a prior license or registration was required, why would the law require the barber to immediately file the name and age of the apprentice with the Board, etc? They would already have that information.

"Taking the Statute as a whole it seems to us that the intention of the Legislature was to let anyone (the health requirements not being here considered) to be an apprentice barber under any licensed barber in the State, but only one to a barber; the other requirements relate only to schools and barbers desiring to teach up to ten apprentices. We are not inclined to go along with the interpretation of the Barber Board; certainly not to the point of prosecution of an apprentice under this Section."

Your inquiry calls for an interpretation of Section 10134, R.S. Mo. 1939, which reads as follows:

"Nothing in this chapter shall prohibit any person from serving as an apprentice in said trade under license issued by the board under a barber authorized to practice in the same, under this chapter, nor from serving as a student in any school or college for teaching said trade under the instruction of a qualified barber: Provided, that in no barber shop shall there be more than one apprentice to two barbers authorized under this chapter to practice said occupation; but all barber shops having but one chair shall be entitled to one apprentice; that all barber schools and colleges shall have not less than one teacher or instructor for every ten students: Provided, that all barbers, or barber schools or colleges, who shall take an apprentice or student, shall immediately file with said board the name and age of each of such apprentices or students, and the said board shall cause the same to be entered in a register kept for that purpose; for which registration a fee of five dollars shall be paid to the treasurer of the board by such apprentice or student: Provided, that any firm, corporation or person, desiring to conduct

a barber school or college in this state, shall first secure from said board a permit to do so, and shall keep the same prominently displayed. For such permit there shall be paid to and collected by said board an annual fee of one hundred dollars to be paid on or before January 31st of each year: Provided further, that said board shall have the right to pass upon the qualifications, appointments, and course of study in said college or barber shops where apprentices are taught the occupation of barbering; and provided further, that said board shall have the right and power to revoke the certificate, permit or license of any such barber school or college, instructor or teacher therein or instructor in any barber shop, for any violation of the provisions of this section."

You will note in the first part of this statute that the language clearly and succinctly states:

"Nothing in this chapter shall prohibit any person from serving as an apprentice in said trade under license issued by the board under a barber authorized to practice in the same, under this chapter, nor from serving as a student in any school or college for teaching said trade under the instruction of a qualified barber: \* \* \*" (Underscoring ours.)

A fundamental rule of statutory construction was laid down by the Court in the case of Artophone Corporation v. Coale, 345 Mo. 344, 1.c. 353:

" \* \* \* Of course 'The primary rule of construction of statutes is to ascertain the lawmakers' intent, from the words of the statute if possible; and to put upon the language of the Legislature, honestly and faithfully, its plain and rational meaning and to promote its object, and 'the manifest purpose of the statute, considered historically,' is properly given consideration.' (Cummins v. K. C. Pub. Serv. Co., 334 Mo. 672, 684, 66 S.W. (2d) 920, 925 (7-10).) \* \* \*

The Legislature uses the terminology, "any person," indicating an intent to allow all persons who so desire and who follow the prescribed procedure to apprentice themselves to a qualified barber or to attend qualified barber schools. The qualification provisos of the statute are directed against the barber shops or colleges where apprentices or students are taught the occupation of barbering, and not against the students themselves. The Board apparently has some discretion as to the equipment, qualifications of instructors, etc., by virtue of the third proviso which gives it the "right to pass upon the qualifications, appointments, and course of study in said college or barber shops where apprentices are taught the occupation of barbering." But, as we interpret this statute, that proviso does not give the Board the right to set up additional qualifications for apprentices or students before issuing licenses.

In 37 C. J., page 238, the general rule is stated:

" \* \* \* Except where the licensing board or officer is vested with discretionary power in granting or refusing licenses, an applicant, upon complying with the conditions imposed, is entitled to a license as a matter of right, and, in some cases, may enforce his right by mandamus. But where other conditions are imposed, he is not entitled to a license as a matter of course by merely paying or tendering the fee or tax required. In the absence of special authority therefor, the licensing board or officials, in passing on applications for licenses, cannot prescribe conditions or requirements in the case of a particular application, in addition to those prescribed by statute or ordinance, with which applicant has already complied."

And again, at page 240:

"The power vested in the board or officer to grant licenses upon the applicant complying with the prescribed conditions, unless mandatory in terms, carries with it, either expressly or impliedly, the power of exercising, within the limits prescribed by the act or ordinance, a

reasonable discretion in granting or  
refusing licenses. \* \* \* \*"  
(Underscoring ours.)

A question which arises is whether or not the fact that the Board is empowered to issue licenses implies a power to set up additional requirements to be met by those applying for licenses.

In the case of Lauck v. Reis, 310 Mo. 184, the Court had before it a question of whether or not the term "licensing" included within its meaning, by implication, the term "regulating." The Court said, l.c. 199:

"The word or term 'regulating' is broader in its scope and meaning than the word 'licensing.' The word 'regulate' is defined, 'to adjust or contend by rule, method, or established mode; govern by or subject to certain rules or restrictions; to direct by rule or restriction; to subject to governing principles or laws.' (Webster's New International Dictionary; Century Dictionary.) The word 'license' is defined, 'to permit or authorize; to give permission; to grant authority to do an act which, without such authority, would be illegal or inadmissible.' (Webster's and Century Dictionaries.) The power to regulate may include the power to license, but the power to license does not embrace the power to regulate. The distinction is clearly and succinctly expressed in Pacific University v. Johnson, 47 Ore. 448, 84 Pac. 704, 706, wherein the Supreme Court of Oregon said: 'To license is one thing and to regulate another. To license means to permit, to give authority to conduct and carry on; while to regulate means to prescribe the manner in which a thing licensed may be conducted.'"

As the Legislature did not give the Board express authority to set up qualifications for apprentices or students, and in the light of the general rules applicable to licensing boards and the Lauck case, above, we do not feel that the Board has



the implied power to set up qualifications, other than those in Section 10134, above, for the admission of apprentices or students.

A second part of your inquiry seems to raise a question as to whether the requirements of Section 10134, above, would apply to single chair barber shops. We think a careful reading of Section 10134 clearly shows that it was the intention of the Legislature to include one chair barber shops within the purview of the statute, as witness the underlined words in the statute:

" \* \* \* that all barbers, or barber schools or colleges, who shall take an apprentice or student, \* \* \* that said board shall have the right to pass upon the qualifications, appointments, and course of study in said college or barber shops where apprentices are taught the occupation of barbering; \* \* \* or instructor in any barber shop, \* \* \*"

Your attention is also called to the wording of Section 10133, R.S. Mo. 1939, which further shows the intention of the Legislature to bring the control of all persons teaching barbering in this State under the direction of the State Barber Board.

#### Conclusion.

It is the opinion of this department:

(1) That the State Board of Barber Examiners does not have the right to require qualifications additional to those set out in Section 10134, R.S. Mo. 1939, from those applying for a license as an apprentice or student.

(2) Section 10134, R.S. Mo. 1939, applies to single chair barber shops and all persons licensed to instruct in barbering in this State.

Respectfully submitted,

APPROVED:

JOHN R. BATY  
Assistant Attorney General

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J. E. TAYLOR  
Attorney General

JRB:ml

TAXATION AND REVENUE: Counties may, by a two-third vote, levy a tax above constitutional limit for health purposes.

FILED

20

March 28, 1947

4/3

Honorable Marshall Craig  
Prosecuting Attorney  
Mississippi County  
Charleston, Missouri

Dear Sir:

We are in receipt of your recent request for an opinion, based on the following state of facts:

"At the regular November election, a separate ballot was placed before the voters on a proposition to vote an additional Tax for the DDT Program. A copy of the ballot and the publication is attached hereto. The proposition was voted 1274 and 327 against, so that it easily carried by more than two-third vote.

"I have a copy of your opinion dated November 14, 1946 written to J. B. Conran of New Madrid County concerning the legality of a levy ordered by the Circuit Court.

"In light of your opinion, our court would like to have your opinion concerning the legality of the levy voted in this county."

Your question requires an interpretation of Article X, Section 11(c), of the Constitution of Missouri 1945. This section embodies two distinct methods of increasing the tax levy, and for reference purposes we have divided same into Part 1 and Part 2, as follows:

Part 1. "Increase of Tax Rate by Popular Vote - Further Limitation by Law - Exceptions to Limitation. - In all municipalities, counties and school districts the rates of taxation as herein limited may be increased for their respective purposes for not to exceed four years, when the rate and purpose of the increase are submitted to a vote and two-thirds of the qualified electors voting thereon shall vote therefor; provided that the rates herein fixed, and the amounts by which they may be increased, may be further limited by law;

Part 2. "and provided further, that any county or other political subdivision, when authorized by law and within the limits fixed by law, may levy a rate of taxation on all property subject to its taxing powers in excess of the rates herein limited, for library, hospital, public health, recreation grounds and museum purposes."

The courts of Missouri have long recognized and held that public health is a public (county) purpose for which tax money may be expended. In the case of *State ex rel. v. Piper*, 214 Mo. 439, l.c. 445, the Court defined the words "for county purposes" and said:

"The Constitution, article 10, section 11, in imposing this limitation on tax assessments used the words, 'For county purposes,' which include in their meaning all subdivisions of the county for the use of which taxes may be imposed. Section 9284, Revised Statutes 1899, quotes those words 'for county purposes' and uses them in the same sense in which they are used in the Constitution. \* \* \*"

In the case of *Board of Commissioners v. Peter*, 253 Mo. 520, the Court ruled that the erection of a county hospital was a public health measure and therefore a public purpose for which tax money could be used. At l.c. 532 the Court said:

"It is further argued that it violates section 3 of article 10, reading:  
'Taxes may be levied and collected for public purposes only. \* \* \* '

"(1) It is not apparent why the purpose to be subserved by the tax in question is not a public purpose within the intendment of section 3, supra. The evil in the mind of the Constitution maker and blazoned forth in his instrument was the danger of a misuse of the taxing power for private purposes, and we are not willing to hold that the statute comes within the mischief interdicted thereby. \* \* \* "

We assume from the information at hand that the DDT Program is one of spraying, to prevent pestilence and disease caused by the floods of the Mississippi river, and for that reason we have quoted at some length from the case of *Morrison v. Morey*, 146 Mo. 543, because we believe it fully supports the contemplated tax expenditure. At l.c. 562, 563 and 564 the Court said:

" \* \* \* It is also true that the police power of the State extends to all kinds of restraints and burdens, in order to secure the general comfort, health and prosperity of the State, and this includes the right to enact suitable regulations looking to the accomplishment of a public purpose and designed for the promotion of public interests. *Tiedeman's Limitations on Police Power*, sec. 1 et seq.; *Cooley's Const. Lim.* (6 Ed.), p. 704 et seq. This power is universally recognized, and its application to any given law is the only question open to debate. The power to construct drains and sewers, to open and improve streets, to regulate the uses of private property so as to prevent nuisances, to establish fire limits in large and populous cities, to establish quarantine, to remove and isolate persons affected with smallpox

and other contagious diseases in order to stop the spread of disease, is all dependent upon the police power of the State, exercised for the benefit of the health and well being of the people. In every case there must be the impress of a public purpose upon the law to make it constitutional. It is not enough that private interests will be subserved, or that private property will be enhanced in value. There must be a public interest applicable to a community of persons to be benefited. The health of the people is the substrata upon which the prosperity of the State rests, and laws conducive to health have always been upheld. In this case the police power of the State is broad enough to authorize the law in question (Welty on Assessments, secs. 350, 351 and 352; Hagar v. Supervisors, 47 Cal. 233), and the case itself is a striking illustration of the impossibility of attaining the end in view by private consent or co-operation and of the necessity of the State lending its aid to the accomplishment of the purpose intended to be reached. Levees must be continuous to be effective. No man alone could accomplish any material good by constructing a levee in front of his own land, where his neighbors refused to do likewise. The levee must all be built at once or it will fall short of the beneficent purpose intended. The contrariety or selfishness of human nature makes it impossible to secure the co-operation of all persons whose concert of action is necessary to successfully cope with the common enemy of man, the floods. One or more persons in a district may be willing to incur the almost certainty of disease or even death, rather than meet the small expenditure necessary to prevent it by building a common levee, just as they might be willing to run the risk of fire by constructing a cheap wooden house in a populous neighborhood, or of drinking impure

well water, or of allowing nuisances and filth and disease-breeding agencies to remain on their premises. The law can not control such cases simply because the person offending is pursuing a course injurious to his own interests, but the law can control and regulate him if other persons are injuriously affected by his conduct, because such other persons can not peaceably control him themselves. This law would be unconstitutional if its only purpose and effect was to improve the value of the lands of the persons in the district, but such is not the only object of the law. We take judicial notice of the fact that overflows are followed by disease, resultant from the decaying deposits left by the water, and that such disease is not and can not be confined to a single family, but spreads among the people of the locality without any fault of theirs, and which they are powerless to prevent. This, then, is a proper case for governmental interference under the police power of the State, as much so as the construction of drains and sewers. Cooley's Const. Lim. (6 Ed.), p. 627."

It follows that public health, being a public purpose, is included in the taxes that may be increased by a vote as specified in Part 1 of Article X, Section 11(c) of the Constitution, supra.

You will also note that Part 1 provides the amount of the increase may be limited by law. We are unable to find any further limitation by the General Assembly. Section 11046, Mo. R.S.A., House Committee Substitute for House Bill No. 468, follows the constitutional provision, and provides:

"For county purposes the annual tax on property, \* \* \* shall not exceed the rates herein specified: \* \* \* Provided, further, that in any county the maximum rates of taxation as herein limited may be increased for not to exceed four years, when the rate and purpose of the

increase are submitted to a vote and two-thirds of the qualified electors of the county voting thereon shall vote therefor."

In reaching the conclusion that a county may increase its tax levy for health purposes above the constitutional limit by a vote, as provided in Part 1 of the constitutional provision, supra, we have considered Part 2, supra, as it might apply to Part 1.

By referring to the title of Section 11(c), Article X of the Constitution, supra, and the discussion and debates of the members of the Constitutional Convention, we have concluded that it has no reference or connection in any way with Part 1, but is an additional exception to the constitutional limit of a tax levy and is a further and distinct method of increasing the levy for health, etc., purposes. You will note the title provides "Exceptions to Limitation."

The following quotations from the record of the Debates of the Constitutional Convention clearly indicate that that body understood and intended that Section 11(c) should provide that taxes may be increased above the limit fixed by the Constitution for (1) all county or public purposes, which includes health, by a two-third vote of the people and (2) for health, etc., purposes by any method as may be authorized and prescribed by the General Assembly:

"MR. MOORE: Judge, I wanted to ask you this question. I am very heartily in favor of the principle of your amendment but I don't quite get it through my head, maybe it is a little thick, why we should strike out the words 'public purposes' and insert these specific items. Now, let me ask you this, did the Committee have in mind that the first part of this section, by a two-thirds vote, they could levy additional taxes within the limitations prescribed by the Legislature for any public purpose? Then under general law they could do this without a vote of anybody for these specific items.

"MR. MAYER: Yes, if the Legislature authorized it.

"MR. MOORE: Now, do you have enough specific items listed, that is the thing I am wondering?

"MR. MAYER: Well, we have I think, all of the specific items that were urged before the Convention as being those that should be put in. The reason these were not put in, we all felt that 'public purposes' covered it and the Committee thought that was too broad and took those words out and I reinserted these words.

"MR. MOORE: Well of course all of the public purposes would mean that the Legislature might levy cities without a vote of the people and levy a tax for any purpose that was public for building a building or any other public purpose and it was believed that that ought to come under a two-third vote.

"MR. MAYER: Thank you.

"MR. ALLAN: Mr. President, I desire to speak on Mr. Phillips' amendment. I was a member of this Committee and it was the unanimous consensus of the opinion of this Committee that ad-valorem taxes were fast becoming obsolete and a relic of barbarism, that modern taxation was attempting to get away from ad-valorem taxes, and yet this same Committee, not only proposes to take off the present constitutional limitations on these ad-valorem taxes; but in effect, invites the people and the Legislature itself to use those ad-valorem taxes and use that theory of taxation for these purposes, hospital and public health, and the purpose that Judge Mayer added by his amendment this morning and which I supported.



"MR. RIGHTWELL: The amendment offered by Mr. Allen and myself would exempt Kansas City from the effect of the proviso beginning at line 26 of Section 11 on page 6 of File 19. Now, as all of the delegates have undoubtedly noted, the section first sets forth the amount of taxes that is based on the hundred dollars valuation that municipalities, counties, and school districts and for purposes other than school district, local taxing units have a right to levy. But the proviso beginning at page 26 contains two separate ideas. The language from line 26 to line 32 provides in effect that any municipality, county or school district, by the vote of two-thirds of those voting on the subject, may increase any of the rates specified. For example, in the case of school district the rate specified is a dollar so that if a two-thirds vote could be secured authorizing such an increase, the rate could be increased to two dollars. As a matter of fact, theoretically, at least, it could be increased to ten dollars and twenty dollars. Of course, that would not be done. That is out of the question.

\* \* \* \* \*

"Well now, the second part of the proviso starts at the bottom of page 6 in line 32 and that provides for no vote by anybody. It simply provides that we authorized, by law, any municipality, county or other political subdivision may levy a rate of taxation on all property subject to its taxing power in excess of the rates herein limited for library, hospital, public health. I think the words 'other public purposes' were stricken out and 'public recreation' and 'museums' were inserted. So that under that proviso in any county or other school district or other taxing unit in this state, if the Legislature could be induced to pass a law authorizing it the taxes could be increased without limit.

"So that we are faced here with a fundamental question of public policy in this section 11. Do you want to put a ceiling on the power to tax as was done in 1875 or do you wish to have no ceiling at all?

\* \* \* \* \*

"MR. RIGHTER: The provision in the first proviso, the provision of the first proviso, from lines 26 to 32 at the bottom of Page 6 are entirely independent of the proviso at the top of Page 7 and the Legislative assembly is not essentially concerned with the first proviso at all. People of the communities, I read this, can go to the polls and by a two-thirds vote of those voting, can increase the taxes of any of these taxing units indefinitely without the General Assembly doing a thing.

\* \* \* \* \*

"MR. MAYER: Mr. President, I hope this amendment of Mr. Phillips will not be adopted. These purposes for which the Legislature may authorize the issuance or the increase of the levy are all purposes in which the public are very deeply interested. They usually will not take a very large levy. It isn't as if they were going to build a lot of buildings and all that sort of thing. It seems to me that there is plenty of safeguard if the people elect their councils, elect their whole county courts. They can't do this except as authorized by the Legislature and under such limitations as the Legislature may prescribe. I don't see why we should require a two-thirds vote to increase a levy of millions say for public health or for a library. It seems to me we are going along in distrust of our local people when we do that. I hope the amendment will be defeated.

"MR. GARTEN: Mr. President, it occurs to me that this amendment is already cared

for by the first part of this because it says in the first part that a rate of taxation on any of these local purposes can be set by two-thirds vote, and then here we go on and say that a rate of taxation for libraries, hospitals, and etc., can be set by two-thirds vote. We will surely - well it seems to me the first part of this provision would cover the latter the way it is amended and if this is the purpose of Mr. Phillips, he would better attain it by striking out the last part of this section as something superfluous.

"PRESIDENT: Have you finished?

"MR. GARTEN: Yes.

"MR. SHELLEY: Mr. President, it occurs to me that this amendment should not be adopted, and if this should be adopted you would accomplish almost the opposite from what the Committee had in mind. You tell the people in the first proviso that if two-thirds of those voting at an election want to do so they can authorize for their respective purposes, an increased rate. Then you go in the next proviso and ask if Senator Phillips amendment should be adopted you say but, if it happens to be for these particularly desirable purposes, you can only do it if the General Assembly tells you that it may, and for that reason, I think it is most inadvisable and should not be adopted."

The above excerpts are just a few of the many in this record which conclusively support the interpretation that Section 11(c), of Article X of the Constitution, provides two distinct methods of increasing the levy.

We are unable to find any authorization by the Legislature that would permit the increase under Part 2 of the constitutional provision, and so held in the opinion rendered to Mr. J. V. Conran, Prosecuting Attorney of New Madrid County, mentioned in your request.

We have examined the ballot submitted and find that it states the period of time, rate and purpose of the increase, as provided in Part 1 of the constitutional provision, and believe same to be proper in form.

Conclusion.

It is, therefore, the opinion of this department that an increase of a tax levy above the limits fixed by the Constitution and law for public purposes (public health) is valid and constitutional when the increase has been voted by a two-thirds majority of the voters on a ballot submitting the rate and purpose of the increase for a period not to exceed four years.

Respectfully submitted,

W. BRADY DUNCAN  
Assistant Attorney General

APPROVED:

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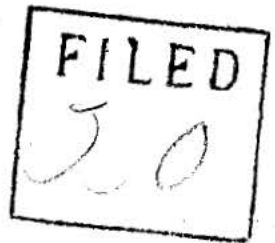
J. F. TAYLOR  
Attorney General

WED:ml

*Copy to Mr. Smith*

SHERIFFS: Sheriff has the custody, rule, keeping and charge of the county jail. In counties of the third class, the sheriff recovers from the county court for board furnished city prisoners.

May 19, 1947



Honorable Marshall Craig  
Prosecuting Attorney  
Mississippi County  
Charleston, Missouri

Dear Sir:

This is in reply to your letter of May 9, 1947, in which you requested an opinion on certain questions relative to the feeding of prisoners in your County Jail. Said letter reads in part as follows:

"I recently wrote you concerning the authority that the County Court might have with reference to renting or leasing a portion of the County jail to the City. You sent me an opinion written on March 26, 1940 in which it was stated that the County Court had no authority to rent any portion of the rooms in the County jail to be used as a City jail by the City Marshall.

"The City of Charleston, which is the County seat of Mississippi County does not have a City jail. It would appear that the City has the right to place their prisoners in the County jail by reason of Section 7360. As you know, under the new law, the Sheriff is now required to present his actual bills for feeding the prisoners and the County Court pays those bills. This obviously raises a very difficult question where a portion of the prisoners are City prisoners all fed by the Sheriff, and all fed at the same kitchen. Taking into consideration the above Section and Sections 2480, 1347.304 (Laws of Missouri, 1945), and Section 9196, along with the above problem which we have, I would like your opinion on the

following questions:

- "1. Is it still your opinion that the conclusion reached in the Attorney General's opinion of March 26, 1940 is still the prevailing law?
- "2. Since the County Court must pay the actual board bills, the hiring of a cook, and janitor service for the jail, would they have authority to charge the City a stipulated amount, say \$1.00 per prisoner per day, said amount to be paid directly to the County, and the Sheriff present all of his bills for food to the County Court for payment? Is the Sheriff authorized to accept any amount from the City for the care and feeding of the prisoners, except perhaps \$1.00 for commitments?
- "3. Does the County Court have authority to enter into an agreement with the City that the City prisoners may be placed in the County jail, the City to pay the County \$1.00 per prisoner per day, and the County to furnish the janitor, cook, and pay the actual grocery bills?"

Although the county court has control and management of the county property, both real and personal, the custody, rule, keeping and charge of the jail is expressly given to the sheriff by Section 9195, R.S. Mo. 1939, which reads as follows:

"The sheriff of each county in this state shall have the custody, rule, keeping and charge of the jail within his county, and of all the prisoners in such jail, and may appoint a jailer under him, for whose conduct he shall be responsible; but no justice of the peace shall act as jailer, or keeper of any jail, during the time he shall act as such justice."

Therefore, it is still our conclusion, as expressed in the opinion rendered under date of March 26, 1940, to Honorable Alfred P. Moeller, that the sheriff shall have the custody, rule, keeping and charge of the county jail, and that the county court has no authority to rent any of the rooms in the county jail to be used as a city jail by the city marshal.

Section 7360, R.S. Mo. 1939, provides:

"If any city as in this chapter provided for have no suitable and safe place of confinement, the defendant may be committed to the common jail of the county by the mayor or police judge of such city, and it shall be the duty of the sheriff, upon the receipt of a warrant of commitment from the mayor or police judge, if he have room, to receive and safely keep such prisoner until discharged by due process of law. Such city shall pay the board of such prisoner at the same rate as may now or hereafter be allowed by law to such sheriff for the keeping of other prisoners in his custody."

Thus it can be seen from a reading of this section that under certain circumstances it is made the duty of the sheriff to receive the city prisoners. Therefore, your two remaining questions may be stated thusly: Under the statutes, in counties of the third class, which includes Mississippi County, is it the county court or the city officials from whom the sheriff must recover for board furnished city prisoners who are in the county jail under the sheriff's custody?

50 C.J., at page 332, says: "The supervision of prisons, being a legislative function, is regulated by statutes, the provisions of which must be observed. These functions can only be performed by the officers, boards, or other authority to whom they have been intrusted by law. The rules and regulations for the government of prisons must be adopted by the appropriate authorities in the manner prescribed, and must be within the limits prescribed by law. \* \* \* \*"

Section 4 of House Bill No. 899, passed by the 63rd General Assembly, applicable to counties of the third class, provides:

"The sheriff shall have the custody and care of persons lodged in the county jail and shall furnish them with clean quarters and wholesome food. At the end of each month the sheriff shall submit to the county court a statement supported by his oath or affirmation of the actual cost incurred by him in the feeding of persons under his custody together with the names of the persons, the number of days each spent in the jail, and whether or not the expenditure is properly chargeable to the county or to the state under the law. The county court shall audit said statement and draw a warrant on the county treasury for the amount of the actual cost payable to the sheriff. The county clerk shall submit quarterly to the State Director of Revenue a statement of the cost incurred by the county in the feeding of the prisoners properly chargeable to the state and the state shall forthwith pay the same to the county treasury."

In the case of County of Douglas v. Coburn, 34 Neb. 351, the county sheriff was suing to recover compensation from the county for board furnished city prisoners. The applicable statutes were similar to our two above quoted sections to the effect that the city shall have the right to use the county jail and that the city shall be liable to the county for the cost of keeping such prisoners. The Supreme Court of Nebraska said at l.c. 354:

"In the very able and elaborate brief of the county attorney, it is contended that the city is liable to the sheriff for the board of the city prisoners, and that the county is not so liable, but he has referred to no statute that authorizes the sheriff to collect such fees from the city. The sheriff is a county officer and receives prisoners into the jail of the county as such. The county board has the general supervision of the jail in common with other property of the county, and it is the duty of such board to see that the rules prescribed by the district judges are carried out. The county is liable to the officer for the board of prisoners committed to the



county jail. He has no arrangement with the city authorities for compensation and the law fails to provide for the allowance of such claims, while it does provide that the county shall be liable. The city, therefore, is not liable directly to the sheriff, but no doubt is to the county, for the amount so expended, with interest thereon.\* \* \* \* \*

In *Nickell v. Waukesha County*, 62 Wis. 469, plaintiff, sheriff of Waukesha County, was suing said county to recover for board furnished prisoners committed to the county jail for violation of a village ordinance. At l.c. 472, the Supreme Court of Wisconsin said:

"The items of the plaintiff's account for the board of and washing for such prisoners, and for receiving and discharging such prisoners, stand on a different basis. As sheriff the plaintiff was bound to take the charge and custody of the jails of his county and the persons therein, and to keep them himself, or by his deputy or jailer; to keep a true and exact register of all prisoners committed to any jail under his charge. Subd. 1, 2, sec. 725, R. S.; Sec. 4945, R. S. He was entitled to receive pay for his actual and necessary disbursements for board and conveyance of such prisoners, and for committing them to and discharging them from prison. Subd. 27-29, sec. 731, R. S. The statutes made the county liable for 'the expense for maintaining persons charged with offenses, and duly committed for trial, and of those who are confined in the county jail, or who may be committed for the nonpayment of any fines and expenses for safe-keeping.' Sec. 4947, R.S.; Bell v. Fond du Lac Co. 53 Wis. 433.

"It is true, the section of the charter giving to the village authority to enact the ordinance in question, also, for the purpose of imprisoning offenders thereunder, gave to the village the use of the jail of Waukesha county, and provided that 'all persons committed to said jail by the marshal or any other officer shall be under the charge of the sheriff of said county, and said village shall be liable for the expenses of

keeping such persons in said jail.' Sec. 18, ch. 30, P. & L. Laws of 1859. Under this provision there would seem to be no doubt but what if the county pays the plaintiff for such expenses, it would have a right of action over against the village for the amount so paid therefor. But this does not take away the primary liability of the county to the plaintiff for such expenses, nor compel him to separate the items of such expense for the other items of his bill. We must therefore hold that the county is liable to the plaintiff for the amount of such items of his account included in the judgment as were for the board of and washing for such prisoners, and for receiving and discharging such prisoners; and for such amount, with interest thereon from the time it should have been allowed by the county board, he is entitled to judgment against the county."

In the Waukesha County case, supra, the provisions of the statutes to which the court referred were very similar to those above quoted provisions of Section 4, House Bill No. 899, and Section 7360 R.S. Mo. 1939, and Section 9196, R.S. Mo. 1939, which says:

"It shall be the duty of the sheriff and jailer to receive, from constables and other officers, all persons who shall be apprehended by such constable or other officers, for offenses against this state, or who shall be committed to such jail by any competent authority; \* \* \* \* \*

Applying the wording of the court to the facts of our case, we find that the sheriff is bound to take the charge and custody of the jail of his county and the persons therein, and to keep them himself or by his deputy or jailer; and keep a true and exact register of all prisoners committed to the jail under his charge. By Section 4, House Bill No. 899, supra, the sheriff is entitled to recover from the county court the actual and necessary costs incurred by him in the feeding

of persons under his custody. The said section provides that the sheriff at the end of each month is to submit to the county court a statement of the actual cost incurred by him in the feeding of persons under his custody. The section then provides for an indication by the sheriff in this statement of whether the expenditure is properly chargeable to the county or to the state. The county pays for all of the expenditure, including that incurred on behalf of state prisoners, and then recovers from the state in its own behalf the cost incurred from feeding said state prisoners. It is our opinion that the same procedure would be followed in counties of the third class in the recovery of costs incurred in the feeding of city prisoners, and that the county recovers in its own behalf from the proper city officials. As provided in Section 7360, supra, the amount to be recovered would be at the same rate as is allowed by law to the sheriff for the keeping of other prisoners in his custody.

#### CONCLUSION

It is, therefore, the opinion of this department that the sheriff shall have the custody, rule, keeping and charge of the county jail, by virtue of which he has the control of the feeding and care of the prisoners intrusted to him. It is further the opinion of this department that in counties of the third class the county court is liable to the sheriff for the actual cost incurred by him in the feeding of persons under his custody in the jail, and it is to the county court that the sheriff is to look for the payment of actual costs incurred by him in the feeding of city prisoners confined in the county jail.

Respectfully submitted,

Wm. C. COCKRILL  
Assistant Attorney General

APPROVED:

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J. E. TAYLOR  
Attorney General

WCC:LR

MEMORIAL AIR PORTS:

Under House Bill 192 city receiving allotment of less than \$10,000 may at a latter date receive further allotment which will make up the full \$10,000 limit.

April 19, 1947

FILED

22

Mr. Hugh Denney  
Director  
Department of Resources and Development  
State Office Building  
Jefferson City, Missouri

Dear Mr. Denney:

This is in reply to your letter of April 16, 1947, requesting an opinion from this department, which reads as follows:

"In your opinion of December 9, 1946, most of the points relative to compliance by city governments with the State Memorial Airport matching fund were clarified. However, the following question has been raised by a community, and we again seek your advice and opinion in this matter:

"If a city files for less than the full \$10,000 of state matching funds at this time, say \$6,000, and then at a later date desires to file for an additional \$4,000 of state matching funds, would such latter application be legal?"

The Act authorizing cities, towns and counties to establish memorial airfields with state assistance, is House Bill 192 of the 63rd General Assembly, which is in part as follows:

"In appreciation of the services of our gallant Armed Forces and to perpetuate

the memory of their heroic achievements in the war against Germany, Japan and their Allies and to promote the advancement of aviation in the name of those who gave their lives as members of our gallant Armed Forces in the war against the aforesaid enemies, cities, towns and counties are hereby authorized to purchase sites and construct and operate air fields in such counties or near such cities and towns and to receive free technical advice from the Department of Resources and Development. Provided further that when any city, town or county in Missouri shall certify to the Governor that it has appropriated a specific sum for the aforesaid purpose and is ready to proceed with the purchase or construction of such air fields a like sum not exceeding ten thousand dollars (\$10,000.00) shall be allotted to said city, town or county from the appropriation hereinafter made for such purpose \* \* \* \* \*

We realize that if a city appropriates a sum less than \$10,000 for the above purpose, which is matched by the state, and then is allowed at a latter date after appropriating a sum which raises the total appropriation to \$10,000 to receive a further allotment from the state, an added burden will be placed upon the administering officials and a certain amount of confusion may result. Further, there is no express authority set out for the proposed plan of allotment. However, this fact should not be given a great deal of weight because of the lack of a definite plan of procedure concerning the administration of this law. The absence of express authority should make little difference under the present circumstances.

The controlling factor in construing this or any statute, is to determine the intention of the Legislature with respect to the purpose or object of the Act. In the case of *City of St. Louis v. James Braudis Coal Co.*, 137 S. W. (2d) 668, the court said at page 669:

"We are in full accord with appellant, that the primary rule of construction,

. whether of statutes or ordinances, is to ascertain and give effect to the lawmakers' intention, and that since such laws are presumably passed in the spirit of justice and for the welfare of the community, they should be interpreted, if possible, so as to further that purpose, and that frequently courts to attain that end, look less to the letter or words of a statute or ordinance and more to the context, the subject-matter, the consequence and effect, and the reason and spirit of the law in endeavoring to arrive at the purpose of the lawgiver."

House Bill 192, by its terms, unquestionably was enacted for the purpose of perpetuating the memory of the heroic achievements of our Armed Forces and "to promote the advancement of aviation." And to properly carry out these purposes, cities, towns and counties, which are qualified to establish memorial airports, must be allowed to take advantage to the fullest extent of the state assistance provided for in said Act. In the case of *Pate v. Ross*, 84 S. W. (2d) 961, the court said, l. c. 963:

"Likewise it is held that statutes should be construed so as to effectuate the purpose of its enactment, to accomplish which purpose words may be restricted or extended. *Kerens v. St. Louis Union Trust Co.*, 283 Mo. 601, 223 S. W. 645, 11 A. L. R. 288."

The proposed plan of appropriation and allotment, while not expressly set out, is in complete accord with the purposes of the Act and should therefore be allowed.

#### Conclusion

When a city, town or county, under the provisions of House Bill 192 of the 63rd General Assembly, requests and receives an allotment of state matching funds in an amount less

Mr. Hugh Denney

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than \$10,000, such city, town or county may, at a latter date, request and receive an additional allotment of state matching funds such as will make up the full \$10,000 limit.

Respectfully submitted,

DAVID DONNELLY  
Assistant Attorney General

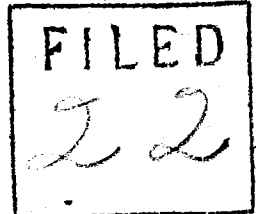
APPROVED:

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J. E. TAYLOR  
Attorney General

DD:EG

AIRPORTS: ) Statutes constitute waiver of State's  
SURPLUS GOVERNMENT PROPERTY: ) prior claim to surplus government  
 ) airports.



May 27, 1947

6/3

Mr. Hugh Denney, Director  
Department of Resources and Development  
Jefferson City, Missouri

Dear Mr. Denney:

This is in reply to your letter of December 13, 1946, requesting an opinion from this department, which reads as follows:

"I would like to have the opinion of your office as to who in the State is responsible for releasing the State's prior claim to surplus Government airports.

"Recently, letters submitted from mayors of Missouri communities to the Governor asking for the State to waive its prior claim to Government airports in their vicinity have been referred to this office. Acting on this basis, we have in each case written a letter indicating the State was not interested in taking over such surplus airport property. There is, however, in my mind a doubt as to the legal right of this agency to speak for the State in this matter, and for that reason I would like to have your opinion."

The statutes relating to the establishment and operation of airports are Sections 15122 through 15127.1, Mo. R.S.A. Upon a reading of the above statutes we find no indication of an interest in or prior claim to surplus government airports by the state as such. The establishment and operation



of airports have been expressly delegated to the various cities, towns and counties of the state. We believe that this is a declaration of the policy of the state to vest this authority solely in said subdivisions.

The Surplus Property Act of 1944, Public Law 457, 78th Congress, 2d Session, Chap. 479, H. R. 5125, provides as follows with respect to airports, Sec. 13 (c):

"(c) No airport and no harbor or port terminal, including necessary operating equipment, shall be otherwise disposed of until it has first been offered, under regulations to be prescribed by the Board, for sale or lease to the State, political subdivision thereof, and any municipality, in which it is situated, and to all municipalities in the vicinity thereof."

The 63rd General Assembly, in Section 2 of House Bill 364, Laws of Missouri, 1945, page 1269, recognized the Surplus Property Act of 1944 as follows:

"Any municipality or political subdivision of this state is hereby authorized and empowered to obtain United States government property under the provisions of the 'Surplus Property Act of 1944, Public Law 457, 78th Congress, Chapter 479, Second Session, H. R. 5125,' and any amendments thereto, in the manner and according to the rules, regulations and conditions required by such Act, or any amendments thereto, irrespective of any provisions otherwise imposed by law or municipal charter or ordinance requiring certain bidding and purchasing procedures."

Under the provision of the above statute all municipalities and political subdivisions of the state are authorized to obtain United States government property. It is clear from said statute that no priority was retained by the state with respect to surplus government airports.

It is a general rule of law that the state may waive the benefits of a priority by enacting laws which evidence this intent. There is no need for an express waiver. In the case of *In re Holland Banking Co.*, 281 S.W. 702, the court said at page 705:

"There is a wealth of cases cited by appellant showing that the common-law priority of the state for debts due to it has been recognized in most of the states. There seems to be no question about such general recognition. It is unnecessary to discuss the cases. Such cases will be appended to this opinion by our reporter.

"Notwithstanding the existence upon its statute books of the priority law applicable by its terms to every conceivable debt due to the state, the state may waive the benefits of such priority law by enacting other laws which evidence such intent. \* \* \*"

Any prior claim to surplus government airports which might be said to exist in favor of the state as against the various municipalities and political subdivisions under the Surplus Property Act of 1944, can be considered waived by the policy of the state which is declared in the statutes delegating to said subdivisions the power and authority to establish and operate airports. No waiver on the part of any state agency is required as the statutes constitute such waiver.

#### Conclusion

Therefore, it is the opinion of this department that no waiver of the state's prior claim to surplus government airports by a state agency is necessary, as the statutes delegating to the municipalities and political subdivisions of the

Mr. Hugh Denney, Director

-4-

state the power and authority to establish and operate airports, constitute such waiver.

Respectfully submitted,

DAVID DONNELLY  
Assistant Attorney General

APPROVED:

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J. E. TAYLOR  
Attorney General

DD:EG

DIVISION OF RESOURCES AND ) Division of Resources and Development  
DEVELOPMENT: ) not authorized under subsection (g) of  
AVIATION: ) Section 15393.7, Mo. R.S.A., to inspect  
SCHOOLS: ) flying schools for the Department of  
Education.

June 5, 1947

FILED

*Copy to Mr. Denney*

Mr. Hugh Denney, Director  
Division of Resources and Development  
Department of Business and Administration  
Jefferson City, Missouri

Dear Mr. Denney:

This is in reply to your letter of May 27, 1947,  
requesting an official opinion from this department, which  
reads as follows:

"For several months this Division's  
Aviation Section has been cooperating  
with the State Department of Education  
in inspecting flying schools for  
veterans' training courses in aviation.  
The program has been carried on merely  
as a cooperative endeavor with the State  
Department of Education, not as a program  
of this organization. It has been  
handled as a routine check when our state  
aviation engineers were on other regular  
business.

"There appears now to be a need for  
follow-up investigations to make sure  
that facilities, especially the fields  
themselves, are being maintained in safe  
flying condition where veterans' train-  
ing programs are being conducted. It  
has been suggested that inspection re-  
ports should be filled out about every  
ninety days for each flying school.

"The Commission, in considering this  
matter, has requested that I secure an  
opinion from you as to the legal right  
of this Division to engage in this in-  
spection activity for the State Department

of Education. It is not that we are opposed to cooperating with other state departments, but rather that we not be accused of exceeding the limits of our authorization in such activities.

"The Commission would also like to know if we have exceeded our authority in making the initial inspections before these flight training schools were approved. The basis for our participating in this program is predicated upon subsection "g" of Section 7, House Bill 502 of the 68th General Assembly, which reads as follows: 'encourage the development of the aeronautical resources of the state and aid in an educational program related to aviation.'"

The precise question is whether the State Aviation Engineer of the Division of Resources and Development may continue the inspection activity referred to in your letter for the State Department of Education.

Your attention is directed to House Bill 944 of the 68th General Assembly, found in the Laws of 1945, at page 1721, which directs the Department of Education to employ inspectors for the purpose of complying with Public Law 346 of the 78th Congress, relating to the inspection of educational and training institutions which are qualified and equipped to educate and train returning veterans:

"The Department of Education is hereby empowered and directed to employ a director, inspectors, and other employees for the purpose of complying with the provisions of Public Law 346 of the 78th Congress, relating to the inspection and listing of the educational and training institutions (including industrial establishments), within the state which are qualified and equipped to furnish education or training (including apprenticeships and refresher or re-training training) for returning veterans."

The Division of Resources and Development was created in 1943 for the general purpose of advancing the economic welfare of the people through programs and activities to develop the State's natural resources and industrial opportunities pertaining to commerce, agriculture, mining, forestry, transportation, recreation and aviation (Section 15393.1, Mo. R.S.A.). It is made the duty of the Division, among other things, to: investigate and assemble information regarding the economic resources and industrial opportunities of the State and the particular sections thereof and to formulate plans for the development, conservation and use of these resources; acquaint the people of Missouri with the industries and industrial opportunities and encourage closer cooperation between the industries of the State and with the people by the use of educational and advertising mediums; encourage the development of recreational areas of the State and encourage the public to visit Missouri by the dissemination of information as to the recreational resources and advantages of the State; and to encourage the formation of sectional committees throughout the State and make available to these committees and other groups and organizations, facts, data and information which may be useful in their effort to encourage the location of industries and commercial enterprises within the State (Section 15393.7, Mo. R.S.A.).

Section 15393.7, Subsection (g), reads as follows:

"Encourage the development of the aeronautical resources of the state and aid in an educational program related to aviation." (Underscoring ours.)

In order to determine whether the above provision is sufficient authority upon which the Division can rely in engaging in said inspection activity for the Department of Education, said section must be considered in the light of all the provisions of Sections 15393.1 and 15393.7. This rule is set out in the case of *Pugh v. St. Louis Police Relief Ass'n.*, 179 S. W. (2d) 927, at pages 934-935:

"In construing said statutes the court must be guided by the primary rule of statutory construction, which is to ascertain and give effect to the intention of the lawmakers from the words used in the statutes and to adopt that sense which

harmonizes best with the context thereof and promotes in the fullest measure the apparent policy and objects of the Legislature. State ex rel. Lentine v. State Board of Health, 334 Mo. 220, 65 S. W. 2d 943. See also, Sutherland on Statutory Construction, 2d Ed., Vol. 2, Section 363."

We must determine from the context of these statutory provisions whether or not the Legislature intended the Division to engage in such inspection activities. You will note that under subsection (g) of Section 15393.7, the Division is authorized to aid in an educational program related to aviation. We submit that the educational program referred to in that section is not a limited one of instruction in a course of study, but rather is an overall public relations program designed to present to the public the advantages of aviation, to encourage the use of aeronautical facilities in Missouri, and generally to promote the aviation industry; in other words, to educate the public, by advertising and the dissemination of pertinent data and information, in aviation and inform them of the aeronautical resources of the State, thereby encouraging their development. This construction is in keeping with the apparent policy of the General Assembly as set out in Section 15393.7, by which the purposes and objectives of the Division are to be accomplished.

It was clearly not contemplated that the Division of Resources and Development should inspect for the Department of Education veterans flying schools, especially in view of House Bill No. 944 which was enacted subsequently to Section 15393.7.

However, we do not believe it follows that the inspections which have already been made should be held for naught but rather that the Department of Education is entitled to take advantage of the assistance rendered by the State Aviation Engineers of the Division of Resources and Development in making an initial inspection before said flight training schools were approved. Further, we believe that our conclusion should not preclude the Department of Education from using such facts, data and information concerning fields and aeronautical resources as the Division of Resources and Development may obtain and compile in the regular course of its duties. This information may be made available to the Department of Education upon its request.

Mr. Hugh Denney, Director

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Conclusion

Therefore, it is the opinion of this department that Section 15393.7, subsection (g) of Mo. R.S.A., does not authorize the Division of Resources and Development of the Department of Business and Administration to inspect flying schools, offering veterans training courses in aviation, for the Department of Education. However, the Department of Education may avail itself of any facts, data and information concerning airfields and aeronautical resources as the Division of Resources and Development may obtain and compile in the regular course of its duties.

Respectfully submitted,

DAVID DONNELLY  
Assistant Attorney General

APPROVED:

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J. E. TAYLOR  
Attorney General

DD:EG



DIVISION OF RESOURCES AND DEVELOPMENT: ) Federal Government cannot con-  
CIVIL AIR REGULATIONS: ) fer on state agencies and  
COURTS: ) courts power to enforce civil  
air regulations.

June 17, 1947

FILED

6-19

Mr. Hugh Denney, Director  
Division of Resources and Development  
Department of Business and Administration  
Jefferson City, Missouri

Dear Mr. Denney:

This is in reply to your letter of June 9, 1947,  
requesting an opinion from this department, which reads as  
follows:

"The Civil Aeronautics Board, through  
its legal counsel, has requested the  
member states of the National Associa-  
tion of State Aviation Officials to se-  
cure opinions of their respective  
Attorney-Generals concerning the legality  
of federal legislation conferring upon  
the states the powers to enforce safe fly-  
ing sections of the Civil Air Regulations.

"Can the Federal Government, by passing  
enabling legislation, confer upon the  
State of Missouri, its enforcement agen-  
cies and courts, the power to enforce  
all or a part of the Civil Air Regula-  
tions?

"An early opinion on this question will  
be very much appreciated as it will enable  
us to make this information available to  
the officials of N.A.S.A.O, who desire to  
formulate a policy to present to the Civil  
Aeronautics Board."

It is a general rule of law that the Federal Govern-  
ment cannot confer jurisdiction upon state agencies and courts.  
In the case of *Ex Parte Gounis*, 263 S. W. 988, the supreme  
Court, In Banc, said at page 990:

"\* \* \* Congress cannot confer jurisdiction upon the state courts; neither can it regulate or control their modes of procedure. \* \* \*

\* \* \* \* \*

"state courts cannot take cognizance of criminal offenses committed against the authority of the United States, or of actions for the recovery of penalties and forfeitures (wholly penal in character) arising under the laws of the United States. \* \* \*"

Under this authority it is clear that the Federal Government cannot confer upon the enforcement agencies and courts of Missouri the power to enforce civil air regulations which are penal in nature and for the recovery of penalties and forfeitures, and punish violators thereof.

However, the jurisdiction of the state and federal courts may be concurrent with respect to civil actions under the federal laws, but even then Congress cannot confer that jurisdiction on the state courts. Such jurisdiction can only result from the Constitution and laws of the state. This rule is set out in *Ex Parte Gounis*, supra, page 990:

"\* \* \* With respect to civil actions the jurisdiction of the state and federal courts may be concurrent. In cases arising under the Constitution, laws, and treaties of the United States, if exclusive jurisdiction in the United States courts be neither express nor implied, 'the state courts have concurrent jurisdiction whenever, by their own Constitution, they are competent to take it.' \* \* \* \* \*"

And is followed in *Niehaus v. Joseph Greenspon's Son Pipe Corp.*, 164 S. W. (2d) 180, where the St. Louis Court of Appeals said at page 186:

"Indeed, in cases of a civil nature arising under acts of Congress and not involving the enforcement of penal laws, a state court, if invested with competent jurisdiction by the constitution and laws of its

own sovereignty, has concurrent jurisdiction with the federal courts, unless, in the enactment of the particular legislation which creates the right of action, its jurisdiction is expressly or impliedly denied. \* \* \* \* \*

"However, notwithstanding the fact that a civil case arising under federal laws may be adjudicated in a state court if falling within the general scope of its jurisdiction, the state court, in entertaining such case, retains its identity as a state court, with its sole power to function as a court derived from the authority of the state creating it. Minneapolis & St. Louis R. Co. v. Bombolis, supra. In other words, if the state court has competent jurisdiction to enforce the federal right, it is for the reason that the state itself has so invested it; and Congress can neither confer jurisdiction upon a state court, nor by the same token, can it regulate or control its mode of procedure in the exercise of the jurisdiction it possesses. \* \* \* \* \*"

We are not aware of the enactment of any particular legislation which creates such jurisdiction in the state courts. If the courts were to hold otherwise, the entire burden of enforcing the civil air regulations, so far as could be done through the prosecution of civil actions, could be imposed upon the state enforcement agencies and courts. The court, speaking of the National Prohibition Act, said in the Counis case, at pages 991-992:

"We entirely agree with the petitioner that Congress is without power to compel the state courts to assume jurisdiction of actions brought to enforce the provisions of the National Prohibition Act. If the United States can institute such actions in state courts by a county prosecuting attorney, it can do so by the Attorney General of the United States or any United States Attorney; and if the state courts are bound to entertain jurisdiction in such actions, then the entire burden of enforcing

the National Prohibition Act, so far as it can be done through the prosecution of civil actions, can be transferred from the courts of the United States to those of the states. In such event the state courts through the stress of national business would cease to function locally. In this connection what is said by the Supreme Court of New Jersey in *Rushworth v. Judges, supra*, is in point:

"If Congress has, without the consent of the state, the power to impose such a duty upon the state courts, there is no legal limit to the authority of the national Legislature to burden the state courts with such a volume of business as to essentially impair their capacity to exercise the judicial functions for which they were created by the state.

\* \* \* \* \*

"\* \* \* Where an act of Congress, such as the National Prohibition Act, is designed to suppress a public evil, it is clearly the duty of Congress to provide efficient national instrumentalities, including courts, for its enforcement. It cannot impose that burden or any part of it upon the state courts; nor is there in any case an implication of duty on the part of a state court to lend its jurisdiction to the enforcement of the laws of the United States in behalf of the United States. That duty devolves wholly upon the courts of the United States, which were created for the purpose of maintaining in part its sovereign authority.

"\* \* \* There is no apparent reason, therefore, for the state's prosecuting officers to institute, or its courts to entertain, actions under the federal law for the enforcement of constitutional prohibition.

If in the proper exercise of their respective powers and prerogatives they effect enforcement of the state law they will have discharged in full measure the duties severally incumbent upon them in that behalf."

It is the duty of the Federal Government to furnish agencies and instrumentalities for the purpose of enforcing its laws.

Our conclusion is further strengthened by the rule that such officers must look to the statutes for their authority. In *Lamar Township v. City of Lamar*, 261 Mo. 171, the court held, at page 189:

"Officers are creatures of the law, whose duties are usually fully provided for by statute. In a way they are agents, but they are never general agents, in the sense that they are hampered by neither custom nor law and in the sense that they are absolutely free to follow their own volition. \* \* \* \* \* The law which fixes his duties is his power of attorney; if he neglect to follow it, his cestui que trust ought not to suffer. In fact, public policy requires that all officers be required to perform their duties within the strict limits of their legal authority."

In the absence of legislation to that effect, the law-enforcement officers and the officers of the courts are not authorized nor permitted to take jurisdiction of the enforcement of federal civil air regulations.

#### Conclusion

Therefore, it is the opinion of this department, that the Federal Government cannot confer upon the enforcement agencies and courts of Missouri the power to enforce civil air regulations.

Mr. Hugh Denney, Director

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However, the state may, by appropriate legislation, invest in such courts jurisdiction concurrent with that of the federal courts with respect to such regulations as are civil in nature.

Respectfully submitted,

DAVID DONNELLY  
Assistant Attorney General

APPROVED:

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J. E. TAYLOR  
Attorney General

DD:EG

AVIATION: Division of Resources and Development not authorized under Sections 15393.1 to 15393.14, Mo. R.S.A., to represent the State in feeder airline application hearings.

August 1, 1947

FILED

8/6  
22

Mr. Hugh Denney, Director  
Division of Resources and Development  
Department of Business and Administration  
Jefferson City, Missouri

Dear Mr. Denney:

This is in reply to your letter of July 14, 1947, requesting an opinion from this department, which reads as follows:

"For several months the Civil Aeronautics Board in Washington has been considering feeder airline applications to operate in or through Missouri. A few months ago our Commission instructed the staff to participate in hearings on the Upper Mississippi feeder airlines case, which we did at the sufferance of the CAB counsel.

"As additional feeder airline application hearings are held, it is apparent that the State of Missouri should participate in seeing that certificates are granted for serving communities in such a manner as to benefit the growth and development of feeder airlines in the State. There are numerous applicants desiring to serve Missouri and, as an agency, we have no interest in what particular applicant receives the Certificate of Convenience and Necessity.

"We are concerned, however, that, for example, a feeder airline operating between St. Louis and Keokuk, Iowa, which stops at Louisiana and Hannibal, should not make a dog-track side trip to Kirksville and back to Keokuk. We believe that in such an instance Kirksville

should be serviced by some other feeder line operating in a more direct method to save both time and distance.

"The question now in our minds is whether or not, under House Bill 502, 62nd General Assembly, we have adequate legal authority to represent Missouri in feeder airline application hearings. We are quite sure the State should be represented, but we desire to determine legality of our intervention."

The Division of Resources and Development was created for the general purpose of advancing the economic welfare of the people through programs and activities to develop the State's natural resources and industrial opportunities pertaining to commerce, agriculture, mining, forestry, transportation, recreation and aviation (Section 15393.1, Mo. R.S.A.). It is made the duty of the Division, among other things, to investigate and assemble information regarding the economic resources and industrial opportunities of the State, and to formulate plans for the development, conservation and use of these resources; acquaint the people of Missouri with the industries and industrial opportunities and encourage closer cooperation between the industries of the State and with the people by the use of educational and advertising mediums; to encourage the development of recreational areas of the state, and to encourage the public to visit Missouri by the dissemination of information as to the recreational resources and advantages of the State.

The claim of authority of the Division to represent Missouri before the Civil Aeronautics Board in hearings, for the purpose of determining whether feeder airlines should be granted certificates of public convenience and necessity by that board, is evidently based upon Section 15393.7, subsection (g), Mo. R.S.A., which provides that said Division shall "encourage the development of the aeronautical resources of the state and aid in an educational program related to aviation."

The above provision standing alone, brief as it is, does not afford a basis for a conclusive determination of the question at hand. In order to determine whether said provision is sufficient authority upon which the Division can rely in said activity, said provision must be considered in the light of all the provisions of Sections 15393.1 and 15393.7, Mo. R.S.A. This familiar canon of



statutory construction is stated in the case of *Norberg v. Montgomery*, (Mo. Sup.) 173 S.W. (2d) 387, where the court said, at l. c. 389:

"The 'several parts, or sections, of such a statute are to be construed in connection with every other part, or section, and all are to be considered as parts of a connected whole, and harmonized, if possible, so as to aid in giving effect to the intention of the lawmakers.' State ex rel. Dean et al. v. Daues et al., 321 Mo. 1126, 14 S.W. 2d 990, loc. cit. 1001, 1002. See, also, *Holder v. Elms Hotel Co.*, 338 Mo. 857, 92 S.W. 2d 620, 104 A.L.R. 339; State ex rel. *Kansas City Power & Light Co. v. Smith*, 342 Mo. 75, 111 S.W. 2d 513; State v. *Wipke*, 345 Mo. 283, 133 S.W. 2d 354; State ex rel. *McKittrick v. Carolene Products Co.*, 346 Mo. 1049, 144 S.W. 2d 153."

The intention of the General Assembly must be taken from the context of all the provisions relating to the scope of authority of the provision. Said provisions clearly show that the purposes and objectives of the Division are to be accomplished by advertising and the dissemination of pertinent data and information concerning the various enumerated fields. Section 15393.7, subsection (g), must be read and construed in connection with these provisions. Therefore, it reasonably appears, from a fair interpretation of these provisions, that the authority granted by that part of Section 15393.7, subsection (g), which reads, "encourage the development of the aeronautical resources of the state," is such as will authorize the Division to inform the public of the aeronautical resources of the state, thereby encouraging their development. In other words, we submit that the General Assembly authorized a general public relations program designed to present to the public the advantages of aviation; to encourage the use of aeronautical facilities in Missouri, and to promote the aviation industry in this manner.

Therefore, it follows that the Division is not authorized to engage in the proposed activity. This conclusion is consistent with the ruling in an opinion rendered to your Division under date of June 5, 1947, wherein it was held that the educational program referred to in the last part of Section 15393.7, subsection (g), was intended to be a general public relations program designed to educate the public in aviation by advertising and the dissemination of pertinent data and information.

Mr. Hugh Denney

(4)

It is significant to note that the General Assembly has not taken steps to regulate or license feeder airlines or to extend the authority of the Public Service Commission to include public air carriers. In the absence of such authorization we may presume that the General Assembly did not intend an agency of this State to assert authority in the manner proposed. In view of the above, if the representatives of the Division were to take part in the proposed activity it is difficult to see the value of such participation.

#### CONCLUSION

Therefore, it is the opinion of this department that Sections 15393.1 to 15393.14, Mo. R.S.A., do not authorize the Division of Resources and Development of the Department of Business and Administration, to represent the State before the Civil Aeronautics Board in feeder airline application hearings.

Respectfully submitted,

DAVID DONNELLY  
Assistant Attorney General

APPROVED:

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J. E. TAYLOR  
Attorney General

DD:CP

AGRICULTURE:  
COMMERCIAL FEEDING-  
STUFFS:

"Sun-cured Alfalfa Meal" and "Dehydrated Alfalfa Meal" are commercial feeding-stuffs, as defined in Section 14319, R. S. Mo. 1939, and require registration and payment of tonnage inspection fees, as required by Section 14326, R.S. Mo. 1939.

January 7, 1947



Mr. Norman I. Dickey  
Director, Feed Division  
Department of Agriculture  
Jefferson City, Missouri

Dear Sir:

This is in reply to your letter of recent date, requesting an official opinion of this department, and reading as follows:

"We are in need of a written opinion from your office interpreting Section 14319, Article 22, R. S. Missouri, 1939, as it applies to Suncured Alfalfa Meal and Dehydrated Alfalfa Meal. Specifically, does 'Suncured Alfalfa Meal' require registration as a commercial feeding-stuff and the subsequent payment of tonnage inspection fees under Section 14326, R. S. Missouri, 1939?

"The enclosed copies of correspondence and records explain the contention of some alfalfa processors that alfalfa meals do not come under the jurisdiction of our Missouri Feed Law."

Section 14319, R. S. Mo. 1939, reads as follows:

"The term 'commercial feeding-stuffs' shall be held to include all feeding-stuffs used for feeding livestock and poultry, except whole seeds or grains, the unmixed meals made directly from the entire grains of corn, wheat, rye, barley, oats, buckwheat, flaxseed, kaffir, and milo, whole hays, straws, cotton seed hulls and corn stover, pure corn chops and pure ground ear corn, when the same

are not mixed with other materials, but the term shall not apply to other materials containing sixty (60) per cent or more of water."

Two questions must be answered in order to determine whether or not "Sun-cured Alfalfa Meal" is a commercial feeding-stuff, as such term is defined in Section 14319, quoted supra: (1) Does the exception of unmixed meals in said section apply to "whole hays," or does it apply only to "the entire grains of corn, wheat, rye, barley, oats, buckwheat, flaxseed, kaffir, and milo?" (2) If the answer to the first question be that the exception does apply to unmixed meals of whole hays, does the term "whole hays" include "Sun-cured Alfalfa Meal?"

A great many states have commercial feeding-stuff laws similar to those of Missouri. The definition of "commercial feeding-stuffs," as defined in the laws of the State of Kansas, is found in Section 2-1001 of the General Statutes of Kansas, 1935, and reads as follows:

"The term 'commercial feeding stuffs' shall be held to include all feeding stuffs used for feeding livestock and poultry, except the following: (a) whole seeds or grains. (b) The unmixed meals made directly from and consisting of the entire grains of corn, wheat, rye, barley, oats, buckwheat, flaxseed, kafir, and milo. (c) Whole hays, straws, cottonseed hulls and corn stover, when unmixed with other materials. (d) All other materials consisting of 60 per centum or more of water."

The definition of "commercial feeding stuffs," as found in the Statutes of Idaho, is found in Section 24-2501 of the Idaho Code of 1932, and provides as follows:

"The term 'commercial feeding stuffs' shall be held to include all feeding stuffs used for feeding livestock and poultry, except whole seeds or grains, the unmixed meals made directly from the entire grains of corn, wheat, rye, barley, oats, buckwheat, flaxseed, kaffir, milo, peas and beans; whole hays, straws, cotton seed hulls, corn stover and ground or whole mill screenings when unmixed with other materials."

Similar statutes are found in the West Virginia Code of 1937, at Section 2077, in the Wyoming Statutes of 1931, at Sec-

tion 5-901, and in the Louisiana General Statutes (Dart), at Section 106.2, in all of which statutes the phrase "unmixed meals made directly from the entire grains," etc., is separated by a semicolon from the phrase beginning "whole hays," etc.

In the Mississippi Code of 1942, at Section 4436, and in the Wisconsin Statutes of 1945, at Section 94.72, we find that the phrase beginning "The unmixed meals," etc., is written as a complete sentence and is separated by letter from the phrase beginning "whole hays," as is found in Section 2.1001 of the Kansas Statutes, set out above.

We believe that it is clear from the definition of "commercial feeding-stuffs," as set out in Section 14319, R. S. Mo. 1939, that the phrase beginning "the unmixed meals" applies only to the entire grains of corn, wheat, rye, etc., and does not refer to meals made from whole hays, and that proper punctuation of the section would have placed a semicolon, instead of a comma, after "milo" in such section. We believe that this is clear because of the fact that in all of the states above listed, the definition of "commercial feeding-stuffs," which is very similar to that found in Section 14319, is punctuated so that it is clear that "unmixed meals" does not apply to meals made from whole hays.

It is said by the Circuit Court of Appeals, Eighth Circuit, in the case of Holmes v. Phenix Ins. Co. of Brooklyn, 98 F. 240, 1. c. 242:

" \* \* \* The comma and semicolon are both used for the same purpose, namely, to divide sentences and parts of sentences, the only difference being that the semicolon makes the division a little more pronounced than the comma; but at the last it is the sense of the words, taken together, that dictates where the punctuation marks are to be placed, and what they shall be."

Section 14319, R. S. Mo. 1939, excepts, we believe, from the classification of "commercial feeding-stuffs," (a) whole seeds or grains, (b) unmixed meals made directly from the entire grains of corn, wheat, rye, barley, oats, buckwheat, flaxseed, kaffir, and milo, (c) whole hays, straws, cotton seed hulls and corn stover, (d) pure corn chops, (e) pure ground ear corn, and (f) other materials containing sixty (60) per cent or more of water. Therefore, the exception of "unmixed meals," in Section 14319, does not apply to "Sun-cured Alfalfa Meal."

"Hay" is defined in Webster's New International Dictionary, Second Edition, as:

"1. a Grass mowed or ready for mowing; esp., grass cut and cured for fodder. b \* \* \* \* the entire herbage, sometimes including the seeds, of grasses and other forage plants, as legumes, harvested and dried esp. for feed; as, timothy, clover hay."

"Alfalfa meal" is defined in the Official 1946 Publication of the Association of American Feed Control Officials, Inc., which association consists of officers in charge of the execution of State, Dominion and Federal laws regulating the sale of commercial feeding-stuffs, and heads of experiment stations, bureaus, divisions, sections and laboratories charged by law with the examination of feeding-stuffs, as:

"The product obtained from the grinding of the entire alfalfa hay, without the addition of any alfalfa stems, alfalfa straw or foreign material, or the abstraction of leaves."

It is to be noted that "alfalfa meal" is defined as the product obtained from grinding alfalfa hay. From this definition, it is clear that the meal obtained from grinding alfalfa hay is not a "whole hay." Further, it is clear that in Section 14319, R. S. No. 1939, the Legislature specifically differentiated between meals made from the entire grains of certain named crops, and entire seeds or grains. This differentiation in Section 14319 between entire grains and meals made from entire grains applies equally to meals made from whole hays and whole hays. Therefore, we hold that "Sun-cured Alfalfa Meal" is not a "whole hay."

"Sun-cured Alfalfa Meal," as defined above, is the product obtained when alfalfa hay, from which the moisture content has been largely removed by drying in the sun, is ground. "Dehydrated Alfalfa Meal" is the product obtained when alfalfa hay, from which the moisture has been largely removed by the application of heat, is ground. The only difference between "Sun-cured Alfalfa Meal" and "Dehydrated Alfalfa Meal" is that dehydrated alfalfa meal contains more vitamins than does sun-cured alfalfa meal. However, as pointed out above, the process of grinding the alfalfa hay makes the resulting meal a commercial feeding-stuff. Therefore, both "Sun-cured Alfalfa Meal" and "Dehydrated Alfalfa Meal" are commercial feeding-stuffs, as such term is defined in Section 14319.

Section 14321, R. S. Mo. 1939, provides for the obtaining of a certificate of registration from the Department of Agriculture by any manufacturer, importer, jobber, firm, association, corporation, partnership, or individual, before he shall be permitted to sell, offer or expose for sale or distribution in this state any feed as defined in Article 22, Chapter 102, R. S. Mo. 1939, which article contains Sections 14319 to 14333, inclusive.

Section 14326, R. S. Mo. 1939, provides for the payment of an annual registration fee of \$2.00 on or before January 1st of each year, and for the making of a statement on or before January 15th and July 15th of each year, by each manufacturer, distributor or seller of any feed, which statement must be made under oath, listing the number of tons of feed sold in the state during the preceding six months, and upon such statement must pay an inspection fee of 8¢ per ton. The only feed that is exempt from the payment of this inspection fee is feed that is to be used only for mixing for resale purposes.

Section 14332, R. S. Mo. 1939, provides that "feed," as used in Sections 14321 and 14326, shall be "commercial feeding-stuffs."

#### CONCLUSION

It is, therefore, the opinion of this department that "Sun-cured Alfalfa Meal" and "Dehydrated Alfalfa Meal" are commercial feeding-stuffs, as defined in Section 14319, R. S. Mo. 1939, and that the processors of alfalfa who offer such products for sale in the State of Missouri must obtain a certificate of registration, as required by Section 14321, R. S. Mo. 1939, must pay a registration fee of \$2.00 before offering such feed for sale, and must pay an inspection fee of 8¢ per ton on all such products sold in the State of Missouri.

Respectfully submitted,

C. B. BURNS, Jr.  
Assistant Attorney General

APPROVED:

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J. E. TAYLOR  
Attorney General

CBB:HR



SCHOOLS: When premiums on policies of insurance on buildings of Central Missouri State Teachers College are paid out of the earnings fund reappropriated to the college, insurance money therefrom is to be turned into the state treasury.

*Copy to Mr. John*

June 2, 1947

*6/6*

FILED  
22

Mr. G. W. Diemer, President  
Central Missouri State Teachers College  
Warrensburg, Missouri

Dear Sir:

This is in reply to your letter of April 26, 1947, in which you requested an opinion relative to the disposition of certain insurance money. Said letter reads as follows:

"Under date of February 21, I wrote you to know as to the disposition of insurance money that might be collected in case of loss by fire. In case the premiums are paid out of the earnings fund reappropriated to the college by the General Assembly, would insurance money be paid to the Board of Regents or would it go into the General Revenue of the State? I did not at that time ask for a special opinion thinking probably one had been previously written. Mr. O'Keefe sent me an opinion written for the Board of Managers of the Missouri School for the Blind, but in the opinion of our Attorney and Board this opinion does not answer our question. Hence I am writing you to request an opinion from your office. I am doing this under instructions from the Board of Regents of the College inasmuch as we are expanding our insurance program and we want to be certain as to the disposition of insurance money that might be collected as the result of any losses. Any attention you may give this request will be appreciated."

A subsequent letter from you contained the following information:



"Our insurance policies were all taken out by authority of the Board of Regents of the Central Missouri State College. In the policies the Board of Regents is the beneficiary. In each appropriation bill as passed by the General Assembly the College is authorized to use Earnings Funds reappropriated to the College for the payment of insurance premiums. The policy of the Board has been to have fairly adequate coverage on all college buildings and contents including academic buildings, dormitories, and buildings at the College Farm."

State ex rel. Thompson v. Board of Regents of Northeast Missouri Teachers College, 264 S.W. 698, 305 Mo. 57, was a case where the State Treasurer sought by mandamus to compel the regents of one of the state teachers colleges to pay into the state treasury the proceeds of insurance policies on certain of the college buildings which had burned. The policies were payable to the board, and the premiums had been paid out of college funds derived from tuition fees. The court held that the money received by the regents did not have to be paid into the state treasury.

In the Thompson case, supra, the State Treasurer contended that the money received by the board from the insurance companies was, within the meaning of the Constitution and statutes, state money, and should have been paid into the state treasury. Constitutional and statutory provisions were invoked to sustain this contention, the main one of which may be said to constitute a basis for the others, being the constitutional provision that all money collected and received by the state from any source whatsoever shall go into the state treasury, and shall be deposited by the treasurer to the credit of the state for the benefit of the funds to which they respectively belong. (This provision is now to be found in Section 15, Article IV, Constitution of Missouri, 1945.) The court, in referring to this contention, said at l.c. 699:

"\* \* This provision, it will be seen from its terms, which are wisely chosen as a limitation upon power, is restricted to 'revenue collected and money received by the state

from any source whatsoever.' By revenue, whether its meaning be measured by the general or the legal lexicographer, is meant the current income of the state from whatsoever source derived which is subject to appropriation for public uses. This current income may be derived from various sources, as our numerous statutes attest, but, no matter from what source derived, if required to be paid into the treasury, it becomes revenue or state money; its classification as such being dependent upon specific legislative enactment, or, as aptly put by the respondent, state money means money the state, in its sovereign capacity, is authorized to receive, the source of its authority being the Legislature. With this limitation--and the Constitution itself is but an instrument of limitations--it should be strictly construed. Thus construed, the spirit which prompted the adoption of the provision is fully recognized and its purpose is promoted. Unless, therefore, it can be successfully contended, in harmony with well-recognized rules of interpretation, that the board of regents of the college is the state, and that moneys received by it other than from appropriations is state money, the constitutional provision will afford no support to the relator's contention."

It is a well-recognized canon of law that funds derived from state funds belong to the state, and must go into the state treasury. Section 36, Article III of the 1945 Missouri Constitution, says:

"All revenue collected and money received by the state shall go into the treasury and the general assembly shall have no power to divert the same or to permit the withdrawal of money from the treasury, except in pursuance of appropriations made by law. \* \* \* \* \*

The duties and powers of the Board of Regents are statutory and can be no larger than is expressly set forth in Article 20, Chapter 72, R.S. Mo. 1939. By such provisions the board has power to sue and be sued, to take, purchase, and hold real estate and to sell and otherwise dispose of same. With all these, the fact remains that the source of creation of this school is the state, and its legal and only dependable source of maintenance is the state without whose appropriations it could not function. We feel that the board is then a subordinate governmental agency with authority to manage and control the school as the state's governmental agent. As such, certain moneys received by the board would be, within the meaning of the constitutional provision above quoted, "money received by the state."

The Thompson case held that money received by the board of regents of that teachers college as payment under the insurance policy for loss by fire was not required to be paid into the state treasury. But it is important to note the factual situation in the Thompson case as it differs from the one you present in your letter. In the Thompson case, the premiums for the insurance policy were paid out of tuition and incidental fees that did not at that time have to be accounted for, and which were not appropriated by the General Assembly to the use of the college. In your case, as is presented in your letter, the premiums on the insurance policies are paid out of the earnings fund reappropriated to the college by the General Assembly. We think this is a very important distinguishing factor between the Thompson case and the case at hand. Because of this, we think for a proper interpretation of the opinion in the Thompson case one must consider it under the premise that it is limited to money received by virtue of insurance on which the premiums were paid out of unappropriated fees; which, at that time, were to be treated as if one of the members of the board had personally, out of his own pocket, paid the premiums on the insurance. We think such a premise is justified by the wording of the court at l.c. 701, where they said:

"Much space is devoted in the lucid brief filed by the respondent to the nonapplications to the matter at issue of numerous other sections of the statutes relating to the management of public institutions and the receipt and disbursement of their

funds from whatever source derived. Without burdening this opinion with their review, it seems sufficient to say that in none of these statutes, either by express enactment or reasonable implication, does it appear that it was within the contemplation or intention of the Legislature that moneys received by the managing boards of educational institutions in the nature of incidental fees should, as a condition precedent to their use by the respective boards, be required to be first paid into the state treasury and appropriated therefrom by the Legislature. In the absence of a mandatory requirement to that effect, no duty is devolved upon such boards to thus dispose of these funds. Their duty in the premises, in the presence of that discretion with which the law has clothed them, is to expend such funds for the college, and account for same in the manner required by the plain provisions of the governing statutes."

By reading the opinion in the Thompson case, under the premise we have above indicated, we feel that the holding was intended to apply to the facts of that case and not to one as we now have under consideration. The wording of the court, where they speak of the board's proper exercise of its discretion in keeping the insurance money and repairing the destroyed buildings, is properly applicable when the premiums are paid out of such funds as they were in the Thompson case. But it is quite a different thing when the premiums on this insurance policy were paid out of state funds reappropriated to the college by the General Assembly. We think that fact is sufficient to require that this money received from insurance be turned into the state treasury. It cannot be said that in so doing the college has lost the benefit of this insurance money, since Section 9363, R.S. Mo. 1939, provides that certain funds be set up for these state teachers colleges, and moneys paid into the state treasury shall be placed to the credit of the fund to which they respectively belong. This fund is subject to reappropriation by the General Assembly for the improvement of said college.

Mr. G. W. Diemer

-6-

CONCLUSION

Therefore, it is the opinion of this department that, if the premiums on the insurance policies covering certain college buildings of the Central Missouri State Teachers College are paid out of the earnings fund reappropriated to the college by the General Assembly, the money received from such insurance policies must be paid into the state treasury.

Respectfully submitted,

APPROVED:

Wm. C. COCKRILL  
Assistant Attorney General

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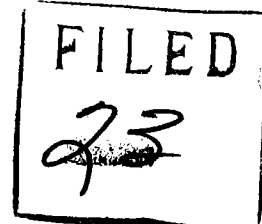
J. E. TAYLOR  
Attorney General

WCC:LR

SCHOOLS:  
TAXATION:

Property owned by state college  
exempt from taxation.

June 3, 1947



Mr. G. W. Diemer  
President  
Central Missouri State College  
Warrensburg, Missouri

Dear Mr. Diemer:

This will acknowledge receipt of your letter of recent date in which you submit the following matter for our opinion:

"I am writing you at the request of the Board of Regents of Central Missouri State College to know whether or not some houses which we purchased last summer are subject to taxation. We purchased four houses directly across from the college to provide a site for a men's dormitory. Inasmuch as we could not immediately erect the dormitory, we have been using the houses to take care of veterans and two faculty families. In three of the houses, we have been housing some forty veterans. In one of the three houses, a member of the faculty and his wife have the lower floor and they are in charge of the dormitory unit on the second floor. The fourth house is a bungalow that we have rented to our vocational home economics teacher and her father. All four of these houses are being maintained by the college to take care of housing emergency needs and any profit that might accrue from them goes back into the improvement of the dormitory and housing program.

In addition to the four houses mentioned above, we purchased a large house as a men's dormitory and have been housing twenty or twenty-two men in the house. This house will probably be maintained permanently as a college dormitory unit.

Mr. G. W. Diemer

In an opinion handed down by your predecessor, our largest dormitory, Laura J. Yeater Hall for Women, was defined as a part of the educational program of the college and not subject to taxation. I am assuming that the five houses in question are also a part of the educational program of the college and hence not subject to taxation. However, the Board of Regents of the College and the County Assessor will greatly appreciate an opinion from you."

Article X, Section 6, of the Constitution of 1945 provides what property may be exempt from taxes. It reads as follows:

"All property, real and personal, of the state, counties and other political subdivisions, and non-profit cemeteries, shall be exempt from taxation; and all property, real and personal, not held for private or corporate profit and used exclusively for religious worship, for schools and colleges, for purposes purely charitable, or for agricultural and horticultural societies may be exempted from taxation by general law. All laws exempting from taxation property other than the property enumerated in this article, shall be void."

It will be noted that the above constitutional provision expressly exempts said property from taxation and also authorizes the Legislature to exempt certain other property from taxation. The property mentioned in the first clause of said constitutional provision is placed beyond the reach of taxing authority. If, therefore, the property you describe in your letter comes within the property mentioned in said first clause of said constitutional provision, it is exempt from taxation by virtue of the constitutional provision. Pursuant to said constitutional provision the Legislature in 1945 passed an act defining what property should be exempt from taxation. Said act (H.C.S.H.B. Mo. 471, Section 5) Laws 1945, P. 1799, reads in part as follows:

"The following subjects shall be exempt from taxation for state, county or local purposes: First, lands and other property belonging to this state; \* \* \*"

Mr. G. W. Diemer

We must, therefore, determine whether the property mentioned in your letter is property belonging to the State of Missouri.

As stated in your letter, the houses were purchased by the Board of Regents of Central Missouri State College.

Section 10751, R.S. Mo. 1939, reads in part as follows:

"For the purpose of establishing state teachers colleges the state is divided into five districts as follows: \* \* \*"

Section 10753, R.S. Mo. 1939, reads in part as follows:

"The boards of regents now constituted and appointed for the first, second, third, fourth and fifth district normal schools and for Lincoln institute are hereby created boards of regents for the first, second, third, fourth and fifth state teachers colleges and for Lincoln university with full succession to property and powers. Said boards shall be known respectively as ' \* \* \* '; and by their respective names they shall have perpetual succession, with power to sue and be sued, complain and defend in all courts, to take, purchase, and hold real estate, and sell and convey or otherwise dispose of the same, and to make and use a common seal and to alter the same."

It will be seen by the foregoing statutes that the Central Missouri State College is a state institution and that the Board of Regents is authorized to acquire real estate for the use of said college. The money with which said college is run and its property acquired is money appropriated by the Legislature out of state funds. There would seem to be no question, therefore, but that the real estate acquired by the college is real estate belonging to the State of Missouri. In *State ex rel. v. Board of Regents etc.*, 305 Mo. 57, 264 S.W. 698, the Supreme Court was considering funds which were realized from collection of insurance policies on buildings owned by a similar college. The question in that case was whether the Board of Regents was required to turn into the State Treasury the proceeds of such insurance policies. In discussing that question the Court said, 264 S.W., 1.c. 700:

"In addition, for what reason it is profitless to discuss, no express power was conferred upon the board to protect the state's property from loss occasioned by fire or other destructive forces."



Mr. G. W. Diemer

Later in the opinion, the Court said, 264 S.W., 1.c. 701:

"The result of the granting of this writ will be to take money out of one of the state's hands and put it in another, which other must remain tightly closed until opened by a legislative sesame."

The Court clearly recognized that the property of the college was state property and that the Board of Regents was the agency of the state in charge of said property.

We believe there is no question, therefore, but that the buildings which you mentioned in your letter belong to the State of Missouri and, therefore, come within the first class of property which is exempt from taxation by Article X, Section 6 of the Constitution as well as by the act of 1945.

#### CONCLUSION

It is, therefore, the opinion of this office that real estate purchased by the Board of Regents of Central Missouri State College for use in connection with the college is exempt from taxation.

Yours very truly,

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Harry H. Kay  
Assistant Attorney General

APPROVED:

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J. E. TAYLOR  
Attorney General

HHK?vlv

PROBATE AND MAGISTRATE COURTS:

Bonds of Magistrate and Probate Judges and clerks; necessary to furnish bond for each office held, except Magistrate Judge.

January 23, 1947

FILED

24

7/5

Honorable Edwin E. Douglas  
Prosecuting Attorney  
Polk County  
Hollivar, Missouri

Dear Sir:

This will acknowledge your recent request for an opinion, based on the following facts:

"Polk County is a county of more than 17,000 population and less than 24,000,000.00 assessed valuation.

"In such a county does the Probate Judge (who is also Ex-Officio Magistrate Judge of the County) still give the bond required of probate judges under Section 13404, R.S. 1939?

"Is he still Ex-Officio Clerk of Probate and required to give an additional bond as such as required under Section 2440, R.S. 1939?

"If the Probate Judge names and designates his Clerk of the Magistrate Court as Clerk of the Probate Court, as I understand he can under Senate Bill 207, Section 22, does this alter the situation and would this change your opinion?

"If he does so designate his Magistrate Clerk as Clerk of Probate, will the Clerk give an additional bond as such Probate Clerk as provided for in Section 2440, R.S. 1939, to be given by the probate judges as ex-officio clerks of probate?"

Polk County has a population of 17,400, an assessed valuation of \$12,305,369, and is a county of the third class.

Section 13404, R.S. No. 1939, was amended by Senate Committee Substitute for Senate Bill No. 200, and provides for a bond for probate judges and clerks as follows:

"Every judge and clerk of the probate court shall, before entering upon the duties of their respective offices, give a separate, good and sufficient bond which, in counties now or hereafter having the following number of inhabitants, shall be in a penal sum as follows:

"(1) in counties with 30,000 inhabitants or less, the sum of \$2000.00,

\* \* \* \* \*

"Such bonds shall be approved by the clerk of the circuit court having jurisdiction in such county, and shall be filed with such clerk. Every such bond shall run to the state or county to which the fees herein provided for are payable and shall be conditioned respectively upon the faithful performance by such judge or clerk of each and every the duties hereinabove imposed upon such respective officers."

Section 2440, R.S. No. 1939, requiring the probate judge to act ex officio as his own clerk, has not been amended and the requirements of a bond are still in force. Said section is, in part, as follows:

"The judge of probate is required to act ex officio as his own clerk, and give bond in like amount, with like conditions and penalties, to be approved by the judges of the county court, filed and recorded, the same as is required of clerks filling said office by appointment: Provided, that any judge of probate may, by an entry

of record in said court, appoint a separate clerk, who shall be paid by said judge and shall hold his office at the pleasure of the judge. Said clerk shall take the oath required of other clerks of court in this state, and, before entering upon the duties of his office, shall enter into a bond to the state of Missouri, with two or more good and sufficient sureties, to be approved by the judge, in the sum of one thousand dollars, conditioned that he will faithfully discharge all the duties of his office; \* \* \* "

In the case of a magistrate clerk being appointed clerk of the probate court, said clerk would be required to give two bonds, one as clerk of each court. Senate Committee Substitute for Senate Bill No. 200, supra, provides the requirements as to being probate clerk. Senate Bill No. 207, Section 21, provides for a bond as a magistrate clerk, to wit:

"In all counties each magistrate shall by an order duly made and entered of record appoint and fix the salary of a clerk of his court and may appoint such deputies and employees as may be necessary for the proper dispatch of the business of his court and fix their salaries at such sum as in his discretion may seem proper. \* \* \* Each clerk of the magistrate court shall take the oath required of other clerks of courts in this State. Before entering upon the duties of his office, the clerk and deputy clerk shall enter into a bond to the State of Missouri, with good and sufficient sureties, to be approved by the magistrate, in the sum of \$1,000.00, conditioned that he will faithfully discharge all of the duties of his office; which bond shall be filed and recorded in the office of the county clerk of the county. \* \* \* "

As a matter of course, the probate judge would not be required to give bond as ex officio clerk if he appointed a regular clerk.

Section 22 of Senate Bill No. 207 provides for the appointment of the magistrate clerk as clerk of the probate court as follows:

" \* \* \* When the judge of the probate court is also judge of the magistrate court, such judge, in his discretion, may designate one or more of such clerks, deputy clerks or employees as clerks, deputies or employees in the probate court."

Briefly, these statutes require a bond for each office, except magistrate judge, even though they be held by the same person.

Conclusion.

It is therefore the opinion of this department that a probate judge must give bond, and he must also give an additional bond when he acts ex officio as his own clerk; that a clerk of the magistrate court must give a bond, and he must also give an additional bond as probate clerk when he acts as such.

Respectfully submitted,

A. BRADY DUNCAN  
Assistant Attorney General

APPROVED:

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J. E. TAYLOR  
Attorney General

WED:ml

TAXATION AND REVENUE: Real property held by Trustees of Jacob L. Babler Trust for income producing purposes is not exempt from taxation.

January 31, 1947

FILED

24

2/6

Honorable Phil M. Donnelly  
Governor of Missouri  
Jefferson City, Missouri

Dear Sir:

Reference is made to your inquiry of recent date, requesting an official opinion of this office, and reading as follows:

"I am enclosing a letter from Joseph W. White, Vice President, Mercantile-Commerce Bank and Trust Company, St. Louis, in regard to the Babler State Park, which is self-explanatory. I believe it would be advisable to have an opinion from your department in regard to the question of taxes referred to in this letter."

The letter referred to by you reads as follows:

"As you know, Henry Babler and this Company are Trustees under the will of Jacob L. Babler, Deceased. By his will, he left his entire residuary estate in trust for a period of twenty years with the income and principal devoted to the maintenance, upkeep and improvement of Babler State Park, situated in St. Louis County, Missouri.

"Included in the assets of the estate are various parcels of real estate in the City of St. Louis and the Counties of St. Louis, Pulaski, St. Charles and Sullivan. The question arises as to whether or not these properties are subject to taxation by the state and the political subdivisions thereof.

"I refer you to Article X of the New Constitution, Sections 6 and 10. It would seem to me

that if we continue to pay general taxes on this real estate we will not be fulfilling the terms of the will of Jacob L. Babler because the money so used to pay these taxes will not be devoted to the purposes set forth in the will; namely, for the maintenance of Babler Park.

"In view of the interest that the State of Missouri has in Babler Park it would seem to me that this is a matter on which the Attorney General should render an opinion."

Section 6 of Article X of the Constitution of 1945, referred to in the letter, reads as follows:

"All property, real and personal, of the state, counties and other political subdivisions, and non-profit cemeteries, shall be exempt from taxation; and all property, real and personal, not held for private or corporate profit and used exclusively for religious worship, for schools and colleges, for purposes purely charitable, or for agricultural and horticultural societies may be exempted from taxation by general law. All laws exempting from taxation property other than the property enumerated in this article, shall be void."

Section 10 of Article X of the Constitution of 1945, also referred to in the letter, reads as follows:

"(a) Except as provided in this Constitution, the general assembly shall not impose taxes upon counties or other political subdivisions or upon the inhabitants or property thereof for municipal, county or other corporate purposes.

"(b) Nothing in this Constitution shall prevent the enactment of general laws directing the payment of funds collected for state purposes to counties or other political subdivisions as state aid for local purposes."

We are unable to discover any relationship between Section 10 of Article X of the Constitution and the question presented.

Acting under the permissive authority granted by Section 6 of Article X of the Constitution of 1945, the 63rd General Assembly enacted House Committee Substitute for House Bill No. 471. Included therein is Section 5, relating to exemptions from taxation for state, county or local purposes. This section reads as follows:

"The following subjects shall be exempt from taxation for state, county or local purposes: First, lands and other property belonging to this state; Second, lands and other property belonging to any city, county or other political subdivision in this state, including market houses, town halls and other public structures, with their furniture and equipments and on public squares and lots kept open for health, use or ornament; Third, lands or lots of ground granted by the United States or this state to any county, city or town, village or township, for the purpose of education, until disposed of to individuals by sale or lease; Fourth, non-profit cemeteries; Fifth, the real estate and tangible personal property which is used exclusively for agricultural or horticultural societies heretofore organized, or which may be hereafter organized in this state; Sixth, all property, real and personal actually and regularly used exclusively for religious worship, for schools and colleges, or for purposes purely charitable, and not held for private or corporate profit shall be exempted from taxation for state, city, county, school, and local purposes; provided, however, that the exemption herein granted shall not include real property not actually used or occupied for the purpose of the organization but held or used as investment even though the income or rentals received therefrom be used wholly for religious, educational, or charitable purposes." (Emphasis ours.)

You will note that the exemption granted to real property owned by religious, educational or charitable institutions extends only to that which is "actually and regularly used exclusively" for the purposes of the institutions. It is our understanding from the statements contained in the letter received by you from Mr. White, that the various properties re-



Honorable Phil M. Donnelly - 4

ferred to therein are not actually and regularly used exclusively for the Babler State Park, but rather that only the income derived therefrom is devoted to that purpose.

In the premises, the properties fall squarely within the proviso contained in the Sixth subdivision of Section 5 of H.C.S.H.B. No. 471, quoted supra. The proviso specifically withdraws such properties from the exemption even though the entire income arising from the ownership thereof is devoted exclusively to the purposes of the trust, for the maintenance, upkeep and improvement of the Babler State Park.

#### CONCLUSION

In the premises, we are of the opinion that the properties held by the Trustees under the will of Jacob L. Babler, Deceased, which are not actually and regularly used exclusively for the Babler State Park, are not exempt from taxation for state, county and local purposes, even though the income derived therefrom is used wholly for the purposes of the trust.

Respectfully submitted,

WILL F. BERRY, Jr.  
Assistant Attorney General

APPROVED:

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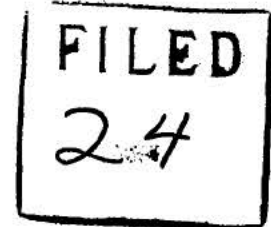
J. E. TAYLOR  
Attorney General

WFB:HR

SCHOOL:  
PUBLIC SCHOOL:  
RETIREMENT FUND:

Mandatory retirement at age 70 not effective during duration of World War II which will not terminate until treaties of peace or until other proper governmental action.

February 14, 1947



Honorable G. L. Donahoe  
Executive Secretary  
Public School Retirement System  
Jefferson City, Missouri

Dear Sir:

This department is in receipt of your request for an official opinion, which reads as follows:

"We would appreciate an opinion on the following question concerning House Bill 151 of the 63d General Assembly:

"'Will the mandatory retirement provision of the Public School Retirement Act as stated in Subsection 1 of Section 6 of the Act become effective as of July 1, 1947.'

"We are requesting this opinion so that we may know the effect of President Truman's Executive Order declaring cessation of hostilities as of December 31, 1946."

House Bill No. 151, enacted by the 63rd General Assembly, sets up a retirement system for public school teachers. Section 6 (1) provides that a person who is 70 years of age or more one year after the date the retirement system becomes operative shall be retired as of that date. However, the section further provides that "the compulsory retirement age shall not be effective for the duration of World War II." House Bill No. 151 went into effect on August 1, 1945.

On December 31, 1946, the President of the United States issued Proclamation No. 2714, which reads as follows:

"With God's help this nation and our allies, through sacrifice and devotion, courage and

Honorable G. L. Donahoe

perseverance, wrung final and unconditional surrender from our enemies. Thereafter, we together with the other United Nations, set about building a world in which justice shall replace force. With spirit, through faith, with a determination that there shall be no more wars of aggression calculated to enslave the peoples of the world and destroy their civilization, and with the guidance of Almighty Providence great gains have been made in translating military victory into permanent peace. Although a state of war still exists, it is at this time possible to declare, and I find it to be in the public interest to declare, that hostilities have terminated.

"Now, therefore, I, Harry S. Truman, President of The United States of America, do hereby proclaim the cessation of hostilities of World War II, effective twelve o'clock noon, December 31, 1946.

"In witness whereof, I have hereunto set my hand and caused the seal of the United States of America to be affixed.

"Done at the City of Washington this 31st day of December in the year of our Lord Nineteen Hundred and Forty-Six, and of the Independence of the United States of America the one hundred and seventy-first."  
(Underscoring ours)

On the same date, a Statement was issued by the President which said:

"I have today issued a proclamation terminating the period of hostilities of World War II, as of 12 o'clock noon today, December 31, 1946.

"Under the law, a number of war and emergency statutes cease to be effective upon the issuance of this proclamation. It is my belief that the time has come when such a declaration can properly be made, and that it is in the public interest to make it. Most of the

Honorable G. L. Donahoe

powers affected by the proclamation need no longer be exercised by the executive branch of the Government. This is entirely in keeping with the policies which I have consistently followed, in an effort to bring out economy and our government back to a peacetime basis as quickly as possible.

"The proclamation terminates government powers under some 20 statutes immediately upon its issuance. It terminates government powers under some 33 others at a later date, generally at the end of 6 months from the date of the proclamation. This follows as a result of provisions made by the Congress when the legislation was originally passed. In a few instances the statutes affected by the Proclamation give the government certain powers which in my opinion are desirable in peacetime, or for the remainder of the period of reconversion. In these instances, recommendations will be made to the Congress for additional legislation.

"It should be noted that the proclamation does not terminate the states of emergency declared by President Roosevelt on September 8, 1939, and May 27, 1941. Nor does today's action have the effect of terminating the state of war itself. It terminates merely the period of hostilities. With respect to the termination of the national emergency and the state of war I shall make recommendations to the Congress in the near future." (Underscoring ours)

From a reading of the Proclamation and the Statement, it will be seen that a cessation of hostilities only is declared and both the Proclamation and the Statement recognize that a state of war still exists. As pointed out in the Statement, certain statutes which will remain in force "until the cessation of hostilities" (55 Stat. 246, Sec. 403 (H); 57 Stat. 42 c. 20) and other statutes which will remain in force until "6 months after the cessation of hostilities" (56 Stat. 1041 c. 680, 57 Stat. 65 c. 62) are affected by the Proclamation. As was said in Kahn v. Anderson, 255 U. S. 1, 65 L. ed. 469, 1.c. 474:

"\* \* \* That complete peace, in the legal sense, had not come to pass by the effect of the Armi-

Honorable G. L. Donahoe

stice and the cessation of hostilities, is not disputable. \* \* \*

In Hamilton v. Kentucky Distilleries and Warehouse Company, 251 U. S. 146, 64 L. ed. 194, Mr. Justice Brandeis, speaking for the court, said at l.c. 203:

"In the absence of specific provisions to the contrary the period of war has been held to extend to the ratification of the Treaty of Peace or the proclamation of peace.\* \* \*

Again in Commercial Cable Company v. Burleson, 25 Fed. 99, Judge Learned Hand rejected the contention that the cessation of hostilities terminated World War I when he said at l.c. 104:

"\* \* \* Had they intended that a suspension of hostilities should terminate the right, they would not have said precisely the contrary. Nor did they change by any limitation of the Constitution that I know. Even if I were to assume that the power were only coextensive with a state of war, a state of war still existed. It is the treaty which terminates the war.\* \* "

In view of the above authorities, it will be seen that the Presidential Proclamation of December 31, 1946, which declared a cessation of hostilities, did not terminate the state of war itself, and any statute that is effective during the duration of World War II is still in full force and effect.

#### CONCLUSION

It is, therefore, the opinion of this department that the mandatory retirement provision of the Public School Retirement Act, Section 6 (1) of House Bill No. 151, which provides that such a provision shall not be effective during the duration of World War II is not effected by the Presidential Proclamation No. 2714, December 31, 1946, which declared the cessation of hostilities because a state of war exists until a treaty is signed and not just until the cessation of hostilities. Therefore, the mandatory retirement provision will not be effective until such date as a peace treaty is signed or the termination of the war is declared by appropriate governmental action.

APPROVED:

Respectfully submitted,

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J. E. TAYLOR  
Attorney General

ARTHUR M. O'KEEFE  
Assistant Attorney General

PUBLIC SCHOOL RETIREMENT ACT: Teachers in state  
training schools and school  
at Mt. Vernon not included.



August 25, 1947

7/11

Mr. G. L. Donahoe  
Executive Secretary  
Public School Retirement System  
Jefferson City, Missouri

Dear Sir:

We have your letter of recent date which reads  
as follows:

"The Public School Retirement Act, which became effective August 1, 1945, and which was amended by House Bills 642 and 1010 of the 63rd General Assembly, provides in Sub-section (1) of Section 1 that, 'Public School' shall mean any school conducted within the state under the authority and supervision of a duly elected District or City or Town Board of Directors or Board of Education and the board of Regents of the several State Teachers Colleges, or State Colleges, and also the State of Missouri and each county thereof, to the extent that the state and the several counties are employers of teachers as hereinafter designated.'

In Sub-section (6) of Section 1, the term 'teacher' is defined in part as follows: 'Teacher' shall mean any teacher, teacher-secretary, substitute teacher, supervisor, principal, supervising principal, superintendent or assistant superintendent, school nurse, or librarian who shall teach or be employed by any public school, State College or State Teachers College on a full-time basis and who shall be duly certificated under the law governing the certification of teachers .....

Sub-section (1) of Section 5 reads as follows:  
'On and after the effective date of this Act, all employees as herein defined of districts included in the retirement system thereby created shall be members of the system by virtue of their employment.'

In Section 38 of Article 4 of the Constitution 1945, training schools are classified as educational institutions. In the Laws of Missouri 1945, providing for the creation and establishment of a Department of Corrections and prescribing its duties and powers, we find that it is the duty of each training school to provide an educational program.

We request an official opinion as follows:

- (1) Are the full-time certificated teachers in the State Training Schools at Boonville, Chillicothe and Tipton members of the Public School Retirement System of Missouri by virtue of employment?
- (2) Are the full-time certificated teachers in the State Sanatorium at Mt. Vernon members of the Public School Retirement System of Missouri by virtue of employment?"

The Public School Retirement Act mentioned in your letter is a new law and has not been before the Courts. We must therefore try to determine what the intention of the Legislature was with respect to the questions you submit by analyzing the act and related acts.

The purpose of the act as set forth in Section 2, P. 1355, L. 1945, is to provide "retirement allowances and other benefits for public school teachers". To determine who is entitled to the benefits provided by the act, it is therefore necessary to determine who are "public school teachers" as that term is used in the act.

Section 1 of the act, as amended, P. 1383, L. 1945, defines "Public School" as follows:

"(1) 'Public School' shall mean any school conducted within the state under the authority and supervision of a duly elected District or City or Town Board of Directors or Board of Education and the board of Regents of the several State Teachers Colleges, or State Colleges, and also the State of Missouri and each county thereof, to the extent that the state and the several counties are employers of teachers as hereinafter designated."

At first blush it would appear that the training schools you mention, being schools conducted under the supervision of the state, might be included in the school systems covered by the act. It should be observed, however, that schools conducted by the state are included only "to the extent that the state and the several counties are employers of teachers as hereinafter designated." Sub-section 6 of Section 1 of the act designates in detail what teachers are included. Said sub-section reads as follows:

"(6) 'Teacher' shall mean any teacher, teacher-secretary, substitute teacher, supervisor, principal, supervising principal, superintendent or assistant superintendent, school nurse, or librarian who shall teach or be employed by any public school, State College or State Teachers College on a full-time basis and who shall be duly certificated under the law governing the certification of teachers: any county superintendent of schools, assistant county superintendent of schools and those employed by county superintendents of schools upon a full-time basis and who shall be duly certified under the law governing the certification of teachers: and the state superintendent of public schools or commissioner of education, persons employed in the State Department of Education or by the State Board of Education in an executive capacity and other persons employed by said State Board of Education on a full-time basis who shall be duly certificated under the law governing the certification of teachers, provided that this clause shall not be construed to include employees of the University of Missouri or Lincoln University."



Under Sub-section (6), supra, the only teachers employed by the state who are included in the term "Teachers" as used in the act are those employed in the State Teachers Colleges or State Colleges, the State Superintendent of Public Schools or Commissioner of Education, those employed in the State Department of Education or by the State Board of Education in an executive capacity and those employed by the State Board of Education on a full-time basis. Teachers at the University of Missouri are expressly excluded by said sub-section. Teachers in the training schools are not employed by the State Board of Education nor by the State Department of Education. They are employed by a Board of Trustees as provided by Section 38, Article IV of the Constitution of Missouri which reads as follows:

"All state training schools and industrial homes for boys and girls shall be classified as educational institutions and shall be in charge of a board of six trustees, three from each of the two major political parties, appointed by the governor by and with the advice and consent of the senate. All employees of the board shall be selected and removed as provided for employees in the state eleemosynary institutions."

By the definitions in the very first section of the act it is clear that only certain designated teachers employed by the state are to be included under the act. Furthermore, Section 11 of the act, p.1365, L. 1945, definitely shows that only teachers employed by the State Board of Education are to be included. Said Section 11 reads as follows:

"To meet the requirements of the retirement system for the period between the time when this Act shall take effect and the time when sufficient contributions to the system are transmitted by employers, the board of trustees shall have authority to accept on behalf of the system such grants or appropriations as may be made to them or it by the General Assembly of Missouri and to repay and return the same to the State Treasury when funds of the system sufficient therefor are available. Provided that any funds appropriated by the General Assembly shall be repaid within two years after the effective date of this Act and

provided further that the State of Missouri shall contribute no funds directly or indirectly to finance the plan to pay retirement allowances by appropriation bills or otherwise, except for payments or contributions of persons employed by the State Board of Education as provided in paragraph (6) of Section 1 of this Act, and except those funds which the District may receive from time to time under a law or laws providing for a general apportionment of school moneys throughout all the State."

It is thus provided that the employer's part of contributions to the retirement funds shall be paid by the state only on teachers employed by the State Board of Education as provided in paragraph (6) of Section 1 which was set out above.

That only teachers employed by the State Board of Education were to be included in the act was further shown by the appropriation acts passed by the same Legislature which passed the retirement act. By the appropriation acts for the State Board of Education (pp 408-412, L. 1945) money with which to pay teacher retirement by that department is expressly provided for. In the appropriation acts for the training school for boys at Boonville (pp 484-485, L. 1945), the Industrial Home for Girls at Chillicothe (pp 486-487, L. 1945) and the Industrial Home for Negro Girls at Tipton (pp 488-489, L. 1945), no money is provided for payment of teacher retirement. Had the Legislature considered that teachers in the last named institutions were included in the retirement system it would certainly have provided funds with which to pay the employer's part of such plan.

What is said above applies also to teachers employed in the State Sanatorium at Mt. Vernon. They are not employed by the State Board of Education, but are employed by the Department of Public Health and Welfare (p 945, L. 1945).

Conclusion

It is, therefore, the opinion of this department that full-time certified teachers in the State Training Schools at Boonville, Chillicothe and Tipton and in the State Sanatorium at Mt. Vernon are not members of the Public School Retirement System by virtue of their employment.

Very truly yours,

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Harry H. Kay  
Assistant Attorney General

APPROVED:

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J. E. Taylor  
Attorney General

HHK/vlv

COUNTY COURTS: After county court has given assent to electric company to erect poles, etc., through, on, under or across the public roads or highways of the county, and electric company has started construction of electric line and installed poles, etc., county court cannot revoke such order of assent.

September 11, 1947

FILED

24

9/13

Honorable William Lee Dodd  
Prosecuting Attorney  
Ripley County  
Doniphan, Missouri

Dear Sir:

This is in reply to your letter of recent date, requesting an official opinion of this department, and reading as follows:

"The County Court of Ripley County made an order granting the Arkansas-Missouri Power Co. permission to construct poles, conductors, guy wires, etc., across part of the County for a distance of about 20 miles to supply electric current for a pumping booster station for the Magnolia Pipe Line Co. The Co. has surveyed out its route and started construction. Now the Ozark Border Electric Co. (R.E.A.) wants the County Court to revoke the order made to the Arkansas-Missouri Power Co. Does the County Court have the right to revoke this order at this time?

"It is merely a battle for priority between the two power Cos. Ark.-Mo. does not intend to supply local current but only to furnish current for the booster station.

"Please answer this by Sept. 15, if possible. The County Court meets on the 15th."

In writing this opinion, we assume that the order granting the Arkansas-Missouri Power Company permission to construct poles, conductors, guy wires, etc., in Ripley County was made under authority of Section 8573, R. S. Mo. 1939. Such section provides as follows:

"No person or persons, association, companies or corporations shall erect poles for the suspension of electric light, or power wires, or lay and maintain pipes, conductors, mains and conduits for any purpose whatever, through, on, under or across the public roads or highways of any county of this state, without first having obtained the assent of the county court of such county therefor; and no poles shall be erected or such pipes, conductors, mains and conduits be laid or maintained, except under such reasonable rules and regulations as may be prescribed and promulgated by the county highway engineer, with the approval of the county court."

The rule regarding the power of county courts to rescind or revoke an order such court has made is found in the case of Mead v. Jasper County, 305 Mo. 476, l. c. 486-487, where the Supreme Court of Missouri, in banc, said:

"The general rule is laid down in 15 Corpus Juris, page 470, where it is said:

"Where a county board or court exercises functions which are administrative or ministerial in their nature and which pertain to the ordinary county business, and the exercise of such functions is not restricted as to time and manner, it may modify or repeal its action; but in no event has such court or board the power to set aside or to modify a judicial decision or other made by it after rights have lawfully been acquired thereunder, unless authorized so to do by express statutory provision . . . . . The same is the case after an appeal has been allowed, or where some special statutory power is exercised, the time and mode of the exercise thereof being prescribed by statute. Where the previous action of the board is in the nature of a contract which has been accepted by the other party, or on the faith of which the latter has acted, it cannot be rescinded by the board without the consent of the other party. Conversely, where the proposition has not been accepted or acted on by the other party, the board may restrict or rescind its

action. In the absence of express statutory authority, a county board cannot review or reverse the act of a prior board performed within the scope of authority conferred by law. A county board or court may, however, at the term or session at which an order is made, revise or rescind it, provided this is done before any rights accrue thereunder, but ordinarily they have no power to do such act subsequent to such term or session.'

"In State v. Morgan, 144 Mo. App. 1. c. 40, it is said:

"'The rule is well settled that a county court may revise or rescind an order at the term or session at which such order is made provided this be done before any rights have accrued under the order.' (Italics ours.)" (First emphasis ours.)

In view of the holding of the court above quoted, and in view of the fact that you state in your letter that the Arkansas-Missouri Power Company has started construction of its electric line, it is clear that the County Court cannot now revoke or rescind its order. Of course, the County Court may make a similar order granting its assent for the erection of poles and the laying and maintaining of pipes, conductors, mains and conduits through, on, under or across the public roads or highways of Ripley County, by the Ozark Border Electric Company.

#### CONCLUSION

It is the opinion of this department that the County Court of Ripley County has no power to revoke or rescind its order giving assent to the construction of poles, conductors, guy wires, etc., in Ripley County by the Arkansas-Missouri Power Company.

Respectfully submitted,

C. B. BURNS, Jr.  
Assistant Attorney General

APPROVED:

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J. E. TAYLOR  
Attorney General

CBB:HR

TAXATION:  
CITIES:

Taxes on property cannot be levied to pay principal and interest of revenue bonds issued by city for construction and operation of public utility.



December 6, 1947

Honorable William Lee Dodd  
Prosecuting Attorney  
Ripley County  
Doniphan, Missouri

Dear Sir:

This is in reply to your letter of recent date, requesting an official opinion of this department and reading as follows:

"If a city votes a bond issue and issues negotiable interest bearing revenue bonds for the establishment of a water system or an electric generating plant and the city is unable to obtain enough revenue from the utility to pay the interest and the principal, will the city be allowed to tax the property of the people to pay off the revenue bonds?

"Please answer this question at once because the City of Doniphan wishes it for reference."

Section 27 of Article VI of the Constitution of Missouri provides as follows:

"Any city or incorporated town or village in this state, by vote of four-sevenths of the qualified electors thereof voting thereon, may issue and sell its negotiable interest bearing revenue bonds for the purpose of paying all or part of the cost of purchasing, constructing, extending or improving any revenue producing water, gas or electric light works, heating or power plants, or airports, to be owned exclusively by the municipality, the cost of operation and maintenance and the principal and interest of the

bonds to be payable solely from the revenues derived by the municipality from the operation of such utility." (Emphasis ours.)

We believe it to be clear and evident from the above quoted provision of the Constitution, particularly that part underlined, that no tax on the property of the people of a city which has voted interest bearing revenue bonds for the establishment of a water system or electric generating plant can be levied to pay the interest and principal of such bonds.

#### CONCLUSION

It is the opinion of this department that taxes on the property of the people of a city which has issued negotiable interest bearing revenue bonds for the establishment of a water system or electric generating plant cannot be levied to pay the principal and interest of such bonds, but that all principal and interest of such bonds must be paid from the revenues derived by the municipality from the operation of the utility.

Respectfully submitted,

C. B. BURNS, Jr.  
Assistant Attorney General

APPROVED:

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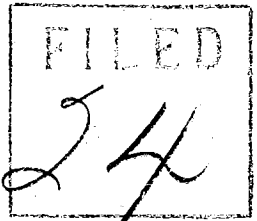
J. E. TAYLOR  
Attorney General

CBB:HR



- 1 -SHERIFF'S: Counties liable for Sheriff's costs in returning paroled inmates to State Hospitals.
- 2 -CITIES; Cases appealed from Police Court of Cities of 4th Class do not become criminal cases.

December 18, 1947



Mr. William Lee Dodd  
Prosecuting Attorney  
Ripley County  
Doniphan, Missouri

Dear Mr. Dodd:

This will acknowledge receipt of your letter of December 6, 1947, in which you request the opinion of this Department. This letter contains requests for opinions on two different subjects and we will attempt to answer such requests in the order set out in your letter.

Your letter requesting these opinions after omitting caption and signatures, was as follows:

"A person was judged insane by the Probate Court and the sheriff took her to Farmington to Hospital No. 4. She remained there for a period and then was released on parole to her sister. About 6 days later she became violent and the Supt. ordered the sheriff to bring her back. The patient's sister is unable to pay mileage to the sheriff, but the sheriff wants to know from what source he is to receive his pay."

"P.S. When an appeal is taken from city police court in 4th class cities to Circuit Court does this become a criminal case to the effect that the sheriff must turn his fees over to the County?"

The first question to be answered by this Department is contained in the body of your letter set out

above, and deals with the transportation of insane persons from the County in which they live to the State Institutions.

The authority of the Probate Courts of the several Counties to send insane poor of their respective Counties to the State Hospitals is contained in Section 9328 of the Revised Statutes of Missouri for 1939 as reenacted in 1945. This section became effective July 1st, 1946, and provides as follows:

"The probate courts of the several counties shall have power to send to a state hospital such of the insane poor of their respective counties as may be entitled to admission thereto. Such probate court shall furnish the county court with a certified copy of the order finding the person to be an insane poor person and the order committing such person. The counties from which such insane poor person has been sent shall pay semi-annually in cash, in advance, such sums for the support and maintenance of their insane poor, as the board of managers may deem necessary, not exceeding six dollars (\$6.00) per month for each patient; and in addition thereto the actual cost of their clothing and the expense of removal to and from the hospital, and if they shall die therein, for burial expenses; and in case such insane poor shall die or be removed from the hospital before the expiration of six months, it shall be the duty of the managers of such hospital to refund, or cause to be refunded, the amount that may be remaining in the treasury of such hospital due to the county entitled to the same; and for the purpose of raising the sum of money so provided for, the several county courts shall be and they are hereby expressly authorized and empowered to discount and sell their warrants, issued in such behalf, whenever it becomes necessary to raise said moneys so provided for."

In Section 9321 of the Revised Statutes of Missouri for 1939 as reenacted in 1945, and which became effective July 1st, 1946, the authority is given to the Superintendent of the Hospitals and his staff to discharge or parole insane persons committed to the State's several institutions. This Section of the Statute is in part, as follows:

"Persons afflicted with any form of insanity shall be admitted into the hospitals for the care and treatment of same. Any patient so admitted may be discharged or paroled whenever in the judgment of the Superintendent and his staff such person should be discharged or paroled."

Under the provisions of the preceding two sections of the Statute, it can be seen that the Probate Court of the various counties have the power to send insane persons to the State Institutions and that after arriving there the Superintendent of each institution and his staff have the authority to discharge or parole any patients. The question to be answered here is where a patient has been paroled by the Superintendent and his staff of a state hospital, if such patient then suffers a relapse and again becomes insane and unmanageable, who shall pay the cost of his transportation back to the Institution.

Under the provision of Section 9328, Supra, it is very clear that the County would be liable for the Sheriff's costs accruing as a result of the transportation of indigent insane from the latter's home to the State Institutions and we feel that under the wording of this Section of the statute, that the County would be liable for the Sheriff's cost if he is ordered to return a paroled patient to the Institution. It will be noted that the Section provides as follows:

"The Counties from which such insane poor person has been sent shall pay  
\* \* \* the actual cost of their clothing,

and the expense of removal to and from  
the Hospital \* \* \* ."

There is no specific provision of the statute referring to the payment of the Sheriff's costs which accrue as a result of the transportation of paroled inmates when being returned to the Hospital. However, in the absence of such provision, it is the opinion of this Department that the above section governs and that the Counties will be liable for the sheriff's costs in transporting a patient to a State Hospital after a revocation of his or her parole.

#### CONCLUSION.

It is, therefore, the opinion of this Department that the Counties are liable for the costs of the Sheriff in returning insane persons to State Hospitals after such persons have previously been paroled.

\* \* \* \* \*

The second question which you wish answered is whether a case becomes a criminal case after an appeal has been taken from the City Police Court in 4th Class Cities to the Circuit Court and whether the Sheriff must turn his fees over to the County wherein the City is located.

It is well settled in this State that an appeal from a conviction in a Police Court of a city of the 4th class does not convert the case into a criminal prosecution, but such case remains a civil action. This principle of law has been cited recently in the well considered cases of: City of Clayton vs. Nemours, 164 S.W. (2d) 935, 237 Mo. App. 167, City of St. Louis vs. Fitch, 193 S.W. (2d) 828, 352 Mo. 706.

Under the provisions of the above cases an appeal from the Police Court of 4th class cities does not, when sent to the Circuit Courts of the various Counties, become a criminal action, and, therefore, the fees of

Mr. William Lee Dodd -5-

the sheriff will be governed by the appeals of the law governing civil actions and not by the Statute which provides that the sheriff must pay all of his fees to the County.

CONCLUSION.

Therefore, it is the opinion of this Department that an appeal of a case from the Police Court in a City of the 4th Class to the Circuit Court does not become a criminal action and thus does not require the Sheriff to pay his costs therein to the County.

Respectfully submitted,

JOHN S. PHILLIPS  
Assistant Attorney General

APPROVED:

J. E. TAYLOR  
Attorney General

CRIMINAL LAW  
ARRESTS

Sheriffs have authority to hold person under arrest without formal charge for a period not to exceed twenty hours; applies to misdemeanors as well as felonies; sheriffs have reasonable time to take persons arrested before magistrate.

March 31, 1947

FILED

25

Honorable Ralph H. Duggins  
Prosecuting Attorney  
Saline County  
Marshall, Missouri

Dear Sir:

We are in receipt of your recent request for an opinion, based on the following state of facts:

"1. Do sheriffs have authority to hold a person in custody for any period of time without charges being filed against the person so detained?

"2. Would it make any difference whether or not a misdemeanor or a felony charge was later filed against that individual?

"3. Must a resident be taken before a Magistrate and charges filed against him immediately upon his being taken into custody or is a reasonable time allowed for that procedure?"

The answer to your questions is found in Section 4346, Mo. R.S.A., which states as follows:

"All persons arrested and confined in any jail, calaboose or other place of confinement by any peace officer, without warrant or other process, for any alleged breach of the peace or other criminal offense, or on suspicion thereof, shall be discharged from said custody within twenty hours from the

time of such arrest, unless they shall be charged with a criminal offense by the oath of some credible person, and be held by warrant to answer to such offense; and every such person shall, while so confined, be permitted at all reasonable hours during the day to consult with counsel or other persons in his behalf; and any person or officer who shall violate the provisions of this section, by refusing to release any person who shall be entitled to such release, or by refusing to permit him to see and consult with counsel or other persons, or who shall transfer any such prisoner to the custody or control of another, or to another place, or prefer against such person a false charge, with intent to avoid the provisions of this section, shall be deemed guilty of a misdemeanor."

An examination of this section leads to the conclusion that a sheriff does have the right to hold a person in custody for a period of time not to exceed twenty hours without a charge being filed; that it makes no difference that the charge when filed is a misdemeanor, and that under this section such sheriff would have a reasonable length of time, not to exceed twenty hours, to take a person under arrest before a magistrate.

The penalty for violation of this section is, as stated therein, a misdemeanor.

#### Conclusion.

It is, therefore, the opinion of this department that sheriffs have authority to hold a person in custody, without a charge being filed, for a period of time not to exceed

Honorable Ralph H. Duggins

-3-

twenty hours, and that authority applies to misdemeanors as well as felonies; that a reasonable length of time, not to exceed twenty hours, is allowed all sheriffs for taking a person before a magistrate having jurisdiction of the offense.

Respectfully submitted,

W. BRADY DUNCAN  
Assistant Attorney General

APPROVED:

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J. E. TAYLOR  
Attorney General

WED:ml



MAGISTRATES: If one person holds both the offices of clerk of the probate court and clerk of the magistrate court he must file two bonds as required by Senate Bill 200 and Senate Bill 207 of the 63rd General Assembly.

January 16, 1947

FILED

26

1/23  
Honorable Walter A. Eggers  
Judge of the Probate Court  
Perry County  
Perryville, Missouri

Dear Sir:

We hereby acknowledge receipt of your letter of recent date requesting an opinion from this department, reading in part as follows:

"Section 21 of SB 207 provides that the clerk of the magistrate court enter into bond in the sum of \$1,000.00.

"Section 2440 RS 1939 provides that the clerk of the probate court enter into a bond in the sum of \$1,000.00.

"If John Doe is appointed clerk of the magistrate court and also clerk of the probate court must he file two bonds?"

Section 21 of Senate Bill 207 of the 63rd General Assembly reads in part as follows:

"\* \* \* Before entering upon the duties of his office, the clerk and deputy clerk shall enter into a bond to the State of Missouri, with good and sufficient sureties, to be approved by the magistrate, in the sum of \$1,000.00, conditioned that he will faithfully discharge all of the duties of his office; which bond shall be filed and recorded in the office of the county clerk of the county. \* \* \*"

Section 13404 of Senate Bill 200 of the 63rd General Assembly, reads in part as follows:

"Every judge and clerk of the probate court shall, before entering upon the duties of their respective offices, give a separate, good and sufficient bond which, in counties now or hereafter having the following number of inhabitants, shall be in a penal sum as follows:

- (1) in counties with 30,000 inhabitants or less, the sum of \$2000.00,
- (2) in counties with more than 30,000 and less than 70,000 inhabitants, the sum of \$3000.00,
- (3) in counties with more than 70,000 and less than 250,000 inhabitants, the sum of \$5000.00,
- (4) in counties with more than 250,000 inhabitants, the sum of \$10,000.00.

Such bonds shall be approved by the clerk of the circuit court having jurisdiction in such county, and shall be filed with such clerk. Every such bond shall run to the state or county to which the fees herein provided for are payable and shall be conditioned respectively upon the faithful performance by such judge or clerk of each and every the duties hereinabove imposed upon such respective officers."

It should be noted that each bond is conditioned upon the faithful performance of the duties of the respective office by each clerk. In other words, the bond given by a clerk of the probate court is required to be conditioned only on the performance of the duties of his office, and the bond given by a clerk of the magistrate court is required to be conditioned only on the performance of the duties of his office.

Where one person holds two distinct offices and a bond is required for each, he must file both bonds. We quote from

46 C. J., Section 396, page 1067:

"Where an officer holds two distinct offices, although one is held ex officio, a bond given for the faithful performance of one office does not cover his liability for his acts in the other office, especially where an additional and totally distinct bond is required for the faithful performance of such other duties, even though such additional bond is not in fact given; \* \*"

In the quotation above, it even goes so far as to say that if a man holds two offices, although the one is held ex officio, that a bond for the faithful performance of one office does not cover his liability for acts in the other. The General Assembly has also followed this policy in that it has required the person holding the office of treasurer and ex officio collector in township organization counties, to provide one bond to cover the liability for his acts as treasurer and another bond to cover the liability for his acts as collector (Sections 13795 and 13994, R. S. Mo. 1939).

It seems to us from the above that the bond required is primarily for the faithful performance of the duties of the particular office and that for this reason the General Assembly has deemed it advisable to require a specified amount for each office.

#### Conclusion

Therefore, it is the opinion of this department that if one person holds both the offices of clerk of the probate court and clerk of the magistrate court, then he must file two bonds as required by Senate Bill 200 and Senate Bill 207 of the 63rd General Assembly.

Respectfully submitted,

APPROVED:

PERSHING WILSON  
Assistant Attorney General

J. E. TAYLOR  
Attorney General

PW:EG

PROSECUTING ATTORNEY:

Prosecuting attorneys may be reimbursed for necessary and indispensable expenditure for stenographic services.

NEPOTISM:

No objection to county judges being related.

January 23, 1947



Mr. John F. Edmundson  
Clerk of the County Court  
Stoddard County  
Bloomfield, Missouri

Dear Sir:

We have your letter of January 17, 1947, requesting an opinion from this department, which reads in part as follows:

"1. How much per annum is the County Court authorized to allow the County Prosecuting Attorney on his Clerk hire? All we can find on it is, the Prosecuting Attorney may appoint an Assistant Attorney, but he must pay this himself. Nothing is stated in the House or Senate Bills passed by the 63rd General Assembly relating to the Clerk Hire of the County Prosecuting Attorney. At least, we do not have the Bills.

"2. Is it lawful for Judges to serve on the County Court if they are related to each other?"

Your first question presents a problem which is directly dealt with in the case of Rinehart v. Howell County, 348 Mo. 421, 153 S. W. (2d) 381. In that case it was held that a prosecuting attorney was entitled to be reimbursed for expenditures for stenographic services when such services were necessary for the proper operation of his office. It was said at 1. c. 424 and 425 (Mo.):

"\* \* \* The instant case was submitted on the theory, as disclosed by the

Mr. John F. Edmundson

stipulated facts and undisputed testimony, that the outlays, as contradistinguished from income, were bona fide, reasonable and actual expenditures for indispensable expenses of the office by respondent (not on the theory that compensation to an officer was involved) and falls within the ruling in Ewing v. Vernon County, 216 Mo. 681, 695, 116 S. W. 518, 522(b). That case quoted with approval a passage from 23 Am. and Eng. Ency. Law (2 Ed.) 388, to the effect that prohibitions against increasing the compensation of officers do not apply to expenses for fuel, clerk hire, stationery, lights and other office accessories and held a recorder entitled to reimbursement for outlays for necessary janitor service and stamps, stating: 'Fees are the income of an office. Outlays inherently differ. An officer's pocket in no way resembles the widow's cruse of oil. Therefore, those statutes relating to fees, to an income, and the decisions of this court strictly construing those statutes, have nothing to do with this case relating to outgo.'

The fact that the General Assembly has provided salary for stenographic service to the prosecuting attorneys in larger counties, does not imply that it was the intention of the General Assembly to exclude such expenditure in all other counties. On the contrary, these provisions constitute legislative recognition of the necessity of such expenditure in the light of the many duties and functions of the prosecuting attorney's office. It is pointed out in the Rinehart case that these statutory provisions are, in effect, "an approved advance in proper instances for the administration of the laws by county officials and the business affairs of the county and for the general welfare of the public." Then the court went on to say, at l. c. 425, that:

"\* \* \* Such enactments, in view of the constitutional grant to county courts, should be construed as relieving the county courts in the specified communities from determining the necessity therefor and, by way of a negative pregnant, as recognizing the right of county courts to provide stenographic

Mr. John F. Edmundson

services to prosecuting attorneys in other counties when and if indispensable to the transaction of the business of the county, and not as favoring the citizens of the larger communities to the absolute exclusion of the citizens of the smaller communities in the prosecuting attorney's protection of the interests of the State, the county and the public. \* \* \*

A prosecuting attorney's right to be reimbursed for his reasonable and actual expenditure for stenographic services depends upon whether such services are necessary and indispensable to the operation of the office of prosecuting attorney. This is a question of fact to be determined in the first instance by the county court. And if that body acts arbitrarily in refusing to reimburse the prosecuting attorney for his expenditure in obtaining such services, then this question may be presented to a court of law in a suit for the recovery of such expenditure.

In answer to your second question, we believe that you have confused the situation referred to there with nepotism. "Nepotism" is defined in 45 C. J., at page 1383, as:

"Favortism shown to nephews and other relatives; bestowal of patronage by reason of relationship, rather than of merit."

The 1945 Missouri Constitution, in Section 6 of Article VII, defines "nepotism" and also imposes a penalty for such practice:

"Any public officer or employee in this state who by virtue of his office or employment names or appoints to public office or employment any relative within the fourth degree, by consanguinity or affinity, shall thereby forfeit his office or employment."

It will be observed, then, that this prohibition relates only to the appointment or employment of relatives of a certain degree by consanguinity or affinity. There is no prohibition with respect to elective officials.

Therefore, since judges of the county court are elected by the people, the prohibition against nepotism is not applicable as between such judges. There is no objection to judges of the county court being related to each other.

Mr. John F. Edmundson

CONCLUSION

Therefore, it is the opinion of this department that a prosecuting attorney is entitled to be reimbursed for expenditure for stenographic services when such services are necessary and indispensable to the proper administration of the affairs of the office of prosecuting attorney. Further, the question of whether such expenditure is necessary and indispensable, is a question of fact to be determined by the county court.

And, it is also the opinion of this department that the prohibition against nepotism is not applicable as between county judges, as they are elective officials.

Respectfully submitted,

DAVID DONNELLY  
Assistant Attorney General

APPROVED:

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J. E. TAYLOR  
Assistant Attorney General

DD:EG

*Appl. 7/24*  
MOTOR VEHICLES: Expiration date of Missouri drivers' licenses issued between July 1, 1946, and June 30, 1947.

February 11, 1947

FILED

26

7/24

Honorable Walter A. Eggers  
Judge of Probate  
Perry County  
Perryville, Missouri

Dear Sir:

Reference is made to your request of recent date for an official opinion of this department, reading, in part, as follows:

"There seems to be quite a difference of opinion in regard to the interpretation of the driver's license law Senate Bill 482.

"Reading Section 8451 line 9 we read 'provided that every operator of a motor vehicle shall, during the year beginning on the first day of July, 1946 and ending the thirtieth day of June, 1947, apply for a new motor vehicle driver's license which shall expire two years after the first anniversary of the date of birth of the applicant occurring after June 30, 1946 etc.'

"The question of the present controversy is as follows:

"John Doe, whose birthday is only December 9th, applies for a driver's license on December 15, 1946. What will be the expiration date of his license?"

Prior to the adoption of Senate Bill No. 482 of the 63rd General Assembly, the applicable statute relative to the term of Missouri drivers' licenses was found as Section 8451, R. S. Mo. 1939, as amended, Laws of 1943, page 661. It read as follows:



"To all applicants over the age of sixteen (16) years, submitting a satisfactory application under the requirements set forth in the preceding section, the commissioner shall issue a motor vehicle driver's license upon the payment of twenty-five cents therefor. From and after the 1st day of July, 1944 every license so issued shall expire at the expiration of the biennial period in which the same was issued. The first such biennial period shall begin on the 1st day of July, 1944 and expire on the 30th day of June, 1946, and each succeeding biennial period shall expire on the 30th day of June in each even numbered year thereafter; provided, however, that all such licenses issued prior to July 1st, 1944 shall be effective during the term for which they were issued." (Emphasis ours.)

You will note that the emphasized portion of this statute had the effect of causing all drivers' licenses issued subsequent to July 1, 1944, to expire on June 30, 1946.

On July 1, 1946, the administration of the Motor Vehicle Drivers' License Law was transferred to a new department as the result of the adoption of the Constitution of Missouri of 1945. The newly created department was without an appropriation and unable to supply applicants with forms by means of which new drivers' licenses might be procured. Recognizing the emergency that then existed, the Governor, by Executive Order dated June 12, 1946, extended the effective period of the licenses which were expiring, by the terms of the statute quoted, on June 30, 1946. The extension was effective "until further notice."

Senate Bill No. 482 of the 63rd General Assembly, with an emergency clause, was approved on July 17, 1946, becoming effective on that date. The Act repealed the statute quoted supra and enacted in lieu thereof a new Section 8451, reading as follows:

"To all applicants, submitting a satisfactory application under the requirements set forth in this article, the commissioner shall issue a motor vehicle driver's license upon the payment of a fee of twenty-five cents therefor, for two years. All motor vehicle drivers' licenses bearing the expiration

date of the thirtieth day of June, 1946, or a later date, shall be valid until the thirtieth day of June, 1947, without the renewal thereof or payment of a fee therefor, provided that every operator of a motor vehicle shall, during the year beginning on the first day of July, 1946 and ending the thirtieth day of June, 1947, apply for a new motor vehicle driver's license which shall expire two years after the first anniversary of the date of the birth of the applicant occurring after June 30, 1946. The anniversary of the date of birth of any applicant born on February 29 shall, for the purposes of this section, during the years in which there is no February 29, be considered as March 1. Every such license shall be renewable on or before its expiration upon application and payment of the required fee." (Emphasis ours.)

The emphasized portion of the Act had the effect of extending the expiration date of all drivers' licenses which would have expired on June 30, 1946, in accordance with the terms of the statute under which they were issued, for an additional period of one year, so that such licenses were and are valid until June 30, 1947.

An additional provision was inserted, however, requiring that all such drivers shall at some time during the year beginning July 1, 1946, and ending June 30, 1947, apply for new motor vehicle drivers' licenses. The expiration of such new motor vehicle drivers' licenses has been fixed at a time two years after the first anniversary of the date of the birth of such applicants occurring after June 30, 1946.

In reaching this conclusion, we have followed the ordinary rules of statutory construction. The phraseology of the statute is quite clear and unambiguous. It is written in words of commonly understood meaning. In construing the statute, such words must be taken in their plain, ordinary and usual sense, as is provided by Section 655, R. S. Mo. 1939, reading, in part, as follows:

"The construction of all statutes of this state shall be by the following additional rules, unless such construction be plainly repugnant to the intent of the legislature, or of the context of the same statute: First, words and phrases shall be taken in their

Honorable Walter A. Eggers - 4

plain or ordinary and usual sense, \* \* \*

Applying this construction of the statute to the factual situation disclosed in your letter, it becomes apparent that the holder of a license issued under the circumstances mentioned will be entitled to operate a motor vehicle thereunder until December 9, 1948.

CONCLUSION

In the premises, we are of the opinion that Missouri motor vehicle drivers' licenses issued subsequent to July 1, 1946, will expire two years from the first anniversary of the birth of the holders thereof occurring subsequent to July 1, 1946.

Respectfully submitted,

WILL F. BERRY, Jr.  
Assistant Attorney General

APPROVED:

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J. E. TAYLOR  
Attorney General

WFB:HR

MAGISTRATE COURTS:  
PROBATE COURTS:

*Memo.*

In counties of less than 30,000 inhabitants special probate judge and ex officio magistrate appointed or elected under Sections 2458 through 2462, R.S.Mo. 1939. Same compensation as regular judge to be paid from magistrate fund. Special probate judge in counties of more than 30,000 inhabitants entitled to same compensation as regular judge, to be paid by county.

October 1, 1947

FILED

26

Honorable Walter A. Eggers  
Judge of the Probate Court  
Perry County  
Perryville, Missouri

Dear Judge Eggers:

This is in reply to your letter of September 23, 1947, requesting an opinion from this department, which reads as follows:

"S.B. 207 Section 10a Laws of Missouri 1945 reads in part as follows:

"If the judge of the magistrate court in any county which has only one magistrate ..... or is absent from the county for a period of five days or more, the Judge of the Circuit Court of such county, may make an order to be entered in the records of such magistrate court, appointing and designating either some magistrate of another county within the circuit or some qualified attorney of the county to act as judge of the magistrate court of such county ..... Any magistrate so appointed shall be entitled to such travel and subsistence expense as may be fixed by the circuit judge,' etc.

"Section 6 of Senate Bill 207 reads in part: 'In counties of 30,000 inhabitants or less, the probate judge shall qualify as judge of the magistrate court,' etc.

"Sections 2458-2461 RS Missouri 1939 provide for the appointment of a qualified attorney to act as probate judge and specifies that for such services he is to receive the same fees that the regular

judge of probate is entitled to receive for similar services.

"SCS for SB 198, Page 1514 Laws of 1945, provides for salaries of Probate Judges in counties of over 30,000 inhabitants.

"The Missouri Constitution abolishes the fee system entirely as applied to Magistrates and Probate Judges.

"Now our association has the following questions for your consideration:

"1. If a temporary magistrate is appointed by the circuit judge in accordance with the provisions of Section 10A of SB 207, will this temporary magistrate also have jurisdiction in probate matters during the period that he serves as temporary magistrate?

"2. If the temporary magistrate does not have probate jurisdiction then how will a temporary judge be appointed to handle probate matters during such an absence of the regular magistrate. Would Sections 2458-2461 RS 1939 prescribe the manner of appointment? If so, what would be the compensation of such temporary probate judge in view of the fact that fees are contrary to the Constitution?

"3. If a probate judge is temporary appointed in counties over 30,000 in accordance with sections 2458-2461 RS 1939, how would such temporary judge be compensated?"

Section 18 of Article V of the 1945 Constitution of Missouri provides, in part, as follows:

"There shall be a magistrate court in each county. In counties of 30,000 inhabitants or less, the probate judge shall be judge of the magistrate court.

\* \* \* \*"

Section 6, Laws of 1945, page 770, implementing the above section, provides:

"In counties of 30,000 inhabitants or less, the probate judge shall qualify as judge of the magistrate court and his failure or refusal to do so shall constitute a vacancy in both the office of probate judge and the office of judge of the magistrate court."

The effect of the above provisions is to combine the offices of probate judge and magistrate in counties of 30,000 inhabitants or less and to invest one person with the duty and authority to perform the functions of both offices. The wording of the Constitution and the statutes is clear and unambiguous in providing that the probate judge shall perform the functions of both offices. Said probate judge is an ex officio magistrate, i.e., by virtue of his office. In other words, his authority as magistrate is derived from his official capacity as probate judge and is appurtenant thereto. Therefore, since the office of probate judge is the fundamental office we must look to the statutes relating to that office. Section 10a, Laws of 1945, page 771, relating to the appointment of temporary magistrates, reads as follows:

"If the judge of the magistrate court in any county which has only one magistrate court is incapacitated and unable to act or to dispose of the business pending before him for any reason, or is absent from the county, for a period of five days or more, the judge of the circuit court of such county, may make an order to be entered in the records of such magistrate court, appointing and designating either some magistrate of another county within the circuit or some qualified attorney of the county to act as judge of the magistrate court of such county until such magistrate resumes his duties, and such magistrate or special judge, when so appointed shall possess all the powers and shall be subject to all the responsibilities of the regular judge of the magistrate court during the time of his appointment. Any

person so appointed shall, before acting as judge of the magistrate court, take the oath required of magistrates. Any magistrate so appointed shall be entitled to such travel and subsistence expense as may be fixed by the circuit judge which shall be paid by the state and charged against the salary of the regular judge of the magistrate court of such county. Any attorney appointed to act as magistrate shall be entitled to one-thirtieth of the monthly salary of the regular judge of the magistrate court of the county for each day he shall act as magistrate to be paid by the state and charged against the salary of the regular magistrate. Such payments shall be made upon the certification of the circuit judge and the clerk of such magistrate court that the person or magistrate was duly appointed and acted as magistrate of such court."

We believe that said section applies only to counties having more than 30,000 inhabitants and less than 70,000 inhabitants where there is one magistrate court, and has no application to counties having 30,000 inhabitants or less where the probate judge is ex officio magistrate.

The election or appointment of special probate judges, in the absence of the regular judge, is governed by Sections 2458 through 2472, R.S.Mo. 1939. When so elected or appointed in counties of 30,000 inhabitants or less, as the case may be, said special judge must, of course, qualify as magistrate.

It is also quite evident that when the Governor, under the authority given him in Section 4 of Article IV of the 1945 Constitution, fills a vacancy in the office of probate judge and ex officio magistrate in counties of 30,000 inhabitants or less he appoints a probate judge who qualifies as magistrate. The office of probate judge and ex officio magistrate in said counties is a constitutional office.

Sections 2461 and 2462, R.S.Mo. 1939, further provide that a special probate judge is allowed the same fees and compensation for his services as the regular judge is entitled to receive. It will be noted that probate judges and ex officio

magistrates in counties of 30,000 inhabitants or less are compensated in their capacity as ex officio magistrates. Section 13404, Mo.R.S.A., relating to the fees charged and collected in probate proceedings, is, in part, as follows:

"In counties now or hereafter having 30,000 inhabitants or less, the judge shall, at the end of each month, pay over to the director of revenue, to be deposited by him with the state treasurer in the 'magistrate fund', all moneys collected by him or his clerk as fees, taking two receipts therefor, one of which he shall immediately file with the state treasurer. \* \* \* \*"

All such fees charged and collected in counties of 30,000 inhabitants or less must be paid into the magistrate fund from which the salaries of magistrates are paid. Further, Senate Bill No. 198 of the 63rd General Assembly, Laws of 1945, page 1514, relating to salaries of probate judges, makes provision only for probate judges in counties of more than 30,000 inhabitants. In Section 17, Laws of 1945, page 773, providing for the salaries of magistrates in the various counties, we find this provision:

" \* \* \* \* In all counties now or hereafter containing a population of 30,000 inhabitants or less, the salary of the magistrate as above provided shall include his compensation as probate judge of said county."

However, in 1943 the General Assembly enacted Section 13404a, Mo.R.S.A., which provided certain salaries for probate judges in counties of 19,000 inhabitants or less. We believe said section is clearly inconsistent with the general compensation system adopted by the 64th General Assembly for judges of the probate court in counties of 30,000 inhabitants or less, and particularly with the foregoing statutory provisions, and must necessarily be considered as repealed by implication. In *Re Naturalization of Serlin*, 45 Fed. Supp. 774; *State ex rel. Wells v. Walker*, 326 Mo. 1233, 34 S.W. (2d) 124; *Vining v. Probst*, Mo. App., 186 S.W. (2d) 611; *State v. Malone*, Mo. App., 192 S.W. (2d) 68.



The question now arises as to the proper source of said compensation. By way of comparison, it will be noted that the compensation of a special or temporary magistrate is, under the provisions of Section 10a, Laws of 1945, page 771, charged against the salary of the regular magistrate. However, it is a familiar rule of law that the person rightfully holding a public office is entitled to the compensation attached thereto, and this right does not rest upon contract. The right to the compensation attached to a public office is an incident to the title to the office and not to the exercise of the functions of the office. The fact that officers have not performed the duties of their office does not deprive them the right to compensation. 46 C. J., Section 233, page 1014; Luth v. Kansas City, 203 Mo. App. 110, l.c. 113; Stratton v. City of Warrensburg, 167 S.W. (2d) 392, l.c. 396; Coleman v. Kansas City, Mo., 173 S.W. (2d) 572, l.c. 577; State ex rel. Nicolai v. Nolte, 180 S.W. (2d) 740, l.c. 741. Therefore, in the absence of a statutory provision such as found in Section 10a, requiring the compensation of a special probate judge and ex officio magistrate to be charged against the salary of the regular probate judge and ex officio magistrate, we believe said regular probate judge and ex officio magistrate is entitled to his full compensation as provided in Section 17, supra, even though at times his duties are performed by a special probate judge and ex officio magistrate. Said compensation is paid by the state from the magistrate fund. It necessarily follows that compensation of a special probate judge and ex officio magistrate should be paid by the state from the magistrate fund.

It will be noted that under the provisions of Section 13404, supra, every judge of the probate court in counties of 30,000 inhabitants or less shall give a good and sufficient bond in a penal sum of \$2,000.00. Said provision certainly applies with equal force to a special probate judge. The reason for the requirement is present in either case.

The foregoing will serve to answer the first two questions presented. With respect to your further question, the foregoing discussion of compensation of regular judges is also controlling except that in counties of more than 30,000 inhabitants probate judges are paid by the county according to Senate Bill No. 198 of the 63rd General Assembly, Laws of 1945, page 1514. Thus, the county must pay the compensation of special probate judges.

Conclusion.

Therefore, it is the opinion of this department that in counties of 30,000 inhabitants or less a special probate judge and ex officio magistrate is appointed or elected under the provisions of Sections 2458 through 2462, R.S.Mo.1939, and is entitled to the same compensation allowed the regular probate judge and ex officio magistrate, said compensation to be paid by the state from the magistrate fund. It is further the opinion of this department that a special probate judge in counties of more than 30,000 inhabitants is entitled to the same compensation allowed the regular probate judge, said compensation to be paid by the county.

Respectfully submitted,

DAVID DONNELLY  
Assistant Attorney General

APPROVED:

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J. E. TAYLOR  
Attorney General

DD:ml

*copy to Mr. [unclear]*

SCHOOLS: One person cannot hold at the same time the office of  
OFFICERS: secretary and treasurer of a consolidated or town  
school district.

October 18, 1947

FILED

26

Honorable J. R. Eiser  
Prosecuting Attorney  
Holt County  
Oregon, Missouri

Dear Sir:

This will acknowledge receipt of your request for an  
opinion which reads:

"Mr. G. Frank Smith, County Superintendent  
of Schools, has asked me to write you  
relative to the legality of one person  
on a six director school board being  
appointed by the board or serving as both  
secretary and treasurer for the school  
district.

"This situation has arisen in a consolidated  
district and a town district. In the con-  
solidated district one of the members of  
the board has been appointed both secretary  
and treasurer and is filling both positions.  
In the town district a person not a member  
of the board has been appointed both secre-  
tary and treasurer. In other words both  
the consolidated and town school district  
have consolidated the office of secretary  
and treasurer and the same person holds  
both offices.

"I have been of the opinion that under the  
provisions of Section 10470 R.S. Mo. 1939  
it was necessary for the board to elect a  
person secretary and another person treasurer  
of the district - that these offices could  
not be consolidated and one person perform  
the duties of both the secretary and trea-  
surer of the district."

There can be no question but that members of such school  
districts may also be appointed and serve as secretary or  
treasurer of said school districts. Section 10470, R. S. Mo.  
1939, specifically grants such authority:

"Within four days after the annual meeting, the board shall meet, the newly elected members, who shall be qualified by the taking of the oath of office prescribed by Article 14, Section 6, of the Constitution of Missouri, and the board organized by the election of a president and vice-president, and the board shall, on or before the fifteenth day of July of each year, elect a secretary and a treasurer, who shall enter upon their respective duties on the fifteenth day of July; said secretary and treasurer may be or may not be members of the board. No compensation shall be granted to either the secretary or the treasurer until his report and settlement shall have been made and filed or published as the law directs. A majority of the board shall constitute a quorum for the transaction of business, but no contract shall be let, teacher employed, bill approved or warrant ordered unless a majority of the whole board shall vote therefor. When there is an equal division of the whole board upon any question, the county superintendent of schools, if requested by at least three members of the board, shall cast the deciding vote upon such question, and for the determination of such question shall be considered as a member of such board. The president and secretary, except as herein specified, shall perform the same duties and be subject to the same liabilities as the presidents and clerks of the school boards of other districts."

The only remaining question is, may the same person hold both offices of secretary and treasurer at the same time? It is apparent that our conclusion will be the same in either case, whether it be a consolidated or town school district, since both are organized in the same manner.

Under the common law, the only limit to the number of offices one person might hold at the same time was that they should be compatible and consistent. Furthermore, that the incompatibility does not consist in a physical inability of one person to discharge the duties of the two offices. The rule at common law is well stated in Volume 46 C.J., Section 46, page 941, and reads:

"At common law the holding of one office does not of itself disqualify the incumbent from holding another office at the same time, provided there is no inconsistency in the functions of the two offices in question. But where the functions of two offices are inconsistent, they are regarded as incompatible. The inconsistency, which at common law makes offices incompatible, does not consist in the physical impossibility to discharge the duties of both offices, but lies rather in a conflict of interest, as where one is subordinate to the other and subject in some degree to the supervisory power of its incumbent, or where the incumbent of one of the offices has the power to remove the incumbent of the other or to audit the accounts of the other. The question of incompatibility does not arise when one of the positions is an office and the other is merely an employment."

In State ex rel. v. Bus, 135 Mo. 325, l.c. 338, the court said:

"The remaining inquiry is whether the duties of the office of deputy sheriff and those of school director are so inconsistent and incompatible as to render it improper that respondent should hold both at the same time. At common law the only limit to the number of offices one person might hold was that they should be compatible and consistent. The incompatibility does not consist in a physical inability of one person to discharge the duties of the two offices, but there must be some inconsistency in the functions of the two; some conflict in the duties required of the officers, as where one has some supervision of the other, is required to deal with, control, or assist him."

There are some constitutional provisions which preclude certain officers from holding more than one office such as will be found in Section 9, Article VII and Section 12, Article III of the Constitution of Missouri, 1945. However, neither

of those provisions are applicable in the instant case.

There is no specific constitutional inhibition against one person holding both of said offices in question, and unless the duties of the two offices conflict and are inconsistent with each other or there is some statutory inhibition against holding both offices at the same time, then your request should be answered in the affirmative. This will require an examination of the statutes prescribing the particular duties, obligations and liabilities respecting said officers. So far as we are able to determine, the courts in this state have never passed on the validity of one person holding the offices of treasurer and secretary appointed by the board of directors of such school districts.

One of the cardinal rules of statutory construction is to determine the legislative intent, if possible, and give it that construction. See *Artophone Corporation v. Coale*, 133 S.W. (2d) 343, 345 Mo. 344.

In reading Section 10470, supra, it is apparent that the Legislature never contemplated that one person should hold both offices. This is borne out by using such phrases as "on or before the fifteenth day of July of each year, elect a secretary and a treasurer, who shall enter upon their respective duties on the fifteenth day of July; \* \* \* \* \* No compensation shall be granted to either the secretary or the treasurer until his report and settlement shall have been made and filed or published as the law directs."

Section 10477, R. S. Mo. 1939, requires the appointed treasurer before entering upon the duties of his office to enter into a bond to the State of Missouri, which bond shall be approved by said board, conditioned that he will render a faithful and just account of all money that may come into his hands as treasurer and otherwise perform the duties of his office. Furthermore, said bond, under the statute, is required to be filed with the secretary of said board, and in case of any breach of the conditions of said bond, the secretary of said board may cause suit to be brought thereon. Under Section 10470, R. S. Mo. 1939, it further requires the president and secretary of such boards to perform the same duties and be subject to the same liabilities as presidents and clerks of the school boards of other districts. Section 10366, R. S. Mo. 1939, requires the president of the board to sign all

warrants drawn and such warrants shall be countersigned by the district clerk. Section 10429, R. S. Mo. 1939, further provides that upon order of the board of directors, it shall be the duty of the district clerk to draw warrants in favor of any party in whom the district has become legally indebted. Also Section 10501, R. S. Mo. 1939, requires a detailed statement of all receipts of school moneys shall be published showing the source of said money, all expenditures and on what account, also the present indebtedness of the district and its nature, rate of taxation for all purposes for the year, and further requires said statement shall be attested by the president and secretary of said board.

From a casual examination of the foregoing statutory provisions, it is not difficult to see wherein the duties of the two offices of secretary and treasurer of such school districts do conflict and are inconsistent. Furthermore, as hereinabove stated, there can be no question but that the Legislature, in creating the two offices, intended that they should be separate and distinct from each other, and that one person should not hold both offices at the same time.

#### CONCLUSION

Therefore, it is the opinion of this department that members of the board of directors of consolidated school districts and town districts may be appointed as either secretary or treasurer of their respective school districts, but cannot serve as both secretary and treasurer. It is the further opinion of this department that no other person appointed by the board of directors of such school districts can serve at the same time as secretary and treasurer of said school district for the reason that the duties of the two offices are conflicting and incompatible.

Respectfully submitted,

AUBREY R. HAMMETT, Jr.  
Assistant Attorney General

APPROVED:

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J. E. TAYLOR  
Attorney General

ARH:VLM

MAGISTRATE COURTS: Magistrate clerks can issue warrants and set the amount of and approve bonds in criminal cases.



November 7, 1947

Honorable Walter A. Eggers  
Judge of the Magistrate Court  
Perry County  
Perryville, Missouri

Dear Judge Eggers:

This is in reply to your letter of October 16, 1947, which reads as follows:

"A copy of the 'Summary of Opinions of the Attorney General in relation to Magistrate Courts' reached me in yesterday's mail.

"I wish to thank you for this copy and I believe that the Magistrates will appreciate it very much and it should prove of great assistance to all.

"I am wondering whether or not one bill was omitted in the 'Summary of Bills enacted by the 64th General Assembly.' I am referring to Senate Bill No. 131 which became effective September 10, 1947.

"In my opinion this bill now permits clerks and deputy clerks of magistrate courts to issue process and I feel that this new section of the statutes will change the opinion rendered by your office under date of Feb. 18, 1947, #93-47, listed on page 8 of the booklet."

The question presented is whether clerks of magistrate courts are authorized, under the provisions of Section 3791 of Senate Bill No. 131 of the 64th General Assembly, to issue



process for the apprehension of persons charged with criminal offenses. Said Senate Bill became effective after the completion of the summary of opinions of the Attorney General in relation to magistrate courts and was not considered in that compilation.

In an opinion rendered to Honorable Stanley Wallach, Prosecuting Attorney of St. Louis County, and directed to Mr. L. L. Bornschein, Assistant Prosecuting Attorney, dated February 18, 1947, this department held, inter alia, that a warrant in a criminal proceeding before a magistrate court could not be issued by a clerk of that court. Said ruling was based largely on Section 3791 of Senate Bill No. 215 of the 63rd General Assembly, found at page 840 of the Laws of Missouri, 1945, which gave said power and jurisdiction only to certain officials. The General Assembly had not given magistrate clerks such power and jurisdiction.

However, in reenacting Section 3791, the 64th General Assembly expressly authorized clerks of magistrate courts to issue process for the apprehension of persons charged with criminal offenses. Said section now provides as follows:

"The following officers shall have power and jurisdiction to cause to be kept all laws made for the preservation of the public peace, to issue process for the apprehension of persons charged with criminal offenses, and hold them to bail; require persons to give security to keep the peace, and to execute the powers and duties herein conferred in relation thereto: The judges of the supreme court throughout the state; judges of the courts of record, except probate judges, within their respective jurisdiction; clerks and deputy clerks of magistrate courts within their respective counties; the mayors and police judges of incorporated cities and towns within the limits of their respective corporations: Provided, that nothing herein contained shall be so construed as to authorize the mayors and police judges of incorporated cities and towns to exercise jurisdiction in prosecutions under the laws of this state, other than those instituted under this article for surety to keep the peace."

(Underscoring indicates new matter.)

Therefore, in view of said recent reenactment of Section 3791, the clerks of magistrate courts may issue process for the apprehension of persons charged with criminal offenses. Our opinion to Honorable Stanley Wallach is modified in that respect.

Your attention is directed to an opinion of this department which was rendered to you as Judge of the Magistrate Court of Perry County on February 17, 1947, holding that clerks of magistrate courts are not authorized to fix the amount of, take, or approve the bond of a defendant in a criminal case. Said opinion ruled that only those persons authorized by law could set the amount of and approve such a bond. However, it was conceded there that had it been specifically provided that clerks could set the amount of and approve such bonds they could legally have performed those acts. We believe Section 3791, supra, does directly authorize clerks of magistrate courts to set the amount of and approve the bond of a defendant in a criminal case by providing that:

"The following officers (clerks and deputy clerks of magistrate courts within their respective counties) shall have power and jurisdiction \* \* \* to issue process for the apprehension of persons charged with criminal offenses, and hold them to bail; require persons to give security to keep the peace, and to execute the powers and duties herein conferred in relation thereto: \* \* \*"  
(Words in parenthesis ours.)

Therefore, our opinion to Honorable Walter A. Rogers, dated February 17, 1947, is hereby withdrawn.

#### Conclusion.

In view of the foregoing, it is the opinion of this department that clerks and deputy clerks of magistrate courts are authorized, within their respective counties, to issue process for the apprehension of persons charged with criminal offenses. It is further our opinion that said clerks and deputy clerks within their respective counties are authorized to set the amount of and approve the bond of a defendant in a criminal case.

Respectfully submitted,

APPROVED:

DAVID DONNELLY  
Assistant Attorney General

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J. E. TAYLOR  
Attorney General

184  
TAXATION: Assessment of taxes by cities may not be in excess  
ASSESSMENT: of the valuations fixed for state and county purposes.

December 9, 1947

FILED

12/15  
26

Hon. J. R. Eiser  
Prosecuting Attorney  
Holt County  
Oregon, Missouri

Dear Sir:

This is in reply to your letter of recent date wherein you submit a request for an official opinion on the following question:

"The other question involved is can the City, which has no assessor, put this property on its tax books when the State and County do not have the property on their books, and is not on the list which is certified to the City by the County Clerk?"

It appears from the statement of facts which you have submitted that the city has attempted to place upon the tax books for city taxes, property which has not been certified to it by the county clerk. Under the law, it is the duty of the county clerk to certify to the respective cities the valuations of properties in such cities as fixed by the board of equalization. Section 11 (a) of Article X of the Constitution of 1945, provides as follows:

"Taxes may be levied by counties and other political subdivisions on all property subject to their taxing power, but the assessed valuation therefor in such other political subdivisions shall not exceed the assessed valuation of the same property for state and county purposes."

It will be noted that by this constitutional provision, political subdivisions are limited in the valuations which they place on property for taxing purposes to the assessed valuation on such property which is fixed for state and county purposes. This provision of the Constitution is taken from Section 11 of Article X of the Constitution of 1875, and seems to be more specific in limiting the cities to the valuations fixed by county courts than did the Constitution of 1875. However, under the Constitution of 1875, the courts

held that cities were limited to the valuations fixed by the county board of equalization. Section 7144, R. S. Mo. 1939, which relates to cities of the fourth class, was an enabling act for said Section 11 of Article X of the Constitution of 1875. This section, after the adoption of the 1945 Constitution, has not been repealed or amended. We think this section is still in full force and effect. It provides in part as follows:

"In assessing property, both real and personal, in cities of the fourth class, the city assessor shall jointly, with the county assessor, assess all property in such cities, and such assessment, as made by the city assessor and county assessor jointly and after the same has been passed upon by the board of equalization, shall be taken as a basis from which the board of aldermen shall make the levy for city purposes. The assessment of the city property, as made by the city and county assessor, shall conform to each other, and after such board of equalization has passed upon such assessment and equalized the same, the city assessor's books shall be corrected in red ink in accordance with the changes made by the board of equalization, and so certified by said board, and then returned to the board of aldermen: Provided, that in cities which do not elect an assessor the mayor shall procure from the county clerk of the county in which such city is located, and it shall be the duty of such county clerk to deliver to the mayor on or before the first day of July of each year a certified abstract from his assessment books of all property within such city made taxable by law for state purposes, and the assessed value thereof as agreed upon by the board of equalization, which abstract shall be immediately transmitted to the council, and it shall be the duty of said council to establish by ordinance the rate of taxes for the year. \* \* \* \* \*

It will be noted that this section provides that the assessment of the city property shall conform to the assessment made by the county board of equalization.

This section was before the Supreme Court in the case of State ex rel. vs. Mining Co., 262 Mo. 490. In that case, the court held that the valuation of property for city taxes can

not exceed the valuation of the same property for state and county purposes. In the case of State ex rel. Flaugh vs. Jaudon, 286 Mo. 181, the court, in discussing the city's tax scheme and its duty to place valuations upon the property to conform to state and county valuations, said, l.c. 197:

"\* \* \* There is nothing therein to compel the city to adopt the valuation for state and county taxes. There is much therein tending to show that it was intended to fit in with the state scheme. The City Assessor must take as a basis the property on hand as of the first of January, it is true, whilst the State takes the property as of the first of June proceeding. But even then, the City Assessor, by the Constitution, could not exceed the value fixed for state and county purposes. \* \* \* \* \*

(Underscoring ours.)

It will be noted that the court in this case said that the valuation put on city property by the city assessor under the Constitution could not exceed the valuation fixed for state and county purposes. We think the foregoing constitutional and statutory provisions, together with the two opinions of the court referred to, clearly demonstrate that the valuation of property for taxing purposes, fixed by city officials in a city of the fourth class, can not exceed the valuation fixed by the county board of equalization for state and county purposes.

#### CONCLUSION

From the foregoing, it is the opinion of this department that a city of the fourth class may not add omitted property to tax rolls certified by the County Clerk or place a valuation on property for tax purposes at a greater amount than that fixed by the county board of equalization for state and county purposes.

Respectfully submitted,

TYRE W. BURTON  
Assistant Attorney General

APPROVED:

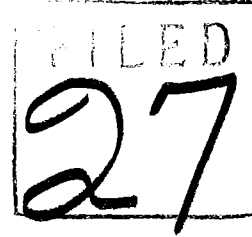
J. E. TAYLOR  
Attorney General

TWB:VLM:ir

SHERIFFS: Sheriff is entitled to \$3<sup>00</sup> per day for attending circuit, probate and magistrate courts if his attendance has been requested by the judges of said courts.

January 3, 1947

Honorable John A. Eversole  
Prosecuting Attorney  
Washington County  
Potosi, Missouri



Dear Sir:

We hereby acknowledge receipt of your letter of recent date requesting an opinion of this department, reading as follows:

"We would like to have an opinion relative to Sheriff's bill No. 872 (HB) now in effect.

"Prior to the time the Sheriff went on a salary, he drew \$3.00 per day for each day spent in County, Probate, and Circuit Court work. We are a fourth class County and he now draws the salary provided for this county.

"Will you please advise us if he is still entitled to the \$3.00 fee for each day he attends Circuit and Probate Court in addition to his present salary."

The compensation of sheriffs is regulated by Section 13, Article VI of the Constitution of 1945, which provides:

"All state and county officers, except constables and justices of the peace, charged with the investigation, arrest, prosecution, custody, care, feeding, commitment, or transportation of persons accused of or convicted of a criminal

offense shall be compensated for their official services only by salaries, and any fees and charges collected by any such officers in such cases shall be paid into the general revenue fund entitled to receive the same, as provided by law. Any fees earned by any such officers in civil matters may be retained by them as provided by law."

Pursuant to the above section, the 63rd General Assembly provided for the compensation of sheriffs of counties of the fourth class in House Bill 872 which reads in part as follows:

"It shall be the duty of the sheriff in counties of the fourth class to charge and collect in all instances every fee, both civil and criminal, including mileage, accruing to his office by law, \* \* \* \* \* provided that he shall retain all fees collected by him in civil matters."

You will note that the sheriff is entitled to retain all the fees collected by him pertaining to civil matters. The \$3.00 fee allowed the sheriff for attending courts of record is found in Section 13411, R. S. Mo. 1939. We believe that this fee is for services rendered by the sheriff in connection with the general administration of the court and that it is clear that it is not a fee charged in connection with the investigation, arrest, prosecution, custody, care, feeding, commitment, or transportation of persons accused of or convicted of a criminal offense, even though a court might dispose of criminal proceedings as well as civil proceedings in any one day. However, before this fee may be claimed by the sheriff's office, it is necessary for the judge of the court of record to request his attendance. We direct your attention to Section 2034 of Senate Bill 228 of the 63rd General Assembly, which provides as follows:

"The several sheriffs shall attend each court held in their counties, when so directed by the court; and it shall be the duty of the officer attending any court to furnish stationery, fuel, and other things necessary for the use of the court whenever ordered by the court."



Further, we find a similar provision in Section 14 of Senate Bill 207 of the 63rd General Assembly, relating to magistrate courts, which reads in part as follows:

"\* \* \* and when so required the sheriff shall be present in person or by deputy and attend on said court."

Therefore, the sheriff would be entitled to retain the \$3.00 fee for attending the magistrate court if he had been requested by the judge to attend said court.

It should be noted that this department has rendered an opinion to the Honorable Gordon R. Boyer under the date of August 26, 1946, wherein we held that the sheriff is not entitled to a \$3.00 fee for his attendance upon county courts.

#### Conclusion

Therefore, it is the opinion of this department that the sheriff in counties of the fourth class is entitled to and may retain the \$3.00 fee provided for in Section 13411, R.S. Mo. 1939, for attendance upon the circuit, probate and magistrate courts if his attendance has been requested by the judge of said courts.

Respectfully submitted,

PERSHING WILSON  
Assistant Attorney General

APPROVED:

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J. E. TAYLOR  
Attorney General

PW:EG



TAXATION AND REVENUE:

Liability of corporation for Missouri franchise tax in year subsequent to filing of articles of dissolution.

January 31, 1947

FILED

27

Honorable Clarence Evans, Chairman  
State Tax Commission of Missouri  
Jefferson City, Missouri

Dear Sir:

Reference is made to your letter of recent date, requesting an official opinion of this office, and reading, in part, as follows:

"Will you kindly furnish the State Tax Commission an opinion on the following subject:

"Is a corporation liable for corporation franchise tax after its articles of dissolution has been filed by the Secretary of State, although the certificate of dissolution is not issued until the succeeding year?"

The procedure for dissolution of corporations is found in Sections 79-83, inclusive, of an Act of the General Assembly found in Laws of 1943, pages 410-491. Section 79 provides for voluntary dissolution upon the written consent of the holders of all outstanding shares, while Section 80 provides for such dissolution upon a two-thirds majority vote of the holders of all of such shares.

Following such consent or election, as the case may be, the provisions of Section 81 become operative. This section reads, in part, as follows:

"Said articles of dissolution, in duplicate, whether by consent of shareholders or by act of the corporation, shall be delivered to the Secretary of State. If the Secretary of State finds that such articles conform to law, he shall, when all taxes, fees and other charges have been paid as in this Act prescribed, file

such articles keeping one copy for the permanent records and the other copy shall be returned to the corporation or its representative to be filed for record by the corporation in the office of the Recorder of Deeds in the county or city in which the registered office of the corporation in this State is located.

"Upon the filing by the Secretary of State of articles of dissolution, the corporation shall cease to carry on its business, except in so far as may be necessary for the proper winding up thereof, but its corporate existence shall continue until a certificate of dissolution has been issued by the Secretary of State, or until a decree dissolving the corporation has been entered by a court of equity, as in this Act provided.

\* \* \* \* \*

(Emphasis ours.)

Section 82 provides the form of the articles of liquidation to be executed upon discharge of all the outstanding debts, liabilities and obligations of the corporation, and is not pertinent to the inquiry.

Section 83 reads as follows:

"Such articles of liquidation in duplicate shall be delivered to the Secretary of State. If the Secretary of State finds that such articles of liquidation conform to law, he shall, when all taxes, fees, and charges have been paid as in this Act prescribed, file the same keeping one copy as a permanent record. He shall thereupon issue a certificate of dissolution and a certified copy of such certificate attached to the other copy of said articles of liquidation, and deliver the same to the corporation or its representative who shall then cause the articles of liquidation and the certified copy of said certificate of dissolution attached thereto to be filed for record in the office of the Recorder of Deeds of the county or city in which the registered office of the corporation in this state is located.

"Upon the issuance of such certificate of dissolution the existence of the corporation shall cease." (Emphasis ours.)

A reading of the entire scheme for such voluntary dissolution indicates that, upon the filing of the consent or election for dissolution, the right of the corporation to continue in business ceases immediately, although corporate existence does continue pending final winding up of the affairs of the corporation. The corporate existence does not cease until the showing has been made to the Secretary of State that all of the outstanding debts, liabilities and obligations of the corporation have been discharged or that provision for such discharge has been made.

In the premises, it becomes pertinent to determine the nature of the Missouri franchise tax. We quote from Missouri Athletic Ass'n. v. Delk Inv. Corp., 20 S.W.(2d) 51, 1.c. 55, wherein the following appears:

" \* \* \* In State v. Pierce Petroleum Corporation (in banc) 318 Mo. loc. cit. 1027, 2 S.W.(2d) 790, 794, this court, speaking of the nature of this franchise tax said:

"The tax is not a property tax, but an excise levied upon the privilege of transacting business in this state as a corporation. State v. Tax Commission, 282 Mo. 213, 221 S.W. 721.'

"This statement of the nature of a franchise tax is in accordance with the authorities generally. In 37 Cyc. p. 817, it is said:

"Properly speaking, a franchise tax is one imposed only on these rights or privileges, and either consisting of a more or less arbitrary sum or measured, without appraisal, by the amount of nominal capital stock; and a tax of this character is not to be regarded as a property tax. \* \* \* And, it is generally held that such a tax is one on the franchise and not on the property of the corporation, although it has been held that a so-called franchise tax which is in fact a tax upon all intangible property in the cor-

poration, including its capital, is really a property tax.'

"In City of Chicago v. Chicago City Railway Co., 245 Ill. App. 473, the court said:

"'A franchise tax is not a tax on the property of the corporation but, properly speaking, is imposed on the corporation for the privilege of carrying on its business and exercising the corporate franchise granted by the State (citing many authorities, including 37 Cyc. 817; State ex rel. Marquette Hotel Investment Co. v. Tax Commission, 282 Mo. 213, 221 S.W. 721), and federal excise taxes are analogous to and often referred to as of the same nature and character as the state corporation franchise tax. American Can Co. v. Emmerson, 288 Ill. 289 (123 N.E. 581).'

"In the case quoted from reference was also made to Flint v. Stone Tracy Co., 220 U.S. 108, 31 S. Ct. 342, 55 L.Ed. 389, Ann. Cas. 1912B, 1312, and to utterances of the Supreme Court of the United States concerning the Corporation Tax Law of 1909 (36 Stat. 11), designated as a special excise tax, of which the Supreme Court said:

"'It is a tax upon the doing of business with the advantages which inhere in the peculiarities, of corporate or joint stock organizations.'

"And the court further said:

"'The tax is laid upon the privileges which exist in the conducting of a business with the advantages which inhere in the corporate capacity of those taxed. \* \* \* It is this distinctive privilege which is the subject of taxation.'"

From the citation, it is clear that the tax is one not only upon the organization as a corporation, but also upon the right to engage in business. Adverting to the emphasized portion of Section 81, quoted supra, it is noted that the right of the cor-

poration to engage in business ceases upon the filing by the Secretary of State of the articles of dissolution. In other words, after the filing of such articles of dissolution, no corporate privileges may be exercised, and the corporate existence is continued for the sole purpose of winding up its internal affairs. Of course, should the organization in fact continue to exercise its corporate privileges after the filing of such articles of dissolution, a different situation would present itself.

It might be thought that, inasmuch as under the provisions of Section 81, quoted supra, the corporate existence is continued for the purpose of winding up the affairs of the corporation, liability for franchise tax might be incurred in the interim between the filing by the Secretary of State of the articles of dissolution and the granting of the certificate of dissolution.

We have been unable to find any decisions of the appellate courts of Missouri either determining whether or not such liability exists or determining the exact nature of corporate business carried on in winding up the affairs of the dissolved corporation. However, we think the case of *Hurd v. Meyer*, 242 N. W. 882, declares the proper rule with respect thereto.

Under the Michigan procedure for involuntary dissolution of corporations, a receiver is appointed to wind up the affairs of the corporation after the decree of dissolution is entered. In other words, that period during which the receiver is in charge of the affairs of the corporation and is liquidating its corporate business is quite similar to the period, under Missouri practice, between the filing of the articles of voluntary dissolution by the Secretary of State and the issuance of the certificate of dissolution by the same officer. The corporate existence, in each instance, is continued for the sole purpose of winding up the internal affairs of the corporation.

In the Michigan case mentioned, the receiver sought a mechanic's lien as a result of certain corporate business engaged in after the entry of the decree of dissolution. It was urged by the defendants that, inasmuch as such receiver had failed to report and pay the annual franchise fee under applicable statutes, the corporate franchise had been suspended, and therefore the receiver was not entitled to a mechanic's lien. In disposing of this contention, the Supreme Court of Michigan said:

"As above noted, the corporation was decreed 'dissolved' November 30, 1928, and the notice of such dissolution was promptly filed with the secretary of state. The power granted to the receiver 'to operate the business' was evidently only such as the court considered reasonably necessary to the advantageous winding up of the corporate business. The right to so continue the business for one year incident to the dissolution of the corporation is granted by statute. Comp. Laws 1929, sec. 15315. Notwithstanding such continuation of its former business, the corporate existence was terminated by the decree of November 30, 1928, and the subsequent filing of notice thereof with the secretary of state. It would be anomalous to say that notwithstanding such termination of the corporate existence, the receiver must continue to pay for the corporation the annual franchise fee. The court ordered the business continued only to enable the receiver to take the necessary steps to realize on the corporation's assets, pay its creditors, and to distribute the surplus, if any, to the stockholders. The annual franchise fee is a charge by the state made against a going corporation for the right and privilege it has of doing business in this state, and is not chargeable incident to closing up the affairs of a dissolved corporation. Jones v. Winthrop Savings Bank, 66 Me. 242; Johnson v. Johnson Bros., 108 Me. 272, 80 A. 741, Ann. Cas. 1913A, 1303; Commonwealth v. Lancaster Savings Bank, 123 Mass. 493; Greenfield Savings Bank v. Commonwealth, 211 Mass. 207, 97 N.E. 927; Mather's Sons Co.'s Case, 52 N.J. Eq. 607, 30 A. 321; State v. Bradford Savings Bank & Trust Co., 71 Vt. 234, 44 A. 349; Keeney v. Dominion Coal Co. (D.C., Ohio) 225 F. 625; State of Ohio v. Harris (C.C.A.) 229 F. 892. \* \* \* After dissolution the receiver of the corporation obviously cannot continue to conduct its corporate business because there is no such corporation in contemplation of law; and all the subsequent acts incident to closing up its affairs are much akin to the administration of the estate of a deceased

person and are carried on under the direction and control of the court. \* \* \* \*  
While engaged in closing up the affairs of the dissolved corporation, the receiver is acting as a trustee and officer of the court; and, as before stated, is not required to file the annual report or to pay the annual franchise fee. \* \* \* (Emphasis cours.)

We believe that a similar conclusion would be reached by the Supreme Court of Missouri.

#### CONCLUSION

In the premises, we are of the opinion that a corporation, filing articles of voluntary dissolution in any calendar year, and thereupon ceasing to exercise the corporate privileges, is not required to file a report nor pay any Missouri corporation franchise tax in the succeeding calendar year, even though the corporate existence continues into such succeeding calendar year for the purpose of winding up the business affairs of such corporation.

Respectfully submitted,

WILL F. BERRY, Jr.  
Assistant Attorney General

APPROVED:

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J. E. TAYLOR  
Attorney General

WFB:HR

TOWNSHIPS:  
ROADS AND BRIDGES:  
ROAD DISTRICTS:  
ELECTIONS:  
TAXATION:

Question of whether or not election held under provisions of Section 8529, Laws of Mo. 1945, authorized imposition of tax voted, depends on question of whether or not townships were formed into "general road districts" by the township boards.

FILED

27

July 25, 1947

8/1

Honorable C. E. Ernst  
Prosecuting Attorney  
Gentry County  
Albany, Missouri

Dear Sir:

This is in reply to your letter of recent date requesting an official opinion from this department, and reading as follows:

"On June 3rd, 1947 an election was held in Gentry County to determine whether or not the several townships in the county might be authorized as general road districts to have levied an additional tax of 35 cents on each \$100.00 of assessed valuation for road and bridge construction, this to be in addition to the levies for road and bridge purposes already provided to be levied by the several townships for road and bridge purposes.

"Since Gentry County has Township organization and we have no special road districts and the County Court has never established any general road districts since the adoption of Township organization and this election was held under the authority, or considered authority, of Section 8529, Page 1480, Laws 1945. A question has been raised as to the validity of the election and the levy of the tax sought to be collected for road and bridge purposes in the several townships."



We assume that a separate election was held in each township, on a petition of ten or more voters in each township, to vote the tax that you refer to.

The answer to the question contained in your opinion request depends on whether or not, as a matter of fact, the townships in Gentry County which voted this tax comprise "general road districts."

We are enclosing official opinions of this department rendered to Honorable R. Kip Briney, Prosecuting Attorney of Stoddard County, under date of May 1, 1945, and Honorable Herbert S. Brown, Prosecuting Attorney of Grundy County, under date of March 24, 1947.

It will be noted that in the opinion to Honorable Herbert S. Brown that part of the opinion to Honorable R. Kip Briney, holding that no authorization for holding such election had been made by the Legislature, is withdrawn, and the opinion to Honorable Herbert S. Brown does recognize the legislative authorization for such election.

It will also be noted that these opinions hold that the question of whether or not a township is a "general road district" is a matter of fact.

On July 10, 1947, this office sent you a copy of an official opinion rendered under date of May 16, 1947, to Mr. Julian O'Malley, which opinion holds that before a "general road district" exists in counties not under township organization, such road district must be formed by the county court.

In counties under township organization, before a general road district exists such road district must be formed by the township board, under the provisions of Section 8814, R.S. Mo. 1939, which provides, in part, as follows:

"The township board of directors shall form the township into one or more road districts. \* \* \* \*"

Honorable C. E. Ernst

-3-

Conclusion.

It is the opinion of this department that the elections held in the townships of Gentry County, under authority of Section 8529, Laws of Missouri 1945, page 1480, authorize the levy of the tax voted if, as a matter of fact, such townships have been formed into "general road districts" by the various township boards.

Respectfully submitted,

C. D. BURNS, JR.  
Assistant Attorney General

APPROVED:

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J. E. TAYLOR  
Attorney General

CEB:ml  
Encs (2)

TAXATION:

Tangible personal property owned by Reconstruction Finance Corporation is not subject to taxation.

November 19, 1947



Mr. Clarence Evans, Chairman  
State Tax Commission  
Department of Revenue  
Jefferson City, Missouri

Dear Sir:

This is in answer to your letter of October 18, 1947, in which you requested an opinion of this department. Said letter reads as follows:

"The State Tax Commission would be greatly pleased to have your opinion as to whether or not the tangible personal property belonging to the Reconstruction Finance Corporation is exempt from taxation in Missouri.

"The Reconstruction Finance Corporation claims exemption from all taxation 'by reason of Acts of Congress of the United States creating Reconstruction Finance Corporation (U.S.C.A. Title 15, Section 10) or extending its existence (Chapter 166, Public Law 132, 80th Congress, First Session, Approved June 30, 1947, Effective, June 30, 1947) which acts of Congress define the limitations within which the property owned by Reconstruction Finance Corporation may be subjected to taxation.' They also refer as ready reference to Section 610, U.S.C.A., Title 15."

The Reconstruction Finance Corporation was created by act of Congress, Act January 22, 1932, Chapter 8, Section 1, 47 Stat. 5, Title 15, U.S.C.A., Section 601, Act June 30, 1947, Chapter 166, Title I, Section 1, Title 15, U.S.C.A., Section 621.

Section 8 of the Reconstruction Finance Corporation Act of 1947 contains the following provision regarding exemption from taxation:

"The Corporation, including its franchise, capital, reserves and surplus, and its income shall be exempt from all taxation now

or hereafter imposed by the United States, by any Territory, dependency, or possession thereof, or by any State, county, municipality, or local taxing authority, except that any real property of the Corporation shall be subject to special assessments for local improvements and shall be subject to State, Territorial, county, municipal, or local taxation to the same extent according to its value as other real property is taxed: Provided, That the special assessment and taxation of real property as authorized herein shall not include the taxation as real property of possessory interests, pipe lines, power lines, or machinery or equipment owned by the Corporation regardless of their nature, use, or manner of attachment or affixation to the land, building, or other structure upon or in which the same may be located. The exemptions provided for in the preceding sentence with respect to taxation (which shall, for all purposes, be deemed to include sales, use, storage, and purchase taxes) shall be construed to be applicable not only with respect to the Corporation but also with respect to any other public corporation which is now or which may be hereafter wholly financed and wholly managed by the Corporation. Such exemptions shall also be construed to be applicable to loans made, and personal property owned by the Corporation or such other corporations, but such exemptions shall not be construed to be applicable in any State to any buildings which are considered by the law of such State to be personal property for taxation purposes. Notwithstanding any other provision of law or any privilege or consent to tax expressly or impliedly granted thereby, the shares of preferred stock of national banking associations, and the shares of preferred stock, capital notes, and debentures of State banks and trust companies, acquired prior to July 1, 1947, by the Corporation, and the dividends or interest derived therefrom by the Corporation, shall not, so long as the Corporation shall continue to own the same, be subject to any taxation by the United States, by any Territory, dependency or possession thereof, or the District of Columbia, or by any State, county, municipality, or local taxing authority, whether now, heretofore, or hereafter

imposed, levied, or assessed, and whether  
for a past, present, or future taxing period."  
Title 15, U.S.C.A., Section 627.

The Reconstruction Finance Corporation is an instrumentality of the Government of the United States. Reconstruction Finance Corporation v. J. G. Menihan, 312 U.S. 81, 61 S.C. 485, 85 L. Ed. 595. As such, property owned by it is subject to state and local taxation only to the extent which Congress has expressly permitted. Reconstruction Finance Corporation v. Beaver County, 328 U.S. 204, 70 L. Ed. 1172; U. S. v. Allegheny County, 322 U.S. 174, 88 L. Ed. 1209. Congress has consented that real estate belonging to the Reconstruction Finance Corporation shall be subject to state and local taxation, but has limited what may be taxed as real estate. Congress has expressly extended the exemption from taxation to cover personal property owned by the corporation. In view of this exemption, such property is not subject to taxation by the State of Missouri or its political subdivisions. The provision consenting to taxation of the buildings which may be classified as personalty by state law is of no importance here because, by statutory definition, buildings are classified as real estate. Laws of Missouri, 1945, page 1799, Section 3.

#### CONCLUSION

Congress having expressly exempted personal property of the Reconstruction Finance Corporation from taxation, tangible personal property owned by it is not subject to taxation by the State of Missouri or its political subdivisions.

Respectfully submitted,

ROBERT R. WELBORN  
Assistant Attorney General

APPROVED:

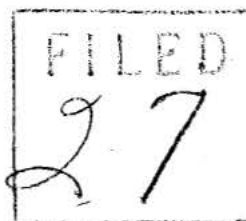
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J. E. TAYLOR  
Attorney General

RRW:LR

TAXATION: All property and assets of a railroad corporation  
FRANCHISE TAX: should be taken into account in calculating  
RAILROADS: franchise tax.

December 18, 1947



Honorable Clarence Evans, Chairman  
State Tax Commission  
Department of Revenue  
Jefferson City, Missouri

Dear Sir:

This is in reply to your letter of recent date wherein you submit a request for an opinion on the following statement of facts:

"In order to arrive at the taxable assets of a railroad in Missouri, it has been, by agreement between the railroads and former State Tax Commissions, the policy to take the percentage of the number of main miles in Missouri against the total main miles in the system against the total assets of the railroad. The difficulty in doing this is that the railroads claim so many assets are not really assets but mere bookkeeping figures \* \* \* \* \*

"According to our interpretation of Section 135 of Corporation Act 1943, which states as follows:

'Every foreign corporation engaged in business in this State whether under a certificate of authority issued under this Act or not, shall pay an annual franchise tax to the State of Missouri equal to one-twentieth of one percent of the par value of its outstanding shares and surplus employed in business in this state, etc., and for the purposes of this Act such corporation shall be deemed to have employed in this state that proportion of its entire outstanding shares and surplus that its property and assets in this state bears to all its property and assets wherever located.'

"We feel that the percentage should be used against all of the assets and not try to discriminate between assets."

In addition to your request, we have received from you a statement made by the Wabash Railroad Company in relation to the assessment of its franchise tax for the year 1947. From this statement and your request, it seems that the question involved is whether or not intangible property of a corporation, which does not have a situs in this state, should be taken into consideration in calculating the franchise tax. Authority for the imposition of the franchise tax is found in Section 135, Laws of Missouri, 1943, page 410. The portion of the section applicable to your question reads as follows:

" \* \* \* Every foreign corporation engaged in business in this state whether under a certificate of authority issued under this Act or not, shall pay an annual franchise tax to the state of Missouri equal to one-twentieth of one per cent of the par value of its outstanding shares and surplus employed in business in this state, or if the outstanding shares of such corporation or any part thereof consist of shares without par value, then, in that event, for the purposes herein contained, such shares shall be considered as having a value of \$5.00 per share, unless the actual value of such shares should exceed \$5.00 per share, in which case the tax shall be levied and collected on the actual value and the surplus, and for the purposes in this Act such corporation shall be deemed to have employed in this State that portion of its entire outstanding shares and surplus that its property and assets in this state bear to all its property and assets wherever located; \* \* \* "

From a reading of this section, it will be found that the franchise tax is based on the value of its outstanding shares and surplus employed in business in this state. The controversy here is, what outstanding shares and surplus of the company are employed in business in this state? In the last clause of said Section 135, supra, a scheme for the determination of this tax is provided. It provides that a corporation shall be deemed to have employed in this state that portion of its entire outstanding shares and surplus that its property

and assets in this state bear to all its property and assets wherever located. With that principle in mind, the following formula would be used:

$$\text{Tax base} = \frac{\text{Outstanding shares and surplus} \times \text{Property and assets in Missouri}}{\text{Total property and assets}}$$

It further appears by the statement furnished by the railroad company to you that this formula has been followed by your department and the railroad company in respect to distributable property, but has not been followed altogether in respect to intangible property. However, we do find some intangible items on this statement which have, by the railroad company, been calculated under the foregoing formula.

In your letter, you state that "the two main items of contention are: 1-'Investments in Affiliated Companies' and 'Other Investments,' being the Railroads purchase of stocks and bonds in Companies affiliated or not affiliated with them. The second main item is 'Temporary Cash Investments' which consist of purchase of United States Government Bonds, the claim being that this money is invested in bonds for the purpose of paying taxes."

These items would generally come within the classification of intangibles. The fact that the company has made temporary cash investments in government bonds for the purpose of paying taxes would not remove such properties from the assets of the company until they are paid out for that purpose. In other words, the company, even though it has made investments in bonds for the purpose of paying taxes, still retains control over this investment, and we think that it would be considered as a part of the property and assets of the corporation for taxing purposes.

In the case of State vs. Freehold Inv. Co., 264 S.W. 702, 705, the Missouri Supreme Court, in speaking of the nature of this tax, said:

" \* \* \* It will be noted that the tax is not levied upon the capital stock and surplus, but is merely measured thereby. It is a tax imposed upon corporations for the privilege of doing business in this state. \* \* \*"

It further appears from the statement of the railroad company that the contention of that company is that the value of intangibles not used in operation are not distributable over the system because they have their situs in Ohio where



the Wabash is incorporated, and their entire value is allocated to that state. It further claims that none of the value of this class of intangibles can be assigned to Missouri because it has no situs in this state. We have made a diligent search for authorities on this question, and the most respectable authority that we find and the case most in point is the opinion of the United States Supreme Court in the case of Adams Express Company vs. Ohio State Auditor, 166 U.S. 185, 41 L. Ed. 965, 1.c. 978. In that case, the question of the assessment of a franchise tax was before the court. The contention there was similar to the contention here--that is, that intangibles of the express company not located in the State of Ohio should not be taken into consideration in determining the amount of franchise tax due from the Adams company to that state. The intangibles referred to in that case consisted of bonds, stocks and investments, which produce a part of the value of the capital stock of the company. These stocks and bonds had a special situs in other states, and the express company contended that for that reason they were exempt from the provisions of the franchise tax and should not be used in calculating the franchise tax for the State of Ohio. In speaking of this contention, the court said, 1.c. 978:

"But where is the situs of this intangible property? The Adams Express Company has, according to its showing, in round numbers \$4,000,000 of tangible property scattered through different states, and with that tangible property thus scattered transacts its business. By the business which it transacts, by combining into a single use all these separate pieces and articles of tangible property, by the contracts, franchises, and privileges which it has acquired and possesses, it has created a corporate property of the actual value of \$16,000,000. Thus, according to its figures, this intangible property, its franchises, privileges, etc., is of the value of \$12,000,000 and its tangible property of only \$4,000,000. Where is the situs of this intangible property? Is it simply where its home office is, where is found the central directing thought which controls the workings of the great machine, or in the state which gave it its corporate franchise; or is that intangible property distributed wherever its tangible property is located and its work is done? Clearly, as we think,

the latter. Every state within which it is transacting business and where it has its property, more or less, may rightfully say that the \$16,000,000 of value which it possesses springs, not merely from the original grant of corporate power by the state which incorporated it, or from the mere ownership of the tangible property, but it springs from the fact that that tangible property it has combined with contracts, franchises, and privileges into a single unit of property, and this state contributes to that aggregate value not merely the separate value of such tangible property as is within its limits, but its proportionate share of the value of the entire property. That this is true is obvious from the result that would follow if all the states other than the one which created the corporation could and should withhold from it the right to transact express business within their limits. It might continue to own all its tangible property within each of those states, but, unable to transact the express business within their limits, that \$12,000,000 of value attributable to its intangible property would shrivel to a mere trifle.

"It may be true that the principal office of the corporation is in New York, and that for certain purposes the maxim of the common law was 'Mobilia personam sequuntur,' but that maxim was never of universal application, and seldom interfered with the right of taxation. Pullman's Palace Car Co. v. Pennsylvania, 141 U.S. 18, 22 (35: 613, 616, 3 Inters. Com. Rep. 595). It would certainly seem a misapplication of the doctrine expressed in that maxim to hold that by merely transferring its principal office across the river to Jersey City the situs of \$12,000,000 of intangible property, for purposes of taxation, was changed from the state of New York to that of New Jersey."

(Underscoring in first paragraph  
ours.)

Following the authority of this opinion, it would seem that the intangibles of a corporation are distributed wherever its tangible property is located and its work is done. The

taxable property of the corporation, which includes the distributable property, extends through different states, and according to the formula which the railroad company and the tax commission have agreed upon, 23.61% of the distributable property of the corporation is for tax purposes located in Missouri. Following the reasoning of the court in the Adams case, supra, then, 23.61% of all of the property, tangible and intangible, would, for tax purposes, be considered as employed in Missouri. We think the reasoning of the court in the Adams Express Company case is sound and fair and that the value of intangibles of a corporation for tax-paying purposes should be calculated on the same basis as are values of tangible property consisting of the distributable property of a corporation.

#### CONCLUSION

From the foregoing, it is the opinion of this department that for the purpose of determining the franchise tax on a railroad corporation, the tax commission may use the same formula for calculating the value of intangible property of a corporation employed in this state as it uses for calculating the value of tangible distributable property, and that the same per cent of intangibles of the corporation should be assigned to Missouri as having a situs therein as is assigned for tangible distributable property.

Respectfully submitted,

TYRE W. BURTON  
Assistant Attorney General

APPROVED:

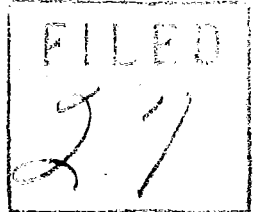
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J. E. TAYLOR  
Attorney General

TWB:VLM

MAGISTRATE COURT: Where fine and costs are immediately  
CRIMINAL COSTS: tendered upon plea of guilty or conviction, same should be received by the sheriff for distribution.

December 30, 1947



1/5

Honorable C. E. Ernst  
Prosecuting Attorney  
Gentry County  
Albany, Missouri

Dear Mr. Ernst:

This is in reply to your letter of recent date requesting an opinion from this department, which reads as follows:

"The Probate Judge and Magistrate of our county is somewhat uncertain about certain rulings from your office with reference to the collection of cost and fees including fines, by the sheriff. One ruling seems to hold that all fees and costs accruing in the Magistrate Court are to be collected by the sheriff and another that the sheriff is authorized to collect fees and cost including fines, only under execution.

"What they want to know is, when a defendant comes into the Magistrate Court, enters a plea of guilty and tenders the amount of the fine and cost, whether the Court turns the money to the office entitled to receive it, or whether he is required to turn the money to the sheriff and let the sheriff disburse it."

Reference is made to an opinion of this department to Honorable A. T. Horton, Judge of the Probate Court of Lincoln County, dated September 23, 1947, which holds that the sheriff in all counties, except counties of the first class, is the proper officer to collect and distribute all fines and costs with regard to criminal matters in the magistrate court and, further, that the sheriff cannot collect such fines and costs

according to a judgment until an execution is issued thereon. A copy of said opinion is enclosed herewith for your convenience.

An execution is a judicial writ issuing from the court where the judgment is rendered, directed to an officer thereof and running against the body or goods of a party by which the judgment of the court is enforced. Without such a writ, such officer cannot levy on the goods and chattels of the defendant for the amount of the fine and costs.

However, we are concerned here with the case where the defendant, on entering a plea of guilty or after a conviction in the magistrate court, immediately tenders the proper amount of the fine assessed and the costs which have accrued in the case. There is no need for an execution to issue on the judgment since the purpose of an execution is merely to enforce payment when such action is necessary. While it is not necessary for the officer in this case to collect the amount of the judgment under an execution, it does not follow that he has no function in this matter.

This department held in the Norton opinion that the sheriff in all counties, except counties of the first class, is the officer charged with collecting the judgment, turning the amount of the fine into the county treasury as provided in Section 3856.36, Mo. R.S.A., and distributing to the proper parties moneys collected in the nature of criminal costs. The fact that the amount of the judgment does not have to be collected under an execution does not relieve the sheriff from the duty of receiving the proper amount and distributing it to the proper parties. Section 11221, R.S. Mo. 1939, provides:

"The sheriffs of the several counties shall collect and account for all the fines, penalties, forfeitures and other sums of money, by whatever name designated, accruing to the state or any county in virtue of any order, judgment or decree of a court of record."

This section makes no distinction in the case where execution is issued and in the case where such execution is not necessary for the collection of such judgment.

Fines and costs which are tendered directly to the magistrate or the magistrate clerk should be turned over to the sheriff

for distribution. This conclusion is strengthened by the fact that there are no provisions in the laws creating magistrate courts which authorize or require the magistrate or magistrate clerk to collect and distribute fines and costs with regard to criminal matters in those courts. This duty is enjoined solely upon the sheriff.

Conclusion.

Therefore, it is the opinion of this department that in a criminal case in the magistrate court, in all counties except counties of the first class, where the defendant upon entering a plea of guilty or after having been adjudged guilty by the magistrate or a jury immediately tenders the proper amount of the fine assessed and the costs incurred, such fine and costs should be collected by the sheriff, or if received by the magistrate or magistrate clerk, should be turned over to the sheriff for distribution according to law.

Respectfully submitted,

DAVID DONNELLY  
Assistant Attorney General

APPROVED:

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J. E. TAYLOR  
Attorney General

DD:ml  
Enc.

COUNTY LIBRARY: County library board has sole right to determine qualifications, pay and number of county library employees.

February 18, 1947



Honorable Melvin E. Fish  
House of Representatives  
Jefferson City, Missouri

Dear Sir:

This department is in receipt of your request for an official opinion which reads as follows:

"The Library District and Free County Library was authorized by a vote at the April school election in Putnam County as provided by Article 6, Chapter 110 R. S., 1939.

"The Library tax will bring an approximate \$10,000 yearly under the present assessment of valuation.

"Section 14768 provides that the board shall 'Appoint a properly qualified Librarian and necessary assistants'. A representative from the State Library Commission advised that the county should spend approximately \$7,000 per year in salaries. The qualified Librarians, whom they recommend ask from \$4,000 to \$5,000 per year. They further state that we are required, under the State Board regulations, to hire an experienced librarian with a degree in library work. We have not been able to find any such person unemployed.

"I, therefore, request your opinion as to the following questions relating to this matter.

- "(1) Does the State Commission have the right to pass on the qualifications of an employee of the local board?
- "(2) Can the State Commission dictate in any manner the number of employees or what salaries shall be paid?

February 18, 1947

"(3) Where it is impossible to find a Librarian, recommended by the State Commission at a reasonable figure, can the State Boards' requirements on the qualifications be waived? (This is assuming that the State Board does have a right to make these regulations)

"If the county is forced to spend more than one half of its income on a salary or even salaries, we know the public will be very indignant about the matter and will desire to take whatever steps are necessary to end the Library Tax."

In answering your request we consolidated the first two questions asked into one question to wit: Does the State Library Advisory Board have the right to pass on the qualifications, salaries and number of the persons hired by a county library board?

Article 6 of Chapter 110, Revised Statutes of Missouri 1939, provides for the establishment of a county library district. Section 14768 of that article provides for a county library board. One of the powers and duties of that board as set forth in Section 14768, is that the board shall, in case such library district establishes its own free county library, appoint "a properly qualified librarian and necessary assistants."

Section 14776, R. S. Mo. 1939 provides:

"All free county libraries established under the provisions of this article shall be visited from time to time by the secretary or organizer of the Missouri library commission, for the study of conditions, and to render such assistance as may be needed. After each such visits, said secretary or organizer shall report, in writing, to the president of the board in charge of each free county library visited, as to the existing conditions, with such recommendations as may be deemed proper. Copy of such reports and recommendations shall be filed in the office of the Missouri library commission."

It will be seen from the above statutes that power to appoint a librarian and assistants is vested by the Legislature in the county library board. The only



right that the Missouri Library Commission which is now the State Library Advisory Board has, insofar as county libraries are concerned, is to visit such libraries and to render assistance to said library, "as may be needed and after such visit to make regular recommendations to the county library board."

A reading of Senate Bill 369, enacted by the 63rd general Assembly, which establishes the State Library Advisory Board discloses that the only function of such board is to govern the State Library and to gather statistics and information which will be available to the other libraries in the state.

It is true that under Section 14736a, Senate Bill 369, the State Library Advisory Board is given the right to make rules and regulations relating to the administration and allocation of State aid to public libraries, but this power only goes to the distribution of the money, and does not in any way take away the right of self-government and control vested in the county library board.

It is a fundamental principle of law that the power of appointment to public office or employment belongs where the people have chosen to place it by their constitution or laws. State ex rel. Hadley v. Washburn, 167 Mo. 680, 67 S. W. 592. As was said in 42 Am. Jr. 950: "As the lawmaking power, a legislature may, when not restrained by the Constitution, provide for the exercise of the appointing power by any department of the government or by any person or association of persons whom it may choose to designate for that purpose."

In 46 Corpus Juris 952, it is said that: "An appointment consists in the choice by the appointing power of the person appointed, and involves the exercise of discretion. While the appointing power may listen to the recommendation or advice of others, \* \* \* yet the selection must finally be the act of the appointing power." The same rule is stated in 42 Am. Jur. 951.

The above rules of law show that the county library board has the absolute power and discretion as to the persons who will be the librarian and assistants in the county library. Such board is the sole arbiter as to the number of such employees and as to the pay to be given such employees, and the State Library Advisory Board has no power or authority to interfere with this discretion other than to make recommendations.

The question next presents itself as to whether the rule or regulation is proper or not, of the State Library

February 18, 1947

Advisory Board that a person with a degree in library work must be employed as librarian by the county library board.

As pointed out above the State Library Advisory Board has the right to make rules and regulations only as to the governing of the State Library and as to the allocation of the money appropriated for state aid to public libraries. They have no authority to make any rules or regulations as to the employees of a county library. The question however still is present whether a county library board must hire as county librarian a person with a degree in library work. It will be noted that Section 14768, supra, provides that the county library board shall appoint, "a properly qualified librarian."

It is a rule of statutory construction that words of common use are to be construed in their natural and ordinary meaning (Bellriva Investment Company v. Kansas City, 13 S. W. (2d) 628; Mannibal Trust v. Elzea, 215 Mo. 485, 286 S. W. 371) and it can not be assumed that the Legislature in the use of a word in a statute intended to give it a meaning radically different from that which ordinarily attaches to it, without some explanation of such intention. State v. Platner, 283 Mo. 82, 22 S. W. 767.

The word "qualification" has been defined by our courts as meaning, "endowed with qualifications fit or suitable for the purpose." State Ex Rel. Attorney General v. Seay, 64 Mo. 89.

In 51 Corpus Juris 113, the word qualified is defined as, "possessed of endowments or accomplishments, or intellectual capacity, or moral worth to discharge the duties of an office."

We do not find the word librarian defined by any court, but Funk and Wagnall's Standard Dictionary defines the word as: "A librarian is one who has charge of the books and appointments of a library, usually with the duty of overseeing the arrangement of the books, and classification, indexing, and use by readers.

Therefore, a "properly qualified librarian" is a person who is endowed with the qualities suitable for being in charge of books and appointments of a library. To hold that this work could be done only by a person with a college degree in library work would give to the term "properly qualified librarian" a distorted construction.

Hon. Melvin E. Fish

February 18, 1947

That it was not the intent of the Legislature to so construe the term is shown by the fact that in Senate Bill 369, the General Assembly specifically stated that: "Such State Librarian shall be a graduate of an accredited college or university, and be graduated from an accredited library school, and must have library experience." If the Legislature had so intended the county librarian to possess such qualifications they could have said so as they did in Senate Bill 369.

Therefore, whether the person hired by the county library board is a properly qualified librarian is a matter vested in the sound discretion of the county library board and their finding that the person whom they hire is qualified, is final.

CONCLUSION

It is therefore the opinion of this department that a county library board has the sole right to appoint a county librarian and assistants and such board determine the qualification, salary and number of such employees, which determination cannot be controlled by any state or county agency.

Yours very truly

ARTHUR M. O'KEEFE  
Assistant Attorney General

APPROVED

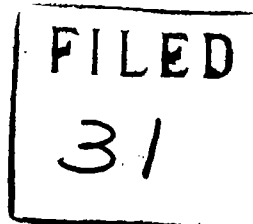
J. E. TAYLOR  
Attorney General

AMO'K:MA

TAXATION AND REVENUE:  
AGRICULTURAL AND MECHANICAL SOCIETIES:

Real property owned by agricultural and mechanical societies not exempt from taxation when not used exclusively for purposes set out in Section 14170, R. S. Mo. 1939.

January 10, 1947



Honorable W. C. Frank  
Prosecuting Attorney  
Adair County  
Kirksville, Missouri

Dear Sir:

Reference is made to your letter of recent date, requesting an official opinion of this office, and reading as follows:

"The Adair County Agricultural and Mechanical Society of Kirksville, Missouri, was duly incorporated in accordance with the provisions of Article 10, Chapter 102, Revised Statutes of Missouri, 1939. The Society have purchased 100 acres of land in Adair County to be used by the Society principally as a place on which to conduct an annual county fair. There are improvements on said property which are currently being rented as a dwelling house and the barn as a community sale barn which bring in a rental of \$125.00 per month. I am informed that the Society contemplate also occasionally renting the bar to various cattle breeding organizations such as the Aberdeen Angus Breeders Society and the Adair County Hereford Association for use as a sale barn. Such sales are a part of the purposes for which the society was incorporated, in that they promote the breeding of fine cattle.

"As Prosecuting Attorney of Adair County, Missouri, I request an official opinion as to whether or not the said premises is subject to

Honorable W. C. Frank

taxation or whether said property is exempt from taxation as being the property of a fraternal non-profit society. If such property is subject to taxation, is all of it subject to such taxation, or only that part which is devoted to income producing activities which are separate and apart from the express purposes stated in the incorporation of the Society."

Section 6 of Article X of the Constitution of 1945, provides as follows:

"All property, real and personal, of the state, counties and other political subdivisions, and non-profit cemeteries, shall be exempt from taxation; and all property, real and personal, not held for private or corporate profit and used exclusively for religious worship, for schools and colleges, for purposes purely charitable, or for agricultural and horticultural societies may be exempted from taxation by general law. All laws exempting from taxation property other than the property enumerated in this article, shall be void." (Emphasis ours.)

The language: "and all property, real and personal, not held for private or corporate profit" is a further restriction added to the provisions for exemption from taxation in the Constitution of 1945 that was not presented in Section 6, Article X of the Constitution of 1875. It being the constitutional authority that empowered the Legislature to enact Section 10942.4, Mo. Revised Statutes Annotated, Laws 1945, p. \_\_\_\_, H.C.S.H.B. No. 471, Sec. 5, now in effect, and providing as follows:

"The following subjects shall be exempt from taxation for state, county or local purposes:  
\* \* \* Fifth, the real estate and tangible personal property which is used exclusively for agricultural or horticultural societies heretofore organized, or which may be hereafter organized in this state; \* \* \*" (Emphasis ours.)

Section 14170, R. S. Mo. 1939, restricts the purposes for which land and other property may be held by any society organized under the provisions of Article X, Chapter 102, R. S. Mo. 1939, and provides as follows:

Honorable W. C. Frank

"The land and other property which may be held by any society under the provisions of this article shall be held by the society for the sole purpose, and none other whatsoever, of erecting enclosures, buildings, and other improvements calculated and designed for meetings of the society, and for exhibitions of various breeds of horses, cattle, mules and other stock, and of agricultural, mechanical and domestic manufactures and productions, and for the purchase and importation, breeding and the keeping thereof of such foreign breeds of stock as the board of directors may deem advantageous to the interest of the county, and for the breeding, raising, purchasing and selling of all classes of pure breed stock."

The question, then, is whether or not the rental of the dwelling house and the barn has the effect of destroying the exclusive use for which such property may be held under Section 14170, supra. Keeping in view that the State has made special provisions for the organization of these societies, and has authorized the county courts to vote public moneys in aid thereof, and that a prominent chapter in our general laws is devoted to such societies, it can well be understood why they have been a proper subject for exemption from taxation. From the beginning, they have been treated as entirely distinct from private corporations organized solely for private gain. The language of the exemption, in view of these various statutes, is significant. They are denominated "societies," not "corporations." While, for certain purposes, they are given corporate powers, they are never classed with other corporations. We are forced to the conclusion that the exemption of agricultural and horticultural societies have reference to societies owning property and devoted exclusively to the uses set out in Section 14170, supra, and the rental of property does not appear in that section. If rental of property owned by the agricultural societies had been one of the lawful purposes of the agricultural societies it necessarily would have been included in the act.

We believe that the opinion in State ex rel. Koeln v. Y.M.C.A., 259 Mo. 233, is decisive of the instant matter. The St. Louis Y.M.C.A. was a religious and educational association. In such capacity it owned certain real property located in the City of St. Louis, of which some fifteen percent of the total area had been converted to income producing rental property. The contention was made by the religious and educational organization that, in view of the fact that such income as was produced under the rental agreement was used exclusively for the purposes of the organization,

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its real property had not lost its exemption from taxation. A decree of the circuit court had upheld the right of the state and city to levy and collect general real estate taxes upon the real property in the circumstances outlined, and the Y.M.C.A. had appealed.

In affirming the decree of the circuit court and holding that the property was subject to taxation the court said, l. c. 237:

"Two of the cases cited by respondent (Taylor v. Labeaume, 17 Mo. 338; and Fitterer v. Crawford, 157 Mo. 51) furnish very strong support for the decree of the circuit court. The ruling in the Fitterer case (157 Mo. 51) is a construction of our present Constitution and statute, and holds that a building owned by a Masonic lodge, on account of the charitable designs and practices of such lodge, is exempt from taxation, so long as it is used exclusively for such lodge purposes, but when two of the floors of such building are rented for commercial purposes then the entire building becomes subject to taxation. In deciding that case it was said: 'There is a very material difference between the "use of a building exclusively for purely charitable purposes," and renting it out, and then applying the proceeds arising therefrom to such purposes. To rent out a building is not to use it within the meaning of the statute, but in order to use it, it must be occupied or made use of. Moreover, by leasing the property the lodge becomes the competitor of all persons having property to rent for similar purposes, and the plain and obvious meaning of the statute is that such property shall not be exempt from taxation.'"

While there are no other Missouri cases which we have been able to find which have decided the precise point with respect to the real property of agricultural or horticultural societies, which has been converted to income producing rental property, yet there are a great many construing similar exemption provisions relative to educational and charitable organizations. In this regard, your attention is directed to Y.M.C.A. v. Baumann, 130 S.W. (2d) 499, and cases cited therein. In each of these cases a similar conclusion was reached to that arrived at in the Y.M.C.A. case from which the excerpt is cited supra.

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The last expression of the Supreme Court of Missouri is found in *Evangelical Lutheran Synod, etc., v. Hoehn*, 196 S.W. (2d) 134 (not yet reported in State Reports), 1. c. 143:

"The prerequisites to tax exemption were:  
(1) the use of the land itself, not merely its usufruct, for those exclusive purposes;  
(2) the owner must be dedicated to those purposes. To that extent the ownership characterized the use. If the first were not true, a proper religious or charitable institution could have claimed tax exemption if, for instances, its real estate was merely rented out and the rentals devoted to its objectives--which is not the law.  
\* \* \* (Emphasis ours.)

In addition to the authorities cited hereinabove, since Section 14170, supra, specifically sets out for what lawful purposes the agricultural societies may hold land and other property, and the fact the power to rent property is not provided for therein, the rental of their property by the societies would be ultra vires, and, in excess of the statutory grant of power to own the land, in addition to the destruction of the exemption from taxation contained in the constitutional and statutory provisions.

#### CONCLUSION

Therefore, it is the opinion of this Department that (1) real property, owned by an agricultural society, which is converted to income producing rental property, is no longer used exclusively for the purposes permitted under Section 14170, R. S. Mo. 1939, and loses its exemption from taxation, even though the income derived therefrom is devoted to the purposes of the agricultural society; (2) the rental of part of the property exempt from taxation destroys the exemption from taxation of the entire property.

Respectfully submitted,

ARVID OWSLEY  
Assistant Attorney General

APPROVED:

\_\_\_\_\_  
J. E. TAYLOR  
Attorney General



TOWNSHIPS: Election held in Livingston County in November, 1946, on  
ELECTIONS: question of continuing or discontinuing township organization was void since the petition for submission of question of continuing or discontinuing township organization was filed less than 60 days before date of such election.

January 23, 1947

FILED

2/5  
31

Honorable Robert C. Frith  
Prosecuting Attorney  
Livingston County  
Chillicothe, Missouri

Dear Sir:

We acknowledge receipt of a letter from Charles S. Greenwood, formerly Prosecuting Attorney of Livingston County, requesting an official opinion of this department, and reading as follows:

"The County Court of Livingston County has asked me for your written opinion in the following matter: On the recent election this County voted on the question of adopting County organization and the proposition carried. It now develops that the petition was filed only thirty (30) days before the election, whereas under the new law sixty (60) days is required.

"The Court wants a statement from you as to whether or not this proposition legally carried under the circumstances or should they go ahead on the theory it carried until the election is declared illegal by some Court action."

The answer to the question propounded in the request for an opinion involves a determination of the effect, if any, on Section 14023, R. S. No. 1939, of House Bill No. 903, passed by the 63rd General Assembly, and effective July 1, 1946.

House Bill No. 903 repeals Sections 13928, 13929 and 13931, R. S. No. 1939, and enacts three new sections in lieu thereof, numbered 13928, 13929 and 13931. Section 13931 of said House Bill No. 903 provides as follows:

"Upon petition of at least one hundred qualified electors of any county of the third or fourth classes praying therefor, which said petition shall be filed in the office of the clerk of the county court, the county court of such county shall, by order of record, submit the proposition of the adoption of township organization form of county government to a vote of the electorate of the county at a general election. If such petition shall be filed sixty days or more prior to a general election, the proposition shall be submitted at said general election; if filed less than sixty days before such election, then the proposition shall be submitted at the general election next succeeding said general election. The election shall be conducted, the vote canvassed and the result declared in the same manner as provided by law in respect to elections of county officers. The clerk of the county court shall give notice that a proposition for the adoption of township organization form of county government in the county is to be voted upon by causing a copy of the order of the county court authorizing such election to be published at least once each week for three successive weeks, the last insertion to be not more than one week prior to such election, in some newspaper published in the county where such election is to be held, if there be a paper published in such county, if not, then by posting printed or written handbills in at least two public places in each election precinct in the county at least twenty-one days prior to the date of election. The clerk of the county court shall provide the ballot which shall be printed and substantially in the following form:

OFFICIAL BALLOT

(Check the one for which you wish to vote)

Shall township organization form . YES : :  
of county government be adopted  
in .....County?..... NO : :

If a majority of the electors voting upon the proposition shall vote for the adoption thereof the township organization form of county government shall be declared to have been adopted: Provided, that counties adopting township organization shall be subject to and governed by the provisions of the law relating to township organization on and after the last Tuesday in March next succeeding the election at which such township organization was adopted."

Section 14023, R. S. No. 1939, provides as follows:

"At any general election holden in this state, in any county having adopted township organization under this chapter, upon the petition of one hundred voters of the county, praying the county court to re-submit the question of township organization to the voters at said election, it shall be the duty of the county court to submit the question again at such election, in like manner as provided in article 1 of this chapter; and if it shall appear, after the canvass of the votes as provided in article 1 of this chapter, that a majority of all the votes cast upon that question shall be against township organization, then township organization shall cease in said county; and all laws in force in relation to counties not having township organization shall immediately take effect and be in force in such county."

A determination of the effect of House Bill No. 903 on Section 14023, R. S. No. 1939, involves a construction of whether or not the phrase "in like manner," in Section 14023, refers to the time of holding an election as provided for in Section 14023, and if it be held that the phrase "in like manner" does refer to the time of holding such election, whether or not the time of holding the election on the township question as provided for in House Bill No. 903 is mandatory or permissive.

We believe the rule regarding the meaning of the phrase "in like manner" is correctly expressed in the case of Porter v. Brook, 97 Pac. 645, 1. c. 648:

"Harris et al. v. Doherty, 119 Mass. 142, and State v. McClure, 91 Wis. 313, 64 I. W. 992, are cases in which the word 'manner' was construed as including the element of time. In State v. McClure the language of the statute under consideration reads: 'It shall be the duty of the county board, at its next annual meeting in November, to fix the salary for the sheriff in the same manner as salaries are fixed for other county officers.' It was attempted by the board at its regular annual meeting in November to fix the salary for the sheriff after he had been elected. There existed in the statute of Wisconsin a provision that the county board at its annual meeting in November should fix the salary of every county officer 'who is elected during the ensuing year, and who is entitled to salary from the county treasury, and that such salary shall not be increased or diminished during his term of office.' The matter in controversy in that case was whether the phrase 'in the same manner' required that the board should fix the salary of the sheriff before his election, as provided for the other county officers. The court in the opinion said: 'The word "manner" in a statute may undoubtedly include "time," if such seems to have been the intent of the lawmakers. The intent of the lawmakers here being clearly to make the fixing of the sheriff's salary a part of the general system, we feel obliged to construe the words "in the same manner" as including the element of "time."'

Section 13931 of House Bill No. 903 provides in detail the manner in which the township question shall be submitted for a vote, including the specific election at which such question shall be submitted. It is obvious that the intent of the Legislature, when it enacted Section 13931 of House Bill No. 903, was to provide a complete scheme for the submission of the township question, and that the specific election at which the question is to be submitted for a vote is part of the manner of submitting such question.

Section 13929 of House Bill No. 903 provides, in part, as follows:

" \* \* \* provided further, that all counties of the third and fourth classes which have heretofore adopted or may hereafter adopt township organization form of county government may abolish the same by submitting such proposition to a vote of the electors of the county in the manner provided by law."

The only statute referring to the manner of submitting the township question is Section 13931 of House Bill No. 903. The quoted provision of Section 13929 of House Bill No. 903 clearly can refer only to Section 13931 of House Bill No. 903, and the intent of the Legislature clearly was that any submission of the township question shall be governed by said Section 13931, including the specific election at which such question is to be submitted.

The power of the county court to order the submission of the township question is conferred by Section 13931 of House Bill No. 903, and the action of the county court in submitting such question must be governed entirely by the provisions of the statute. Said Section 13931 provides that the county court shall submit the question at the next general election if the petition for such submission shall be filed sixty days or more prior to a general election, and the county court shall submit the question at the next succeeding general election if the petition shall be filed less than sixty days before a general election.

In the case of State v. City of Maplewood, 99 S. W. (2d) 138, 1. c. 141, we find the following statement regarding the construction to be placed upon the word "shall" when used in statutes:

"The construction to be put upon the word 'shall' depends upon the intention which prompted the Legislature to use such word, as evidenced by the language of the entire statute and the purposes sought to be accomplished thereby."

The Kansas City Court of Appeals said in the case of State v. Webb, 49 Mo. App. 407, 1. c. 410:

" \* \* \* Section 4598, Revised Statutes, 1889 (which is the first section of the local-option law), provides that, 'upon application by petition signed by one-tenth of the qualified voters of any county who

shall reside outside the corporate limits of any city or town having, at the time of such petition, a population of twenty-five hundred inhabitants or more, \* \* \* the county court of such county shall order an election to be held in such county at the usual voting precincts for holding any general election for state officers, to take place within forty days after the reception of such petition, to determine'.

\* \* \*"

The court further said, l. c. 412:

"By the terms of the first section of the law (which we have quoted above) it is the unqualified mandate of the statute that the county court 'shall order the election to be held in such county \* \* \* to take place within forty days after the reception of such petition.' If, then, this petition was presented to, and received by, the county court, on July 10 (and this is unquestionably true), then an election held in pursuance thereof on August 31--fifty-two days after the reception by the court--was beyond the period fixed by the statute, and, hence, said election was unauthorized and void. This exact point was so held by the St. Louis Court of Appeals in State ex rel. v. Ruark, 34 Mo. App. 325. In a well-considered opinion by Judge Biggs, it was there decided that an election under the local-option law will be void, if appointed and held on a day more than forty days after receipt by the county court of the petition of such election. The statute is mandatory, not merely directory. To the same effect, see decision by the court of appeals of Texas. Ex parte Sublett, 4 S. W. Rep. 894."

The Supreme Court of Missouri said in the case of State ex rel. v. Ellison, 271 Mo. 123, l. c. 129-130:

" \* \* \* It is the law of this State that 'no election can be held unless provided for by law' (State ex rel. v. Jenkins, 43 Mo. l. c. 265), and it is also the law, announced by

the St. Louis Court of Appeals (In re Wooldridge, 30 Mo. App. 1. c. 618), and subsequently approved by this court (Ex parte Lucas, 160 Mo. 1.c. 280), that a local option election held in a city of over twenty-five hundred inhabitants within forty days of a municipal election is absolutely void and 'has no greater force than no election at all.' In such case this court has declared that an election not held within the proper time was void 'because the courts were acting outside and beyond their respective jurisdictions, and consequently their orders were null and void.' The Wooldridge case is one of those referred to. This court added (State ex rel. v. Patterson, 207 Mo. 1.c. 147): 'This is true for the reason that a court of limited jurisdiction, and inferior courts not proceeding according to the course of the common law, are confined strictly to the authority given; and the records of such courts must show the existence of all facts necessary to give jurisdiction.'

\* \* \* \* \*

"County courts have no inherent authority to call local option elections. Their jurisdiction is derived solely from the statute. Section 7238 authorizes, generally, the calling of an election, and Section 7244 specifically prohibits its being called during a named period. The court has no more jurisdiction to call such an election during a period covered by Section 7244 than it would have to call one if there were no Section 7238. Section 7244 is as much a limitation upon Section 7238 as if it had been incorporated therein. It is as much a limitation as the provision that no local option election shall be held within forty days of a municipal or other election. It is a direct negation of the power and jurisdiction of the county court to act in the circumstances named and, in this case, those circumstances appear from the record of the county court and from the opinion of the Court of Appeals. The Court of Appeals proceeds upon the theory that

the case made showed a valid election in 1912. That being true, it showed the condition which brings into operation Section 7244, and that section, when brought into operation, simply negatives the power and jurisdiction of the county court to call another election until the lapse of the specified period. \* \* \*

Applying the reasoning found in the above quoted decisions, it is clear that the statutory provision in Section 13931 of House Bill No. 903, regarding the election at which the county court shall submit the township question, is mandatory, that the county court has no power to submit such question at any election other than the election specified in the statute, that the submission of the township question at an election other than that specified by the statute is a nullity, and that the vote on the township question, when submitted at an election other than that specified in the statute, is wholly void.

#### CONCLUSION

It is, therefore, the opinion of this department that the election held in Livingston County, Missouri, in November, 1946, on the question of continuing or discontinuing township organization, was a void election, since the petition for submission of the question of continuing or discontinuing township organization in such county was filed less than sixty days before such general election.

Respectfully submitted,

C. D. BURNS, Jr.  
Assistant Attorney General

APPROVED:

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J. E. TAYLOR  
Attorney General

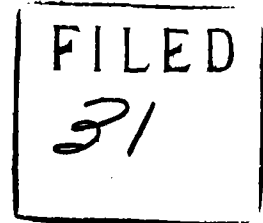
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ELECTIONS: A petition presented to county court under pro-  
TAXATION: visions of Sec. 14185, Laws of 1943, p. 317, be-  
fore county court has set tax levy for county  
purposes, is of no effect, and county court has no authority to call  
such election. If county court does levy the constitutional limit  
for county purposes, no election can be held and no levy can be made  
under the provisions of Sec. 14185, Laws of 1943, p. 317.

March 24, 1947

Honorable W. C. Frank  
Prosecuting Attorney  
Adair County  
Kirksville, Missouri



Dear Sir:

This is in reply to your letter of recent date, requesting an  
official opinion of this department, and reading as follows:

"I would like an official opinion from your  
office in interpreting Section 14185, Laws  
of Missouri, 1943. We have a fair associa-  
tion in Adair County that has presented our  
County Court with a petition signed by the  
required number of tax payers, requesting  
that election be called as provided in this  
section of the statutes.

"Our County Court in setting up the budget,  
anticipated that it will take the full \$.50  
limit for County purposes to pay the neces-  
sary expenses of running our County Govern-  
ment and when they meet in July to set the  
levy, it is their intention to set the same  
at \$.50.

"Query: Can this association force the  
County Court under this section to call this  
election before the court has made an order  
setting the levy for revenue purposes for  
the year 1947, or can they require the court  
to submit this proposition to the voters and  
in the event the same carries require the  
court to reduce their levy \$.10 for \$100 in  
order to stay within the constitutional limit?"

Honorable W. C. Frank

Section 14185, Laws of Missouri, 1943, page 317, provides, in part, as follows:

"In all counties of this state in which the constitutional limit is not levied for county purposes, it shall be the duty of the county court, upon the filing of a petition signed by not less than 300 resident taxpayers and qualified electors of such county, to call an election to submit to the qualified voters thereof, a special levy of not more than two mills on the dollar (\$1.00) valuation, which levy, together with all other levies for county purposes, shall not exceed the constitutional limit of levy for the county affected, for the purpose of encouraging, promoting and improving the livestock, poultry, agricultural, horticultural, mechanical fabrics and fine arts, products and articles of domestic industry, and the exhibition of such stock, poultry articles and commodities, at the district or county fair held in such county. If a majority of the voters voting at said election shall be in favor of such proposition, then it shall be the duty of the county court at its next regular term thereafter to make such levy, \* \* \* \*." (Emphasis ours.)

Section 11044 of House Committee Substitute for House Bill No. 468 of the 63rd General Assembly provides as follows:

"After the assessor's book of each county, except in the City of St. Louis, shall be corrected and adjusted according to law, but not later than September 1, of each year, the county court shall ascertain the sum necessary to be raised for county purposes, and fix the rate of taxes on the several subjects of taxation so as to raise the required sum, and the same to be entered in proper columns in the tax book."

The Supreme Court of Missouri, in the case of State v. Davis, 73 S. W. (2d) 406, said in regard to the meaning of the word "levy" as applied to taxes, at l. c. 407:

Honorable W. C. Frank

means the formal order, by the proper authority, declaring property at its assessed valuation, subject to taxation at a fixed rate. State ex rel. Hamilton v. Hannibal & St. J. Ry. Co., 113 Mo. 297, loc. cit. 307, 21 S. W. 14. \*\*\*"

Since Section 14185, Laws of Missouri, 1943, page 317, provides specifically that the election shall be called in counties "in which the constitutional limit is not levied for county purposes," it is clear that no petition for the election can have any effect until the county court has made its levy for county purposes as provided by Section 11044 of House Committee Substitute for House Bill No. 468 of the 63rd General Assembly.

Since this is true, the County Court of Adair County, under Section 11044 of House Committee Substitute for House Bill No. 468 of the 63rd General Assembly, has the power to fix the levy for the rate of taxes so as to raise the sum of money required for county purposes, and it is obvious that the election can be called under the provisions of Section 14185, Laws of Missouri, 1943, page 317, only if a tax rate less than the constitutional maximum has been levied. Until the tax rate for county purposes has been levied by the county court as provided in Section 11044 of House Committee Substitute for House Bill No. 468, it would be impossible for such rate to be known, and therefore it could not be known as to what tax rate, for the purposes specified in Section 14185, Laws of Missouri, 1943, page 317, could be levied in order not to exceed the maximum constitutional limit of tax rates.

Section 11 of Article X of the Constitution and Section 11046 of House Committee Substitute for House Bill No. 468 of the 63rd General Assembly provide that the maximum levy for county purposes for a county under three hundred million dollars valuation, which classification includes Adair County, shall not exceed fifty cents on the one hundred dollars, with the exception that such limit may be increased, for not to exceed four years, when the rate and purpose of the increase are approved by two-thirds of those voting at an election for such increase.

Obviously, the provision which authorizes the increase for not to exceed four years does not have any application to Section 14185, Laws of Missouri, 1943, page 317, because (1) it is specifically provided in such section that "which levy, together with all other levies for county purposes shall not exceed the constitutional limit of levy for the county affected," and (2) a

Honorable W. C. Frank

majority vote only is required by Section 14185, Laws of Missouri, 1943, page 317, while a two-thirds vote is required by Section 11046 of House Committee Substitute for House Bill No. 468 of the 63rd General Assembly.

#### CONCLUSION

It is the opinion of this department that a petition presented to the County Court of Adair County before the County Court has set the tax levy for county purposes under the provisions of Section 11044 of House Committee Substitute for House Bill No. 468 of the 63rd General Assembly, is of no effect, and the County Court has no authority to call such election.

It is further the opinion of this department that if the County Court of Adair County levies a fifty cent rate for county purposes under the provisions of Section 11044 of House Committee Substitute for House Bill No. 468 of the 63rd General Assembly, no election can be called and no levy made under the provisions of Section 14185, Laws of Missouri, 1943, page 317.

Respectfully submitted,

C. B. Burns, Jr.  
Assistant Attorney General

Approved:

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J. E. Taylor  
Attorney General

AUDITS: State auditor is not required to audit or formulate bookkeeping systems for the office of the sheriff of the City of St. Louis.

June 12, 1947

FILED

31

Mr. James V. Frank  
First Associate City Counselor  
Law Department, City of St. Louis  
St. Louis, Missouri

Dear Sir:

This is in reply to your letter of recent date wherein you submit a request for an official opinion upon the following statement of facts:

"The Comptroller's Office of the City of St. Louis is in a quandary as to whether the State Auditor, under Senate Bill 311, Sections 21 and 24, passed by the 63rd General Assembly, is required to audit the office of the Sheriff of the City of St. Louis, and whether or not the State Auditor is required to formulate a system of accounting and reporting for the office of the Sheriff of the City of St. Louis."

The portion of Section 21 of Senate Bill No. 311, passed by the 63rd General Assembly, which is found at page 584, Laws of Missouri 1945, is as follows:

"It shall be the duty of the state auditor at least once every two years, either in person or by one or more competent persons appointed by him, to visit, examine, inspect, and audit in accordance with recognized governmental auditing practices the accounts of the various institutions of the state, including the state hospitals, state university, Rolla school of mines, state teachers colleges, Missouri state school, reform school for boys, industrial home for girls, Missouri state sanatorium, confederate soldiers' home, federal soldiers' home, and all other institutions supported in whole or in part by the state, and such other officers of the state as receive

their appointment from any elective officer, and also at least once during the term for which any county officer is chosen to examine, inspect, and audit the accounts of the various county officers of the state supported in whole or in part by public moneys, and without cost to the county, county clerks, circuit clerks, recorders, county treasurers, county collectors, sheriffs, public administrators, probate judges, county surveyors, county highway engineers, county assessors, prosecuting attorneys, county superintendents of schools, in every county in the state which does not elect and have a county auditor. Such audit shall be made by the state auditor as near the expiration of the term of office as the auditing force of the state auditor will permit. Such audit shall be made in counties having a county auditor whenever qualified voters of the county to a number equal to five per centum of the total number of votes cast in said county for the office of governor at the last election held for governor preceding the filing of such petition shall petition the state auditor for such audit, but such counties shall pay the actual cost thereof into the state treasury: Provided, that any county having an audit by petition shall not be audited more than once in any one year. \* \* \* (Underscoring ours.)

Section 24 of said Senate Bill referred to in your request provides that the auditor shall formulate a simple and complete system of accounting and reporting for all state institutions and appointive officers referred to in Section 21 and for each and every county office. The provisions of the two sections hereinbefore referred to were taken from the Revised Statutes of 1939, relating to audits and uniform systems of bookkeeping and found at Article 3, Chapter 87, especially in Sections 13094 and 13095. Said Section 13094 requires the auditor to, at least once during the term for which any county officer is chosen, inspect, examine and audit the accounts of such county

officer in every county in the state which does not elect and have a county auditor. The language of Section 13095, R. S. Mo. 1939, is copied almost verbatim in Section 24 of said Senate Bill No. 311 and referred to in your request.

The construction placed on said Sections 13094 and 13095, supra, by the state auditor has been that he did not have jurisdiction to audit the accounts or provide a book-keeping system for the City of St. Louis. These sections have been the law since 1933 (Laws of Missouri 1933, page 416). While the courts are not bound by the construction placed upon a statute by an administrative official, still the rule seems to be that some weight should be given to the construction placed on a statute by the administrative official. This principle was followed in the case of *Brown v. Mars, Inc.*, 135 Fed. (2d) 843. Also in the case of *Williams v. Williams*, 30 S.W. (2d) 69, the court held that a construction long placed on a statute by clerks of courts, unless plainly wrong, should be upheld.

However, without applying this rule of construction in order to reach our conclusion, we think the Constitution, statutes and charter of the City of St. Louis will support our conclusion hereinafter set out. Under Section 31 of Article VI of the Constitution of 1945, the City of St. Louis is recognized both as a city and as a county. This section reads as follows:

"The city of St. Louis, as now existing, is recognized both as a city and as a county unless otherwise changed in accordance with the provisions of this Constitution. As a city it shall continue for city purposes with its present charter, subject to changes and amendments provided by the Constitution or by law, and with the powers, organization, rights and privileges permitted by this Constitution or by law."

Section 32 (b) of said Article VI of the Constitution of 1945 reads as follows:

"The lawmaking body of the city may order an election by the qualified voters of the city of a board of thirteen freeholders of such city to prepare a new or revised charter of the city, which shall be in harmony with the Constitution and laws of the state, and shall provide, among other

things for a chief executive and a house or houses of legislation to be elected by general ticket or by wards. Such new or revised charter shall be submitted to the qualified voters of the city at an election to be held not less than twenty nor more than thirty days after the order therefor, and if a majority of the qualified voters voting at the election ratify the new or revised charter, then said charter shall become the organic law of the city and shall take effect, except as otherwise therein provided, sixty days thereafter, and supersede the old charter of the city and amendments thereto."

These provisions of the Constitution clearly demonstrate that the framers of the Constitution intended that the City of St. Louis be treated both as a city and as a county, and that the charter of the City of St. Louis, in its present form and as amended, would be the organic law of that city.

Then, in order to determine whether or not the officers of the City of St. Louis would be subject to audit by the state auditor, it would depend upon whether or not the City of St. Louis elects or has a county auditor.

Under Section 2 of Article 15 of the charter of the City of St. Louis, the duties of the comptroller, with reference to auditing the accounts of the officers, provides as follows:

"The comptroller shall have the qualifications and forfeit his office for the causes provided with regard to the mayor; receive a salary of eight thousand dollars per annum; give bond to the city for not less than three hundred thousand dollars, and appoint one deputy comptroller and such other deputies and employes as may be provided by ordinance. The comptroller shall be the head of the department of finance and exercise a general supervision over its divisions, over all the fiscal affairs of the city and over all its property, assets, and claims, and the disposition thereof. He shall preserve the credit of the city, and for that purpose, or in case



of any extraordinary emergency of any kind, he may, with the approval of the board of estimate and apportionment, and with or without any ordinance or other authority or appropriation therefor, draw warrants on the treasurer or effect temporary loans to pay debts and judgments and other liabilities of the city, or to meet any such emergency, charging such warrants to any excess balances in appropriations made by the general annual appropriation bill and specifically reporting his action to the board of aldermen at its first meeting thereafter. He shall have a seat and a voice but no vote in the board of aldermen. He shall be the general accountant and auditor of the city and the records in his office shall show the financial operations and condition, property, assets, claims, and liabilities of the city, all expenditures authorized, and all contracts in which the city is interested. He shall require proper fiscal accounts, records, settlements, and reports to be kept, made, and rendered to him by the several departments and offices of the city, including the license collector's office so far as consistent with law, and shall control and continually audit the same, and prescribe forms, rules, and regulations therefor and require their observance. He shall regulate the making of all requisitions for supplies. Except as by this charter or by law or ordinance otherwise provided he shall prescribe and regulate the manner of paying creditors, officers, and employees of the city. He shall audit all pay rolls, accounts, and claims against the city, and certify thereon the balance as stated by him and draw his warrant on the treasurer therefor, but no pay roll, account, or claim, or any part thereof, except for the preservation of the credit of the city, or in case of extraordinary emergency as hereinbefore provided, shall be audited against the city unless certified by the officer having knowledge of the facts, and authorized by law or ordinance, and the amount required for payment of the same appropriated for that purpose by ordinance and in the treasury. \* \* \*

Then, in Article 1 of Chapter 13 of the Revised Code or General Ordinances of the City of St. Louis and especially under Section 1038, the duties of the comptroller, with respect to auditing accounts, is set out in the following language:

"The division of audit and accounting shall examine and audit all payrolls, accounts, claims, and demands against the city for the payment of which money may be drawn from the city treasury and for which appropriation has been made with the approval of the board of estimate and apportionment. It shall examine the accounts of the treasurer and at least monthly verify the cash on hand and in banks. It shall examine and adjust the accounts of all officers or employees who receive or collect city revenue, doing so as often as the comptroller may think proper or the city's interest may require, and such examination shall be made at least monthly. It shall examine the accounts of constables and clerks of justices of the peace and the clerk of the city courts and dockets of the said courts and of the justices of the peace and of the divisions of the court of criminal correction and of the circuit court (both civil and criminal divisions), to the end that the fees and costs accruing therein and belonging to the city shall be promptly paid into the city treasury. It shall examine the accounts of the sheriff and ascertain the amounts of fees collected and the expenses authorized. \* \* \*"  
(Underscoring ours.)

Then, under Section 1083 of Article 5 of Chapter 13 of the Revised Code or General Ordinances of the City of St. Louis, it is provided that reports be made to the comptroller by the various departments of the city. This section reads in part as follows:

"Annual and semi-annual reports of the fiscal business under the charge of all officers and departments and boards of the city shall be made and delivered to the

comptroller on the second Tuesday of April and October, respectively, of each year, in relation to all the fiscal business under their charge since their last annual report. That of the head of division of audit and accounting shall present a balance sheet of all accounts at the date of his last annual report, the aggregate debits and credits, respectively, in detail added to each account since, and a balance sheet of all such accounts of the date of the report, and shall contain such other information in relation to the business of his office as may be required. That of the treasurer shall state in detail the cash on hand at the date of his last annual report, the amount since received and the amount paid out in detail to the debit and credit, respectively, of the various accounts of his books, the balance remaining on hand, and of what it consists and where it is deposited. Similar monthly reports shall be made by all officers and departments and boards, and submitted to the comptroller on the second Tuesday of each month, and all reports shall contain a list of all deputies, clerks and assistants, employed in their respective offices.\* \*"

We think that since the provisions of the Constitution, whereby the charter of the City of St. Louis becomes the organic law of the city, and the provisions of the charter and enabling ordinances, wherein the office of comptroller is set up as the auditing department of the City of St. Louis, that the City of St. Louis would be in a separate class from those counties in which the lawmakers have provided for audits by the state auditor. However, we do think that the City of St. Louis, since the comptroller does audit the various county officers and formulates a bookkeeping system, would come within the class of counties which does elect and have an auditor, and for that reason, the state auditor would not have any jurisdiction over the officers of the City of St. Louis for the purpose of auditing or for formulating a uniform accounting system except in cases where he is petitioned to make an audit as is provided for in the latter part of said Section 21 of Senate Bill No. 311.

Mr. James V. Frank

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#### CONCLUSION

It is therefore the opinion of this department that the state auditor is not required to audit the office of the sheriff of the City of St. Louis, nor is he required to formulate a system of accounting and reporting for that office, because under the charter and ordinances of the City of St. Louis that city does have an officer, namely the comptroller, who performs the functions of a county auditor.

Respectfully submitted,

TYRE W. BURTON  
Assistant Attorney General

APPROVED:

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J. E. TAYLOR  
Attorney General

TWB:VLM

COUNTY COURT: Fees derived from license charges,  
LIQUOR: under Liquor Control Act, must be  
REVENUE: placed in the general revenue.

FILED

31

July 1, 1947

7/15

Honorable W. C. Frank  
Prosecuting Attorney  
Adair County  
Kirksville, Missouri

Dear Sir:

In your recent opinion request you ask the following question:

"The County Court of this county are desirous of placing the revenue collected for liquor licenses, pool halls and other licenses in the road and bridge fund.

"The County Clerk would like an official opinion from your office regarding the revenue from these sources. He would like to be informed as to where this revenue must be placed; that is, must revenue collected for such licenses be placed in the general revenue fund or can it be ear-marked for the road and bridge fund or any other special fund."

It may be conceded that Sections 4904 and 4945, R.S. Mo. 1939, do provide for license charges, to be levied by the County Court, upon those persons seeking to engage in the liquor traffic. Further, there is no question but that Section 15397, R.S. Mo. 1939, authorizes the County Court to place a license charge against the operation of a pool table or billiard table. The Legislature, while expressly authorizing the collection of license charges for these activities, failed to provide a method for determining where the funds derived from said license charges were to be placed. The only statutory definition of the term "revenue" to be found is contained in Section 10910, R.S. Mo. 1939, where, in part, it provides:

" \* \* \* \* Whenever the term revenue is used in this article it shall be understood and taken to mean the ordinary or general revenue to be used for the current expenses of the county as is provided by this article regardless of the source from which derived. \* \* "

The question presented is whether or not the revenue derived from these license charges is assignable to a special fund or whether said revenue must be assigned to the general revenue fund from which the county expenditures must come.

Section 10911, Laws of 1943, page 650, provides that the County Court shall classify proposed expenditures in six definite categories. Section 10914, Laws of 1943, page 652, provides that the County Court shall show the estimated expenditures for the year by classes. These classes, by statute, stand in priority to each other, therefore a class one obligation must be paid before any other subsequent class obligation is payable. If the funds that are to be derived from the charges for licenses for liquor and pool table licenses are assigned to a class other than the general revenue fund, it would, in effect, destroy the priority of classes for which the statute provides. In other words, if the priority provided for in Sections 10911 and 10914, as to the paying of obligations as to classes, is to stand, there can be no ear-marking of funds derived from a particular source. In fact, the quotation from Section 10910 clearly shows that the source of the income to the county is not the criterion to be used in determining whether funds are special or general revenue funds. Unless specific statutory authority for the proposal you suggest is found, it would be most illogical to conclude that a county can determine into which class funds, regardless of source, are to be deposited when one considers the direction of the Legislature that monies are to be paid out in priority as to class.

It seems apparent the Legislature contemplated that all revenue be considered general revenue, unless raised by special levy, when it determined that certain classes of obligations were to be paid in priority. If certain obligations were not prior to other obligations, it would have been an unnecessary act on the part of the Legislature

Honorable W. C. Frank

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to have established priority among various classes of county obligations.

Conclusion.

Therefore, this office must conclude that there is no authority for the County Court or any county officer to declare that funds from a particular source may be deposited in a particular fund. Further, that funds derived from license charges for liquor and pool table activities must be deposited into the general revenue fund.

Respectfully submitted,

WILLIAM C. BLAIR  
Assistant Attorney General

APPROVED:

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J. E. TAYLOR  
Attorney General

WCB:ml

ELECTIONS:  
LIQUIDATED COUNTY SCHOOL FUNDS:

County court can consolidate  
two or more election precincts  
in the county regardless of  
township boundaries.

September 8, 1947



Honorable W. C. Frank  
Prosecuting Attorney  
Adair County  
Kirksville, Missouri

Dear Mr. Frank:

This is in reply to your letter of September 3, 1947,  
requesting an opinion from this department, which reads as  
follows:

"The County Court has called a special  
election as provided in the Laws of  
Missouri for 1945 found on page 876,  
providing for holding elections upon  
the proposal to distribute annually  
the capital of the liquidated school  
fund.

"In Adair County we have ten townships  
and twenty-nine election precincts in  
said townships and our County Court  
plans on having three election precincts  
in the entire County for this election  
and think that they have the right to do  
so by the authority of House Bill No. 155  
passed by the 64th General Assembly.

"Query: Does the County Court have power  
and authority under House Bill 155 to  
consolidate the election precincts into  
three, or do they merely have the power  
to consolidate two or more precincts in  
a township?

"It will be greatly appreciated if you  
could give us an opinion at the earliest  
opportunity so that we will have it in  
time for this election which will be on  
October 21."



Section 1 of Senate Bill No. 186 of the 63rd General Assembly, found in Laws of Missouri 1945, page 876, under which the county court called said special election, provides:

"Whenever there shall be presented to the body having in its charge the capital of the county and township school funds of any county or the City of St. Louis a petition, signed by qualified electors of said county or the City of St. Louis equal in number to five per cent of the voters casting a ballot in said county or the City of St. Louis for the office of governor at the last preceding general election at which said office was voted upon, praying that the proposal be submitted to the qualified electors for making annual distribution of the capital of the liquidated school fund, such body shall cause an election to be held upon said proposal."

Section 2 of that act was repealed by House Bill No. 155 of the 64th General Assembly and two new sections were enacted in lieu thereof, to be known as Section 2 and Section 2a. Section 2 now reads, in part, as follows:

"Said proposal shall be submitted at a special election to be held for that purpose within sixty days after the filing of the petition therefor or at the next general election held in such county. Notice of such election shall be given by publication in some newspaper of general circulation within the county or City of St. Louis for not more than two weeks, the last insertion to not be longer than one week prior to the date of such election. The proposal shall be submitted on a ballot in substantially the following form:

For annual distribution of the capital of the liquidated county and township school funds.

Against annual distribution of the capital of the liquidated county and township school funds.

Said ballot shall carry upon it instructions to the voters to strike out the statement not indicating their preference. The voting shall take place at the regular election precincts in the area wherein such election shall be held, unless the election districts or precincts are consolidated as hereinafter provided, and the judges and clerks thereof shall be selected by the board having authority to make such appointments for general elections. Judges and clerks shall be the same in number at each election precinct as is provided by law for general elections, unless reduced in number as provided in Section 2a; and they shall receive the same compensation as may be provided for judges and clerks serving at general elections. \* \* \* \*

(Underscoring indicates new matter.)

Section 2a provides as follows:

"The county courts in the several counties of this state in relation to any election upon the proposal to distribute annually the capital of the liquidated school fund shall have the power and authority, in its discretion, to consolidate two or more election districts or precincts in their respective counties, and to use in such election districts or precincts the number of judges and clerks, not to exceed two of each, that it may deem necessary."

The question presented is whether or not the county court is limited, under the provisions of the above section, to the consolidation of two or more election precincts in each township in the county. We believe the language of the statute is quite clear in providing that the county court may, in its discretion, consolidate two or more election precincts in the county for the purpose of said election.

Where a statute is plain and admits of but one meaning, there is no room for construction and it must be given effect as written. The court may not search for a meaning beyond the statute itself. Thompson v. Siratt, 95 Fed. 2nd 214; Swarts v. Siegel, 117 Fed. 13, 54 C.C.A. 399; State ex rel. Bell v. Phillips Petroleum Co., 349 Mo. 360, 160 S.W. (2d) 704; St. Louis Amusement Co. v. St. Louis County, 347 Mo. 456, 147 S.W. (2d) 667; State ex rel. Jacobsmeyer v. Thatcher, 338 Mo. 622, 92 S.W. (2d) 640; Cummins v. Kansas City Public Service Co., 334 Mo. 672, 66 S.W. (2d) 920.

If the county court reasonably believes that a small number of election precincts in the county, three in this case, is sufficient for the purpose of a special election, under the provisions of Senate Bill No. 186 of the 63rd General Assembly, Laws of 1945, page 876, as amended by House Bill No. 155 of the 64th General Assembly, the county court is vested with the power and authority to so declare. All election precincts in the county are subject to such consolidation regardless of township boundaries.

#### Conclusion.

It is, therefore, the opinion of this department that the county court has the authority to consolidate two or more election precincts in the county for the purpose of voting in a special election on the proposal to distribute annually the capital of the liquidated county school funds. Said consolidation may be made regardless of township boundaries.

Respectfully submitted,

DAVID DONNELLY  
Assistant Attorney General

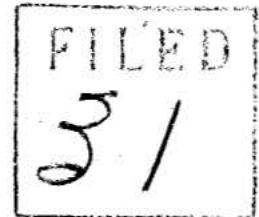
APPROVED:

J. E. TAYLOR  
Attorney General

DD:ml

TOWNSHIP COLLECTORS: Township collectors are not required to turn over tax books until after their final settlement with the county court.

October 28, 1947



Honorable Robert C. Frith  
Prosecuting Attorney  
Livingston County  
Chillicothe, Missouri

Dear Mr. Frith:

This is in reply to your letter of October 16, 1947, in which you requested an opinion, as follows:

"The County Treasurer and the various Township Collectors are in somewhat of a disagreement as to whether the tax books for 1947 should be turned over to the County Treasurer's office on January 1, 1948, and if not on that date, then when should they be turned over to the County Treasurer. This County is a County of third class, under Township organization. I would appreciate it if you would send me an opinion on this matter."

It is our understanding that the township collectors continue the collection of taxes until March 1 of the year following the one in which the taxes were assessed.

Section 14000, R.S. 1939, reads, in part, as follows:

"The township collector of each township shall, at the term of the county court to be held on the first Monday in March of each year, make a final settlement of his accounts with the county court for state, county, school and township taxes and produce receipts from the proper officers for all school and township taxes collected by him,

less his commission on same, at which time he shall pay over to the county treasurer and ex officio collector all moneys remaining in his hands, collected by him on state and county taxes, and shall at the same time make his return of all delinquent or unpaid taxes, as required by law, and shall make oath before said court that he has exhausted all the remedies required by law for the collection of said taxes. He shall also, on or before the twentieth day of March in each year, make a final settlement with the township board. \* \* \*

Under Section 14000, above, the collectors are required to make their final settlements at the term of court to be held on the first Monday of March. It seems to be necessarily implied that if they collect taxes through January and February, they must have their books in order to carry out these duties. Further, they must have their books in order to make their final settlements. So it would seem that they should have some control over the books until their final settlements with the court. Section 13990, R.S. 1939, reads as follows:

"At the meeting of the county court on the first Monday in March in each year, or at such other time as may be directed by law, the county treasurer shall make a full and complete settlement of his accounts, and exhibit his books and vouchers relating to the same, which settlement of his accounts, when accepted by the court, shall be entered of record by the county clerk."

Under this section, it is the duty of the county treasurer, who is also ex officio collector, to make his final settlement with the court at the meeting on the first Monday in March. Undoubtedly, he also needs the books to make his settlement and should receive them from the township collectors for that purpose. This would seem to imply that the county court should allow the treasurer a reasonable time in which to complete his accounts and perfect his settlement with the court.

It seems that the matter of the exact date that the ex officio collector should receive the tax books is really one

for cooperation between officials involved. We have been unable to find any law which requires the township collectors to turn over the tax books for 1947 on January 1, 1948. It is logical and reasonable that if the collectors continue to make collections during the months of January and February, they should have the books for that purpose.

Conclusion.

It is the opinion of this department that the township collectors are not required to turn over the tax books for 1947 on January 1, 1948, but that the books should be turned over to the ex officio collector after the final settlements of the township collectors with the county court.

Respectfully submitted,

JOHN R. BATY  
Assistant Attorney General

APPROVED:

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J. E. TAYLOR  
Attorney General

JRB:ml

MAGISTRATES: If reason for change of venue is bias and prejudice of inhabitants of a county, venue must be awarded to magistrate in adjoining county. Magistrate has no authority to require proof of such bias and prejudice.

September 11, 1947

FILED

32

719  
Honorable Joseph H. Garrett  
Judge of the Magistrate Court  
First Division, St. Louis County  
Clayton, Missouri

Dear Judge Garrett:

This is in reply to your letter of recent date requesting an opinion from this department, which reads as follows:

"As Magistrate, First District of St. Louis County, I respectfully request your office at its earliest convenience to give me an opinion on the following questions:

"I. In a county of 250,000 to 650,000, where change of venue is filed under Sec. 4 of Sec. 76, Sen. Bill 207 (i.e., bias and prejudice of inhabitants of the county), is cause to be sent

(a) to Magistrate of an adjoining County, as provided in general statewide provisions of Sec. 77 of said Act,

OR

(b) to the Circuit Court of same County, as occurs under Sec. 77 applying to changes of venue when there is no other Magistrate in the County where taken?

and

"II. In view of the provisions of Sec. 77 (that Magistrate where a change of venue is filed loses jurisdiction upon filing of the affidavit), where change of venue affidavit is filed under Sec. 4 of Sec. 76,

Sen. Bill 207 (as in I. above), has Magistrate any right or authority to require proof of such 'bias and prejudice of the inhabitants of the County' as in criminal cases in Circuit Court?

"This problem is becoming acute here because of efforts of attorneys for defendants in unlawful detainers to force cases into the already over-crowded dockets of the Magistrate Courts in the City of St. Louis, when such cases are filed, and the property lies in St. Louis County. If I.(a) above is the correct solution, such cases will have to be sent into the City Courts, or into surrounding rural counties, it would seem."

Section 76 of Senate Bill No. 207 of the 63rd General Assembly, Laws of 1945, page 789, providing for change of venue in civil cases pending before magistrates, reads as follows:

"Either party shall be entitled to change of venue in any civil cause pending before a magistrate, if he shall, before the jury is sworn or the trial is commenced before the magistrate, file an affidavit that the magistrate is a material witness for him, without whose testimony he cannot safely proceed to trial, or that he is near of kin to either party, stating in what degree, or that he cannot have a fair and impartial trial before such magistrate on account of his bias or prejudice, or that he cannot have a fair trial in the county on account of bias and prejudice of the inhabitants of such county, which affidavit shall be made either by a party to a suit pending or by said party's agent or attorney."

If the affidavit requesting a change of venue states as cause for such change of venue that the magistrate is a material witness in the case, without whose testimony he cannot safely proceed to trial, or that the magistrate is near of kin to either party, stating in what degree, or that there cannot be



a fair and impartial trial before such magistrate on account of his bias or prejudice, the magistrate must award the venue to some competent magistrate in the county, if there be one, unless the party asking for a change of venue shall in his affidavit state that another magistrate in the county is a material witness for him, without whose testimony he cannot safely proceed to trial, or that he is near of kin to either party, stating in what degree, in which case, or in the event there is no other magistrate in the county, the case shall be certified to the circuit court for trial as if originally filed in the circuit court. However, if said change is requested on account of bias or prejudice of inhabitants of the county, venue must be awarded to the magistrate of some adjoining county for trial.

Section 78a, Laws of 1945, page 790, is applicable only to counties having 250,000 to 650,000 inhabitants, but does not modify the foregoing with respect to those counties. Said section relates only to the procedure employed to effect a change of venue in and from those counties. In other words, the only change made by said section from the general sections relates to the time of transfer of the case and the notice to the parties involved.

With respect to the second question presented, we direct your attention to the language of the statutes. Section 77, Laws of 1945, page 789, provides that "Upon the filing of the affidavit in due time, requesting change of venue, the magistrate must allow the change of venue and enter an order accordingly," and Section 78a provides that "In all counties having 250,000 to 650,000 inhabitants, upon filing an application and affidavit for a change of venue in due time the magistrate must allow the change of venue and note same on his docket." We believe the above provisions are mandatory and require the magistrate to allow a change of venue when the proper application and affidavit requesting such change of venue are filed in due time. State v. Price, 111 Mo. App. 423, 85 S.W. 922; State v. Superior Court in and for City and County of San Francisco, 14 Cal. App. 2nd 718, 58 Pac. 2nd 1322; Morris v. Karr, 342 Mo. 179, 114 S.W. (2d) 962. Said change of venue is then a matter of right and not within the discretion of the court. Ralston v. Ralston, Mo. App., 166 S.W. (2d) 235, 1.c. 237; Dowling v. Allen and Company, 88 Mo. 293, 1.c. 299, 300; Douglass v. White, 134 Mo. 226, 1.c. 233, 234, 34 S.W. 367. This being the case, the magistrate has no authority to require proof of "bias or prejudice

Honorable Joseph H. Garrett -4-

of the inhabitants of the county" when said cause is stated to be the basis for such change of venue.

Conclusion.

Therefore, it is the opinion of this department that when the proper application and affidavit requesting a change of venue in a civil case pending before a magistrate, for the reason that the inhabitants of the county are biased and prejudiced, are filed in due time the magistrate must award the venue to a magistrate of some adjoining county for trial. It is further the opinion of this department that the magistrate has no authority to require proof of such "bias or prejudice of the inhabitants of the county."

Respectfully submitted,

DAVID DONNELLY  
Assistant Attorney General

APPROVED:

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J. E. TAYLOR  
Attorney General

DD:ml

LABOR: )  
WORKMEN'S COMPENSATION: ) The Division of Workmen's Compensation has the power  
 ) to appoint an assistant or deputy to the Director to  
 ) whom the latter may delegate the authority to per-  
 ) form the ministerial acts of his office.

April 23, 1947

FILED

33

5/20

Honorable Spencer H. Givens, Director  
Division of Workmen's Compensation  
Jefferson City, Missouri

Dear Sir:

We hereby acknowledge receipt of your letter of recent date requesting an opinion from this department, reading as follows:

"I am respectfully requesting your opinion on the questions raised by the problem of administration stated below:

"The Division of Workmen's Compensation is a reorganization of the old Workmen's Compensation Commission and is a part of the new Department of Labor and Industrial Relations. Reorganization was effected by Senate Bills 246 and 248 of the Sixty-Third General Assembly.

"The executive head of the Division is a director under the provisions of Section 12 (a) of Senate Bill No. 246 of the Sixty-Third General Assembly. Nowhere is there set up specific provisions for the Director to name an Assistant to act in his absence nor an executive secretary or chief clerk to whom could be assigned certain work such as the certification of documents and papers. After nine months of directing the affairs of the Division, I feel that the best and most efficient administration of the Workmen's Compensation Law calls for the assistants I have mentioned above.

"Authority, I believe, is given generally in Section 3747 above cited, beginning with line 27 and ending with line 29 on page 9

of Senate Bill 248, which citation reads:  
'The Division may appoint or employ such  
other persons as may be necessary to the  
proper administration of this chapter.'

The question to be considered is whether an officer or a Commission can appoint or employ a deputy or an assistant without being given specific legislative authority to do so. Under the provisions of the statutes applying to your department, no such specific legislative authority is conferred upon it; however, under Section 3747, R. S. Mo. 1939, as amended by Senate Bill 248 of the Sixty-Third General Assembly your Division is given the power to appoint or employ such persons as may be necessary to the proper administration of your department's affairs.

In view of the fact that your department does not have the power to appoint or employ deputies or assistants by specific statutory authority, it is advisable to inquire whether such power of appointment was given an officer at common law. The courts of this state have only touched this question in one case and then perhaps the language of the case might be considered dictum. However, in 46 Corpus Juris 1062, Section 380, we find the following statement:

"At Common Law, however, public officers may appoint deputies for the discharge of ministerial duties, except where the law requires the duty to be performed by the principal in person." Citing *Hunter vs. Hemphill*, 6 Mo. 106

Taking the above statement as authority along with the case cited, it would appear that your Division would have authority to appoint an Assistant or Deputy Director.

It might further be added that the Division is given the power and the discretion to "appoint or employ such other persons as may be necessary to the proper administration of this chapter." If your department in its discretion considers that an assistant or deputy to the Director is necessary, for the proper administration of its affairs, then under the aforesaid provision it surely would have the power to appoint or employ such. It seems apparent that the Legislative intent was that your Division should have authority to appoint or employ such assistant, or deputy if needed. Statutes which are not completely clear should be construed so as to ascertain and give effect to the legislative intent expressed therein. See *Pugh vs. St. Louis Police Relief Ass'n.*, 179 S. W. (2d) 927, 237 Mo. App. 922; *Haynes vs. Unemployment Compensation Commission*, 183 S. W. (2d) 77, 353 Mo. 540.

Further, statutes should be construed in a manner destined to produce sensible results and should not be construed in a manner to effect an absurdity. State vs. Irvine, 72 S. W. (2d) 96, 335 Mo. 61. If we were to construe this statute as holding that you could not appoint or employ an assistant or deputy to the Director, then a result might be reached whereby the affairs of your Division would be at a standstill due to your possible illness or absence from the State and resultant inability to perform some ministerial act. This certainly was not the intent of the Legislature.

It further might be pointed out that practically every department in the State government has some person (although each department may have a different designation for such officer) who in the absence of the department head, can perform the ministerial acts of such office. It is not reasonable to believe, therefore, that your department should be denied this authority.

However, as pointed out above if any statute requires a ministerial act to be performed by the officer or commission in person, then the deputy or assistant may not act for his principal. Further, on all papers that require the signature of the principal the deputy must sign the principal's name and add his name as deputy or assistant.

#### CONCLUSION

It is, therefore, the opinion of this department that under Section 3747, R. S. Mo. 1939, as amended by Senate Bill No. 248 of the Sixty-Third General Assembly, your Division has the authority, if in its considered discretion it is necessary to insure the proper administration of your affairs, to appoint or employ an assistant or deputy to the Director to whom the latter may delegate the authority to perform the ministerial acts of his office.

Respectfully submitted,

JOHN S. PHILLIPS  
Assistant Attorney General

APPROVED:

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J. E. TAYLOR  
Attorney General

JSP/vb

POLICE RETIREMENT SYSTEM: ) Section 8, subsection (1), paragraph (a)  
STATUTES: ) of House Bill 307, not retroactive in  
) its operation.

FILED

June 25, 1947

7/1  
Mr. F. D. Glore  
Secretary  
Police Retirement Board  
Kansas City, Missouri

Dear Mr. Glore:

This is in reply to your letter of June 2, 1947,  
requesting an opinion of this department, which reads as  
follows:

"Under the Police Retirement Law known  
as House Bill 424, which passed the last  
previous session of the legislature and  
approved June 12, 1946, authorized the  
paymaster of the Board of Police Commis-  
sioners to deduct 4% of the salary of a  
policeman to be applied as his contribu-  
tion to the Police Retirement Fund. I  
refer you to Section 8 of House Bill 424.

"House Bill 307 passed by the current  
state legislature and approved June 2,  
1947, is an amendment to House Bill 424.  
I refer you to Section 8, sub-division 1  
of that bill which provides:

"that such deductions shall not ex-  
ceed \$10.00 during any one month."

"since June 15, 1946, deductions have  
been made on the basis of 4%, and we have  
in several instances deducted in excess  
of \$10.00 per month in keeping with the  
law. Now that the contribution of mem-  
bers is reduced to a sum not exceeding  
\$10.00 per month, is it proper and can we

refund to the members all in excess of \$10.00 per month that we have collected to this date?

"House Bill 424 is shown in the September pamphlet of the Missouri Revised Statutes Annotated at pages 158 to 167 both inclusive, and the particular section to which I refer is shown on page 165 of said pamphlet as section 9476.108, under the head of 'Deductions from Compensations.'

"I am handing herewith for your convenience House Bill 307 as it is not yet shown in the annotated or other statutes and refer you to Section 8, Paragraph 1, thereof.

"I would greatly appreciate an early reply to this letter as it is important that we make our records conform to your ruling."

Section 9476.108, Mo. R.S.A., of the law setting up a Police Retirement System in cities of 300,000 to 500,000, provides in part:

"(1) (a) The Board of Police Commissioners shall deduct or cause to be deducted from the compensation of each member until retirement an amount equal to 4% of said compensation. The sum so deducted shall be paid by the Board of Police Commissioners monthly or semi-monthly to the Retirement Board to be credited by him to the Pension Fund."

Section 8, subsection (1), paragraph (a) of House Bill 307 of the 64th General Assembly, with an emergency clause, amending the above section, is as follows:

"The Board of Police Commissioners shall deduct or cause to be deducted from the compensation of each member until retirement an amount equal to 4% of said compensation; provided, however, that such deduction shall not

exceed \$10 during any one month. The sum so deducted shall be paid by the Board of Police Commissioners monthly or semi-monthly to the Retirement Board to be credited by him to the Pension Fund."

The question for our consideration is whether that part of Section 8, subsection (1), paragraph (a), which provides "that such deduction shall not exceed \$10 during any one month," is retrospective in operation, thereby authorizing refunds to members who have contributed in excess of \$10 per month since the effective date of the Police Retirement System law. Retrospective laws are those which take away or impair vested rights acquired under existing laws, or create a new obligation, impose a new duty or attach a new disability in respect to transactions or considerations already past. It is a general rule of law that statutes are held to operate prospectively. In *Lucas v. Murphy*, 156 S. W. (2d) 686, the court said at page 690:

"\* \* \* Regardless of the type of legislation under consideration, 'In the construction of statutes the uniform rule is that they must be held to operate prospectively only, unless the intent is clearly expressed that they shall act retrospectively, or the language of the statute admits of no other construction.' *Jamison v. Zausch*, 227 Mo. 406, 417, 126 S.W. 1023, 1027, 21 Ann. Cas. 1132; 2 *Cooley*, Taxation, Sec. 514, p. 1145; 2 *Lewis-Sutherland*, Statutory Construction, Sec. 642, p. 1157; Const. Mo. Art. 2, Sec. 15."

In *Home Indemnity Co. v. State of Missouri*, 78 Fed. (2d) 391, it was held, at page 394:

"A careful reading of the statute satisfies that its provisions were intended to operate prospectively. It is an elemental rule of construction that a statute ought not to be construed to



operate retrospectively in the absence of clear, strong, and imperative language commanding it. \* \* \*

And also, in the case of Western Pac. R. Corporation v. Baldwin, 89 Fed. (2d) 269, where the court said, at page 273:

"The question is certainly not free from doubt, but a general rule of statutory construction followed by the federal courts is 'that a retrospective operation will not be given to a statute which interferes with antecedent rights, or by which human action is regulated, unless such be the unequivocal and inflexible import of the terms, and the manifest intention of the legislature.'  
\* \* \*

There is no intention expressed to construe the above amendatory section retrospectively. The only change in Section 8, subsection (1), paragraph (a), was the addition of the proviso limiting deductions or contributions to \$10 per month. In the absence of such intention and clear expression in the terms of the statute, we cannot give the retrospective construction. Ex post facto construction is as pernicious as ex post facto legislation (188 Fed. 991).

Amendatory acts are not given retrospective construction. However, the provisions of the original statute that are repeated in the amendatory statute, are to be considered as having been the law from the time they were first enacted. The Springfield Court of Appeals held in an opinion in Mott Store Co. v. St. Louis and San Francisco Railroad Co., 173 Mo. App. 189, which was later approved by the Supreme Court in 254 Mo. 654 (l. c. 196, Mo. App.):

"\* \* \* Again, the law as announced in 36 Cyc. 1223, in dealing with the subject of amendatory acts is as follows:

"'Unless required in express terms or by clear implication, an amendatory act will

not be given a retrospective construction. Proceedings instituted, orders made, and judgments rendered before the passage of the amendment will therefore not be affected by it, but will continue to be governed by the original statute. Where a statute, or a portion thereof, is amended by declaring that, as amended, it shall read as follows, and then setting forth the amended section in full, the provisions of the original statute that are repeated are to be considered as having been the law from the time they were first enacted, and the new provisions are to be understood as enacted at the time the amended act takes effect."

Section 8, subsection (1), paragraph (a) of House Bill 307, therefore dates back to the original enactment of the Police Retirement system law, except that portion providing "that such deduction shall not exceed \$10 during any one month," which took effect on the date of the approval of House Bill 307, June 23, 1947, and became operative from that date.

#### Conclusion

Therefore, it is the opinion of this department that the portion of Section 8, subsection (1), paragraph (a) of House Bill 307 of the 64th General Assembly, providing "that such deduction shall not exceed \$10 during any one month," is not retrospective in operation but is effective from the date of the approval of said House Bill 307, i. e., June 23, 1947. It is our further opinion that the Kansas City Police Retirement Board cannot refund to the members of the Kansas City Police Retirement System, that amount which was contributed pursuant to Section 9476.108, Mo. R.S.A., by each member in excess of \$10 per month.

Respectfully submitted,

APPROVED:

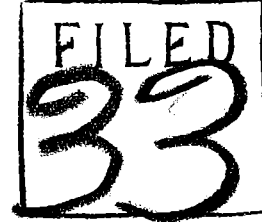
DAVID DONNELLY  
Assistant Attorney General

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J. E. TAYLOR  
Attorney General

COUNTY COURTS: Moneys placed in wrong funds may be  
COUNTY FUNDS: withdrawn and correctly credited to  
proper fund by a nunc pro tunc judgment of County Court.

July 10, 1947



Honorable R. M. Gifford  
Prosecuting Attorney  
Milan, Missouri

Dear Sir:

This will acknowledge receipt of your letter of May 6th requesting an opinion of this department and also your letter of May 26th supplementing your original request. Omitting caption and signatures, your letter of May 6th stated as follows:

"In March, 1947, the County Court of Sullivan County accepted a bridge in the county belonging to Big Medicine Drainage District #1 in consideration of the payment to the County of \$600. Upon receipt the Clerk placed such money in the general fund and now the Court desires to make an order withdrawing such sum and placing it in the road and bridge fund for use during the present year.

I advised them that it could not be so withdrawn. They desire your opinion."

Your letter of May 26th supplementing the above further stated the following:

"On the 9th day of May, 1947, you requested additional information before rendering an opinion as to transfer of funds from general fund to road and bridge fund for use during present year by County Court of Sullivan County.

On the 29th day of December, 1944, petition for mandatory injunction was sought by Sullivan and Grundy counties to compel Big Medicine Drainage District No. 1 of Grundy and Sullivan Counties to build, repair and maintain certain bridges where the District's ditch intersected public roads. This matter finally came before

the Supreme Court and was remanded to the lower court. In February, 1947, a judgment and decree was agreed upon and settlement reached in this matter and a part of this judgment recited that Sullivan County was to accept one of the bridges in issue upon the payment of \$600.00 by the District. That sum was later paid and was placed in the general funds of the county. At the time the budget was set for this year no agreement relative to this bridge or any of the matters then in litigation were in being and, therefore, could not have been considered by the Court in preparing the budget.

Trusting this is the information needed, I am."

It does not appear from your two letters exactly why the sum of \$600.00 was paid to Sullivan County or for what purpose such sum was to be used. However, from the wishes of the Court it would appear that this sum was to be used for the maintenance and upkeep of the bridge. Therefore, we must assume for the purposes of this opinion that such was the case.

You state in your letter of May 26th that the litigation relative to the bridge in question was terminated by a judgment and a decree agreed upon in February, 1947. Since the budget for Sullivan County for 1947 had already been set up, the money obtained through the aforesaid agreement could not have been contemplated when such budget was set. As a result there were no debts or liabilities of the County for which this sum would be responsible.

Again taking facts from your letters, we assume that when the County Clerk received the \$600.00, he or some other county official through error, deposited it to the credit of the General Fund instead of the Road and Bridge Fund. Consequently, this sum never became a part of the General Fund since it was credited to such fund by mistake. Now the question is can the County Court transfer this sum from the General Revenue Fund to the Road and Bridge Fund.

The only sections of the statute dealing with transfers of funds is Section 13829 and 13830, R. S. Mo., 1939, which provides as follows:

13829-"Whenever there is a balance in any County treasury in this state to the credit of any special fund, which is no longer needed for the purpose for which it was raised, the county court may, by order of record, direct that said balance be transferred to the credit of the general revenue fund of the county, or

to such other fund as may, in their judgment, be in need of such balance."

13830-"Nothing in the preceding section shall be construed to authorize any county court to transfer ~~or~~ consolidate any funds not otherwise provided for by law, excepting balances of funds of which the objects of their creation are and have been fully satisfied."

Although the aforesaid sections of the statute would indicate that the sum in question could not be transferred if it was needed for the liabilities under the General Revenue Fund, this department feels that such statutes refer only to money that is correctly in the particular fund in question. Where there is an error or a mistake, we feel that the County Court should be permitted to rectify the error and place the money in the correct fund.

We feel that the proper way for this sum in question to be placed in the Road and Bridge Fund is for the County Court of Sullivan County to enter a nunc pro tunc judgment and set aside the action of the Clerk in placing the money in the General Revenue Fund and order that it be placed in the Road and Bridge Fund. In case of Webb vs. Elliott, 75 Mo. App. 577, it was held that the law authorizes the Court to enter a nunc pro tunc judgment where the Clerk entered up the wrong judgment. Also in Schulte vs. Schulte, 127 S. W. (2d) 748, affirmed at 140 S. W. (2d) 51, the Court held that the power to correct a judgment nunc pro tunc is inherent in courts of record irrespective of statute.

Although, as far as we know, the erroneous placing of the controversial sum was not made by an order or judgment of the County Court of Sullivan County, yet this department feels that by a nunc pro tunc judgment, the Court may order the sum withdrawn from the General Revenue Fund and placed in the Road and Bridge Fund.

#### CONCLUSION

It is therefore the opinion of this department that the sum of \$600.00 which was placed in the General Revenue Fund of Sullivan County can be withdrawn therefrom and placed

Hon. R. M. Gifford

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in the Road and Bridge Fund by a nunc pro tunc judgment of  
the County Court.

Respectfully submitted,

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JOHN S. PHILLIPS

Assistant Attorney General

APPROVED:

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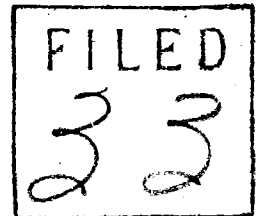
J. E. TAYLOR

Attorney General

JSP/vb

7  
TAXATION: No provision for compensating assessor for picking up  
real estate transfers in recorder's office and trans-  
ASSESSOR: ferring them to plat books in his office.

Looking for  
5/1/47  
July 23, 1947



Honorable Charles E. Ginn  
Prosecuting Attorney  
Lawrence County  
Mt. Vernon, Missouri

Dear Sir:

We have your letter of recent date wherein you request  
an official opinion from this department on the following  
statement of facts:

"I would like to have your opinion as to  
whether or not it is the duty of the  
assessor in a third class county to pick  
up the transfer of real estate in the  
recorder's office and transfer the same  
to the plat books in the assessor's office,  
and if so, is he allowed additional com-  
pensation for such work."

The office of county assessor being one created by  
statute, we must look to the statutes to ascertain its powers  
and duties. In Laws of Missouri 1945, page 1791, Sections  
30, 31 and 32, we find the following provisions relating to  
plats of the lands in the respective counties:

"Section 30. Each county court of this  
state shall procure from the register of  
the United States land office and keep  
on file plats of all townships and parts  
of townships in their respective counties,  
showing the county lines on a scale suf-  
ficiently large to show the sections and  
parts of sections, by their legal subdivi-  
sions, and all lands subject to taxation  
at that time, and also all private land  
claims with the name of the original claim-  
ant, the number of the survey and the num-  
ber of acres."

"Section 31. In any county where land  
plats or maps have been lost or destroyed,  
the county court of such county shall pro-  
cure others to supply the places of those

so lost or destroyed; and where any county court fails to procure such maps or plats at least sixty days before the time for commencing the assessment in any year, it shall be the duty of the assessor of such county to procure them, to be paid for by the county."

"Section 32. The assessor shall have free access to all land plats and maps during the time of assessment with a view to ascertain what lands are taxable; and upon the return of the assessor's books to the board of equalization, the said board shall compare the same with the plats and maps of the county; and in all cases where any lands have been omitted by the assessor, they shall be placed in the assessor's books and assessed as other lands are required to be assessed by this chapter."

From these sections, no provisions are made for the assessor to list transfers of real estate. The only connection the assessor has with the books, according to these sections, is that he has access to these plats and maps for the purpose of ascertaining what lands in the county are taxable.

According to Section 22, Laws of Missouri 1945, page 1789, it would appear that the lawmakers have considered it not necessary that the land be correctly assessed in the name of the owner because they have provided in this section that an error or omission in regard to the name of the person who owns the land shall not in anywise impair the validity of the assessment for taxes. This section reads as follows:

"Each tract of land or lot shall be chargeable with its own taxes, no matter who is the owner, nor in whose name it is or was assessed. The assessment of land or lots in numerical order, or by plats and a 'land list' in alphabetical order, as provided in this chapter, shall be deemed and taken in all courts and places to impart notice to the owner or owners thereof, whoever or whatever they may be, that it is assessed and liable to be sold for taxes,



interest and costs chargeable thereon; and no error or omission in regard to the name of any person, with reference to any tract of land or lot, shall in anywise impair the validity of the assessment thereof for taxes."

An assessor might get the idea that it is his duty to pick up these transfers of real estate in the recorder's office and transfer them to the plat books in his office on account of the provisions of Section 36, Laws of Missouri 1945, page 1793, l.c. 1794, which are as follows:

" \* \* \* It shall be the further duty of the assessor, each year, in compiling the book provided for above, to procure the descriptions of the land and the names of the owners from the book known as and denominated 'the land list,' kept by the recorder as provided for in this chapter, carefully noting and accurately entering in their proper places all changes that may have occurred, either in the names of owners or descriptions of land since the last 'real estate book' was compiled. \* \* \* "

It would appear from the foregoing quoted provisions of said Section 36 that the recorder of deeds is required to keep "the land list." Under authority of Section 9784, R. S. Mo. 1929, it was the duty of the recorder to keep this "land list." However, in 1939, Laws of Missouri 1939, page 840, this section was repealed; therefore, there is no "land list" in the recorder's office to which the assessor could refer for the purpose of procuring the descriptions of the land and the names of the owners thereof.

Section 36, Laws of Missouri 1945, page 1793, prescribes the duties of the assessor with respect to preparing the assessment books. The portion of this section, relating to the preparation of the real estate book, reads as follows:

"In all counties, except the city of St. Louis, the assessor shall be provided with two books, one to be called the 'real estate book,' and the other to be called the 'personal assessment book.' The 'real estate book' shall contain all lands subject to assessment. It shall be in tabular form, with suitable captions and separate columns.

The first column shall contain the name of the owner or owners, if known; if not, the name of the party who paid the last tax; if no tax has ever been paid, then the name of the original patentee, grantee or purchaser from the federal government, the state or county, as the case may be, opposite thereto; the second column shall contain the residence of the owner; the third column shall contain an accurate description of the land by the smallest legal subdivisions, or by smaller parts, lots or parcels, when sections and the subdivisions thereof are subdivided into parts, lots or parcels; the fourth column shall contain the actual cash valuation. When any person shall be the owner or original purchaser of a section, quarter section or half quarter section, block, half block or quarter block, the same shall be assessed as one tract. The assessor shall arrange, collect and list all lands owned by one person in the county, under his name and on the same page, if there be room to contain it, and if not, on the next and following leaf, with proper indications of such continuance, whether they be lots and blocks in a city, or sections or parts of sections in the country--the lowest numbered range, township and section, block, lot or survey always being placed first in such list, and so on in numerical order until said list for each property owner is completed. The assessor shall consolidate all lands owned by one person in a square or block into one tract, lot or call, and for any violation of this section, in unnecessarily dividing the same into more tracts than one or more lots than one, the county court shall deduct from his account for making the county assessment, ten cents for each lot or tract not so consolidated. At the close of each of the owners' lists, the assessor shall place all the lands that appear to belong to the said owner, which cannot be properly described by numerical order, as contemplated in this section,

which shall be otherwise properly described, indicating the quantity and location thereof. \* \* \*

It would appear from this section that in order for the assessor to properly make his assessment that it would be necessary for him to obtain the information from records of the county as to who are the owners of the various pieces of real estate. If it is necessary for him to perform this function, it is incidental to his duties as assessor. In that case, the principle announced by the Supreme Court in the case of State ex Inf. McKittrick vs. Wymore, 132 S. W. (2d) 979, 1.c. 987, might be applicable. In that case, the Court was discussing a section which prescribed the duties of the prosecuting attorney but did not go into detail. The Court approvingly quoted the rule from 46 C. J., Section 301, page 1035, as follows:

"The duties of a public office include those lying fairly within its scope, those essential to the accomplishment of the main purpose for which the office was created, and those which, although incidental and collateral, serve to promote the accomplishment of the principal purposes."

The Court also quoted approvingly from Throop's Public Officers, Section 542, page 515:

"The rule respecting such powers is, that in addition to the powers expressly given by statute to an officer or a board of officers, he or it has, by implication, such additional powers, as are necessary for the due and efficient exercise of the powers expressly granted, or as may be fairly implied from the statute granting the express powers."

So, if it is necessary for the assessor in making his assessments to pick up the transfers of real estate in the recorder's office and transfer them to the plat books in his office, it would be on account of the fact that he is required to list in the land book the name of the owner or owners of the lands which he is assessing.

Even if the assessor is required to perform this service, no provisions are made for compensating him for it. The compensation of the assessor in counties of the third class is found in Laws of Missouri 1945, page 1555. Section 1 of the act allows the assessor 45 cents per list for making assessments and six cents per entry for making real estate and tangible personal assessment books. This same act provides for compensation for the assessor for serving as a member of the county board of equalization, for taking merchants' tax statements and entering them in the tax books, for making lists for agricultural statistics and for attending the annual assessors' meeting called by the state tax commissioner. This act makes no provision for compensating the assessor for any duties which he might perform in picking up transfers of real estate in the recorder's office and transferring them to the plat books, unless the lawmakers intended that the compensation of six cents per entry for making real estate and tangible personal assessment books would include pay for that service.

While the statutes do not expressly require the assessor to pick up these transfers of real estate in the recorder's office and transfer them to the plat books in his office, yet if it is necessary for him to do this in order to properly make his assessments, he must point out the statute authorizing compensation for this service before he would be entitled to such compensation. The rule announced in the case of Nodaway County vs. Kidder, 129 S. W. (2d) 857, 1.c. 860, would be applicable here:

"It is well established that a public officer claiming compensation for official duties performed must point out the statute authorizing such payment. \* \* \*

\* \* \* \* \*

"It has been held that employment as city attorney, for which a salary was paid, includes services rendered in connection with a special tax matter, and that compensation as city attorney covers such service, and that a city collector may not contract with such city attorney for additional compensation for services in such matters. Edwards v. City of Kirkwood, 162 Mo. App. 576, 579, 142 S. W. 1109.

"In the case of Robinson v. Huffaker, 23 Idaho 173, 129 P. 334, 337, the defendant, who was a county commissioner and acting for the county as such, and drawing fees as such, was declared not entitled to additional pay for services rendered in inspecting roads and bridges. The court held that where one accepts an office with compensation fixed by law, he has no legal claim for extra compensation, and a promise by the county board to pay him an extra fee was not binding, though he had rendered services and exercised a degree of diligence greater than could legally have been required.

"In the case of City of Indianapolis v. Lampkin, 62 Ind. App. 125, 112 N. E. 833, it was held that a city clerk could not be paid extra compensation for preparing an index of council proceedings, since such work was an incident to the office and was an official duty."

These authorities clearly demonstrate the principle that an officer must point to the statute which provides for his compensation and that he can not be paid extra compensation for service incidental to his main duties.

In this opinion, reference is made to Section 36, Laws of Missouri 1945, page 1793. In order that one may not be misled as to the application of that particular section, we call attention to Section 37, Laws of Missouri 1945, page 1795, which provides in part as follows:

"Nothing in the preceding section shall be construed to apply to counties which have already adopted a method of plats and abstracts to facilitate the assessment and collection of the revenue; nor shall the provisions of the preceding three sections apply to counties having a less population than forty thousand, unless a majority of the voters in any such county shall elect to adopt its provisions at a general election, upon the question being ordered to be submitted by the county court: \* \* \*"

It will be noted from this section, however, that if a county has already adopted a method of plats and abstracts to facilitate the assessment and collection of revenue that the provisions of Section 36, hereinbefore referred to, would not be applicable. If the plan which the county has adopted should require the assessor to list the property in the name of the owner, our conclusion as to that class of counties would be the same as to those which follow the provisions of said Section 36. This is by reason of the fact that such duties would be incidental to the assessment of property by the assessor and for the further reason that the statute does not make any provision for compensating the assessor for that particular service.

#### CONCLUSION

From the foregoing, it is the opinion of this office that the statutes do not expressly require the assessor in a county of the third class to pick up the transfers of real estate in the recorder's office and transfer them to the plat books in his office, but if as incident to his duties in making assessments he does perform this service, there is no authority under the statute for compensating him for such work.

Respectfully submitted,

TYRE W. BURTON  
Assistant Attorney General

APPROVED:

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J. E. TAYLOR  
Attorney General

TWB:VLM

WORKMEN'S COMPENSATION: Dissolution of insurer is not of itself such a default of insurer as to render employer primarily liable to injured employee, his dependents or other persons entitled to rights thereunder.

August 23, 1947

FILED

33

Mr. Spencer H. Givens, Director  
Division of Workmen's Compensation  
Jefferson City, Missouri

Dear Sir:

This is in reply to your letter dated August 21, 1947, wherein you requested an opinion of this department relative to the liability of employers after the dissolution of their insurers. Said letter reads as follows:

"The recent dissolution of a compensation insurance carrier authorized to do business in Missouri has created legal and administrative problems on which we are seeking your advice in regard to the facts and questions stated below:

"On June 26, 1947, the Keystone Mutual Casualty Company of Pittsburgh, Pennsylvania, was dissolved by order and decree of the Court of Common Pleas of Dauphin County, Pennsylvania, and the Insurance Commissioner of the Commonwealth of Pennsylvania was directed to take possession of the property of said company and to liquidate its business and affairs.

"The Keystone Mutual Casualty Company began doing business in Missouri in 1943 and has written considerable business. At the present time there are a number of compensation cases, both adjudicated and unadjudicated, pending against this company.

"Our questions are these:

"In the light of the provisions of Section 3713, R. S. Mo., 1939, did employers insured by the Keystone Mutual Casualty Company for their Missouri compensation liability become primarily liable for the payment of unadjudicated claims as of June 26, 1947?

"In claims already adjudicated but not yet paid out, on June 26, 1947, did employers insured by the Keystone Mutual Casualty Company for their Missouri compensation liability become primarily liable for the payment of the balance of compensation due?"

Section 3715, R.S. Mo. 1939, reads as follows:

"If the employer be not insured his liability hereunder shall be primary and direct. If he is insured his liability shall be secondary and indirect, and his insurer shall be primarily and directly liable hereunder to the injured employee, his dependents or other persons entitled to rights hereunder. On the request of the commission and at every hearing the employer shall produce and furnish it with a copy of his policy of insurance, and on demand the employer shall furnish the injured employee, or his dependents, with the correct name and address of his insurer, and his failure to do so shall be prima facie evidence of his failure to insure, but such presumption shall be conclusively rebutted by an entry of appearance of his insurer. Both the employer and his insurer shall be parties to all agreements or awards of compensation, but the same shall not be enforceable against the employer, except on motion and proof of default by the insurer. Service on the employer shall be sufficient to give the commission jurisdiction over the person of both the employer and his insurer, and the appearance of the employer in any proceeding shall also constitute the appearance of his insurer, provided that after appearance by an insurer, such insurer shall be entitled to notice of all proceedings hereunder."

The Industrial Commission and the Division of Workmen's Compensation were created and are governed by statutory provisions, and consequently a careful analysis of these statutes is necessary to a proper determination of any question which may arise relating thereto. *Kristanik v. Chevrolet Motor Company*, 226 Mo. App. 89.



And, as has been repeatedly stated by the courts of this state, the Workmen's Compensation Act is to be interpreted, when possible, most favorably to the employee and his dependents. Decker v. Raymond Concrete Pile Company 336 Mo. 1116.

It is to be noted that Section 3715, R.S. Mo. 1939, supra, says:

"\* \* \* Both the employer and his insurer shall be parties to all agreements or awards of compensation, but the same shall not be enforceable against the employer, except on motion and proof of default by the insurer.\* \* \*" (Underscoring ours.)

Brashear v. Brand-Dunwoody Milling Company, 21 S.W. (2d) 191, involved a Workmen's Compensation case where the Commission gave an award of compensation against the employer but not against the insurer. The case reached the St. Louis Court of Appeals, and that court, in referring to the above quoted section of the statute, said at l.c. 193:

"It is argued that the award of the commission against defendant, the insured, and not against the insurer, is void, because the award 'shall not be enforceable against the employer, except on motion and proof of default by the insurer.' Section 27 provides two situations in which the award may be against the employer primarily; i.e., if the employer be not insured, or upon motion and proof of default. It thus seems the commission has jurisdiction to make the award against the employer, if it finds, as a matter of fact, that either of those two conditions exists."

The court continued at l.c. 193:

"The commission admittedly had jurisdiction of the parties and the subject-matter when it made its award. It further had the power to make the award primarily and directly against the employer. It is true it would have no such power, unless the employer was not properly insured, or in the event the insurance company failed to function. That,

however, was a question of fact. We have no insurance policy or finding of facts before us for consideration, but, as before stated, only the record proper. Under that record, the judgment is regular and within the jurisdiction of the commission, as well as the circuit court."

The wording of that court indicates that, in accordance with the wording of Section 3715, R.S. Mo. 1939, supra, "on motion and proof of default by the insurer," the award of the Commission is enforceable against the employer. Upon such proof of default by the insurer, as regards the employee, the employer becomes primarily liable. In accordance with the spirit of the Workmen's Compensation Act, it is felt desirable that the employer either assure or insure the payment of any compensation that might be awarded. This is for the purpose of better protecting himself, as well as insuring payment to the employee or his dependents in case of injury. Section 3713, R. S. Mo. 1939, reads as follows:

"Every employer electing to accept the provisions of this chapter, shall insure his entire liability thereunder except as hereafter provided, with some insurance carrier authorized to insure such liability in this state, except that an employer may himself carry the whole or any part of such liability without insurance upon satisfying the commission of his ability so to do. If the employer fail to comply with this section, and injured employee or his dependents may elect after the injury to recover from the employer as though he had rejected this chapter, or to recover under this chapter with the compensation payments commuted and immediately payable. If the employer be carrying his own insurance, on the application of any person entitled to compensation and on proof of default in the payment of any installment, the commission shall require the employer to furnish security for the payment of the compensation, and if not given, all other compensation shall be commuted and

become immediately payable: Provided, that employers engaged in the mining business shall be required to insure only their liability hereunder to the extent of the equivalent of the maximum liability under this chapter for ten deaths in any one accident, but such employer may carry his own risk for any excess liability."

If, then, the employer becomes insured with an insurer who is subsequently dissolved, such dissolution would not of itself be sufficient proof of default by the insurer as to render the employer primarily liable, in accordance with the provisions of Section 3715, R.S. Mo. 1939, supra. It is conceivable that upon dissolution an insurance company could still pay an injured employee his claim in full, under the provisions of the Workmen's Compensation Act. If, however, at the hearing held on a claim against an employer and his insurer, where both are made a party to the hearing, it develops that the insurer is dissolved, and on motion the referee finds as a matter of fact that there is such an inability of the insurer to pay as to amount to a default of the insurer, such a finding would render the employer primarily liable both as to adjudicated and unadjudicated claims.

#### CONCLUSION

It is, therefore, the opinion of this department that, under the facts presented, on June 26, 1947, the employer did not become primarily liable merely because of the dissolution of the insurer. Both the employer and the insurer would be parties to the hearing on the award. If, at that hearing, on motion the referee finds that there was such an inability to pay by the insurer as to amount to a default by said insurer, such a finding would render the employer primarily liable to the employee, his dependents or other persons entitled to rights thereunder. Such primary liability would exist as to both adjudicated and unadjudicated claims.

Respectfully submitted,

Wm. C. COCKRILL  
Assistant Attorney General

APPROVED:

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J. E. TAYLOR  
Attorney General

WCC:LR

MAGISTRATES: Three questions regarding abstracting and indexing unsatisfied judgments appearing in records of justice of the peace.

September 6, 1947

FILED

33

9/11

Honorable Bernard W. Gnefkow  
Third District Magistrate Court  
Jackson County  
Kansas City, Missouri

Dear Sir:

This will acknowledge your request for an opinion which, in part, reads:

"I would like to have an opinion from your office in regard to Section 1, Part 2 of the recently approved Senate Bill No. 96, on the following questions.

"(1) Of what should an abstract of judgment consist? Does the state plan to make up a sample form for all the Magistrates to use or must each Magistrate make up his own form?

"(2) Will it be in accord with this law if the abstracts of judgment are put on forms so that they may be assembled and bound in alphabetical order or will it be necessary to compile 2 books, one as an index and one containing the abstracts?

"(3) There are a number of cases on the Justice of the Peace Docket books which contain no entry other than the record of filing. The jackets containing the original papers are in many instances impossible to locate, particularly those over 3 years old. No doubt many of these cases were settled out of court. Will it be necessary to record these cases or does this law apply only to those cases where the Justice or clerk has made an entry on the Docket book showing a judgement had been rendered?"

In your request three questions are asked which require the interpretation of Section 7, paragraph (2) of Senate Bill No. 96 which was enacted by the 64th General Assembly and was approved and became effective June 23, 1947. Section 7, paragraph (2) provides:

"(2) The clerk of the magistrate court shall prepare and keep in a well bound book an abstract and index of all unsatisfied judgments in civil cases appearing in the records of justices of the peace which have been delivered to him, and which were rendered at any time after the first day of January 1935. Such abstract and index shall show the names of the parties to each action in which the judgment was rendered, arranged so that the names of the parties in whose favor the judgment was rendered shall appear in alphabetical order, the date of the judgment, the amount thereof and an appropriate reference to the book or record where the record of such judgment may be found. The magistrate is authorized to employ such additional clerical assistants as may be necessary to prepare such abstract and index of judgments rendered prior to January 1, 1947, and reasonable compensation of such assistants together with other necessary expenses involved in preparing such abstract and index shall be paid from the county treasury upon the order of the county court. The county court shall provide an adequate and safe storage place for the books and records of justices of the peace which shall be readily accessible to the magistrate court."

The above section requires the clerk of the magistrate court to prepare and keep in a well bound book an abstract and index of all unsatisfied judgments, which were rendered after January 1, 1935, in civil cases which appear in the records of the justice of the peace that are delivered to the clerk of the magistrate court.

We find no statutory provision imposing a duty on the state to provide sample abstract and index forms of unsatisfied judgments. The wording of the statute clearly requires the clerk

of the magistrate court to prepare the abstract and index, and we believe that it would be incumbent on the clerk to adopt an appropriate form or method in keeping such records.

In your first question it is also asked of what should the abstract of unsatisfied judgments consist. Regarding this question the statute provides as follows:

"\* \* \*Such abstract and index shall show the names of the parties to each action in which the judgment was rendered, arranged so that the names of the parties in whose favor the judgment was rendered shall appear in alphabetical order, the date of the judgment, the amount thereof and an appropriate reference to the book or record where the record of such judgment may be found.\* \* \*"

Looking at the above language of the statute, we believe that it requires the abstract of unsatisfied judgments to show the names of the parties to the litigation, the party in whose favor the judgment was rendered, the date of the judgment and the amount of the judgment. If this much is shown we believe there would be a compliance with the provision of the statute. The other provisions of the statute requiring the arrangement of names in alphabetical order and making appropriate reference to the book or record where the record of the judgment may be found, we believe, refer and relate to indexing requirements.

In answer to your second question it does not appear that the statute requires the keeping of separate books for the index and abstract of unsatisfied judgments. We believe that it would be entirely proper to keep the index and abstract of unsatisfied judgments in one book if it can be conveniently and satisfactorily done.

In answer to your third question, we direct your attention to the first part of paragraph (2), Section 7 which provides:

"The clerk of the magistrate court shall prepare and keep in a well bound book an abstract and index of all unsatisfied judgments in civil cases appearing in the records of justices of the peace which have been delivered to him, \* \*"

The above provision clearly provides that the only abstract to be kept is of unsatisfied judgments of civil cases which actually appear in the records of the justice of the peace which have been delivered to the clerk of the magistrate court.

CONCLUSION

It is, therefore, the opinion of this department that:

- (1) The clerk of the magistrate court in keeping the abstract of unsatisfied judgments in civil cases as required in paragraph (2), Section 7 of Senate Bill No. 96, should show in said abstract the names of the parties to the action in which the judgment was rendered, the party in whose favor the judgment was rendered, the date of the judgment and the amount of the judgment. The clerk of the magistrate court shall prepare and keep the abstract of unsatisfied judgments in appropriate form in a well bound book.
- (2) The statute does not require that the index and abstract of unsatisfied judgments be kept in separate books; if they can be satisfactorily kept in one book it would be proper to do so.
- (3) The only judgments that have to be abstracted or indexed are unsatisfied judgments in civil cases which actually appear in the records of the justice of the peace which have been delivered to the clerk of the magistrate court.

Respectfully submitted,

RICHARD F. THOMPSON  
Assistant Attorney General

APPROVED:

J. E. TAYLOR  
Attorney General

RFT:smw

WORKMEN  
DIVISION

COMPENSATION

Relating to tax moneys collected from insurance carriers and the transferral of the Division fund to the credit of the ordinary revenue fund of the state.

September 26, 1947

FILED

33

Mr. Spencer H. Givens, Director  
Division of Workmen's Compensation  
Jefferson City, Missouri

Dear Mr. Givens:

This is in reply to your letter of August 26, 1947, wherein you requested an opinion relative to certain funds of the Workmen's Compensation Division. Said letter reads as follows:

"May we have your opinion on the status of the Workmen's Compensation Fund as established by Chapter 29, R. S. Mo., 1939 (Missouri Workmen's Compensation Law), in light of the following facts and questions:

"Prior to the reorganization of the state government under the new Constitution, balances in the Workmen's Compensation Fund, after a certain specified time following the end of an appropriation period, were taken over by the General Revenue Fund, by authority of a general statute.

"Section 3757 of the Workmen's Compensation Law, which deals with the Workmen's Compensation Fund, was amended by the Sixty-Third General Assembly, and became effective July 3, 1946, when approved by the Governor. Among other things, this section provides that 'upon receiving said money the state treasurer shall place the whole thereof to the credit of the fund for the support of the Missouri workmen's compensation division.' No mention is here made of transferring any part of this fund to the general revenue, except in the latter part of the section which provides for a transferral only of a refund to pay back any appropriation out of



the general revenue, 'as the division may from time to time determine.'

"Section 17 of Senate Bill No. 237, also enacted by the Sixty-Third General Assembly, (page 1982 of the Laws of Missouri, 1945) was approved April 26, 1946, and became effective July 1, 1946--three days prior to the effective date of Section 3757 mentioned above. It is the statute that provides generally for fund balances to be transferred to the 'ordinary revenue fund of the state.'

"We feel that Section 3757, R. S. Mo., 1939, having been approved and made effective after the section providing for fund transferrals, governs the Workmen's Compensation Fund, and that transferrals from it cannot be made, except to repay appropriations from the General Revenue Fund."

Section 3757, R.S. Mo. 1939, under the chapter relating to Workmen's Compensation, dealt with the assessment of a tax upon the various insurance carriers, and the payment of such amount annually into the state treasury. Said section concluded:

"\* \* \* Upon receiving said money the state treasurer shall place the whole thereof to the credit of the fund for the support of the Missouri workmen's compensation commission. As the commission may from time to time determine, the state auditor and state treasurer shall make transfers to the general revenue fund from the fund for the support of the Missouri workmen's compensation commission, so as to refund any appropriations made to said fund out of the general revenue fund."

Senate Bill No. 248, passed by the 63rd General Assembly, Missouri Laws of 1945, page 1996, repealed, among others, Section 3757 of the 1939 Revised Statutes. Section 3757 of said bill, Missouri Laws of 1945, page 2002, contains the same provision as to an assessment of a tax upon the various insurance carriers, and provides for the annual payment of such amounts into the Revenue Department. Said section concludes:

"\* \* \* Upon receiving said money the state treasurer shall place the whole thereof to the credit of the fund for the support of the Missouri workmen's compensation division. As the division may from time to time determine, the state auditor and state treasurer shall make transfers to the general revenue fund from the fund for the support of the Missouri workmen's compensation division, so as to refund any appropriations made to said fund out of the general revenue fund."

Also enacted by the 63rd General Assembly was Senate Bill No. 237, Missouri Laws of 1945, page 1977, relating to the state treasurer. Section 17 of said bill, which in its general provisions is the same as Section 13051, R.S. Mo. 1939, and which was repealed by the 63rd General Assembly, reads as follows:

"All fees, funds and moneys from whatsoever source received by any department, board, bureau, commission, institution, official or agency of the state government by virtue of any law or rule or regulation made in accordance with any law, shall, by the official authorized to receive same, and at stated intervals be placed in the state treasury to the credit of the particular purpose or fund for which collected, and shall be subject to appropriation by the General Assembly for the particular purpose or fund for which collected during the biennium in which collected and appropriated. The unexpended balance remaining in all such funds (except such unexpended balance as may remain in any fund authorized, collected and expended by virtue of the provisions of the constitution of this state), shall at the end of the biennium and after all warrants on same have been discharged and the appropriation thereof has lapsed, be transferred and placed to the credit of the ordinary revenue fund of the state by the state treasurer.\* \* \*"

It can thus be observed that we have these two acts passed by the same Legislature, and to an extent dealing with the same subject matter--Senate Bill No. 237 relating to the state treasurer, Section 17 thereof providing for the deposit in the ordinary revenue fund of the state treasury of all fees, funds and moneys from whatsoever source; and Senate Bill No. 248 relating to Workmen's Compensation, Section 3757 thereof providing that the tax money received from the insurance carriers be placed to the credit of the fund of the Division. In other words, it might appear that Section 3757, supra, is inconsistent with Section 17, supra, in that it does not provide for the transfer of the moneys in the fund to the general revenue fund, whereas, Section 17 does so provide. In *Gasconade County v. Gordon*, 241 Mo. 569, the court said at l.c. 581:

"In 36 Cyc. 1151, the general rule is thus announced: 'The rule that statutes in pari materia should be construed together applies with peculiar force to statutes passed at the same session of the Legislature; it is to be presumed that such acts are imbued with the same spirit and actuated by the same policy, and they are to be construed together as if parts of the same act. They should be so construed, if possible, as to harmonize, and force and effect should be given to the provisions of each; if, however, they are necessarily inconsistent, a statute which deals with the common subject-matter in a minute and particular way will prevail over one of a more general nature; and of two inconsistent statutes enacted at the same session, that will prevail which takes effect at the later date.'"

At l.c. 583 the court continued:

"It is easy to see why the rule of construction pertaining to statutes in pari materia applies with peculiar force to statutes passed at the same session of a legislative body. In such case we have in fact the same minds acting upon the one subject. It is not to be presumed that the same body of men would

pass conflicting and incongruous acts. The presumption is, that they had in mind the whole subject under consideration; that whilst the one general subject is touched in several separate acts, yet the legislative intent was that of a harmonious whole. In such case, it is the duty of the courts to so construe all the acts in such manner that each and every part thereof may stand, if such construction can be attained, without doing violence to the language used in the several acts."

We have then the rule of construction in such cases that, unless there is such a clear inconsistency in the acts that the two cannot possibly stand together, the two should be read together and harmonized, if possible, with a view to giving effect to a consistent legislative policy. State ex rel. County of Buchanan v. Fulks et al., 296 Mo. 614.

Bearing in mind such rules of legislative construction, and in an attempt to harmonize the two acts, let us examine them to see the possible meaning intended to be applied by the Legislature. Section 3757, appearing in the Missouri Laws of 1945, supra, says that, upon receipt of the money derived from these taxes on the insurance carriers, the state treasurer shall place the whole thereof to the credit of the fund for the support of the Missouri Workmen's Compensation Division. And as the Division may from time to time determine, the state auditor and state treasurer shall make transfers to the general revenue fund from the fund for the support of the Missouri Workmen's Compensation Division, so as to refund any appropriations made to said fund out of the general revenue fund. In other words, said section is silent as to any transfer of this fund to the general revenue fund, other than as the Division may from time to time determine. Section 17 of Senate Bill No. 237, appearing in Missouri Laws of 1945, supra, says that all fees, funds and moneys from whatsoever source received by any department, board, bureau, commission, institution, official or agency of the state government by virtue of any rule or regulation shall be placed in the state treasury to the credit of the particular fund, which in our case would be the fund for the support of the Workmen's Compensation Division, and be subject to appropriation for that fund during the biennium in which collected and appropriated. Then said section says:

"\* \* \* The unexpended balance remaining in all such funds (except such unexpended balance as may remain in any fund authorized,

collected and expended by virtue of the provisions of the constitution of this state), shall at the end of the biennium and after all warrants on same have been discharged and the appropriation thereof has lapsed, be transferred and placed to the credit of the ordinary revenue fund of the state by the state treasurer.\* \* \*

Are these provisions above described so repugnant as to be impossible of harmonizing? We think not. We see nothing in Section 3757 which would indicate that its provisions are intended to apply other than during each respective biennium. At the end of such periods the unexpended balance remaining in such fund is to be governed by Section 17 and thus be transferred to the credit of the ordinary revenue fund of the state. Such a working system is quite consistent with the procedure to be followed generally in this state as regards the state revenues. The unexpended balance remaining of such funds as the one in question are, under Section 17, supra, to be transferred into the general revenue, as provided in said section, with the exception of certain specified funds. Such excepted funds must be so provided for specifically. As was stated by the court in State v. McReynolds, 193 S.W. (2d) 611, 1.c. 613, where the court was referring to certain fees in the hands of the Curators of the University of Missouri, "Such fees are expressly excepted by statute from those funds required to be placed in the State Treasury. Section 13051, R.S. 1939, Mo. R.S.A." (Section 13051 was repealed by the 63rd General Assembly, and had the same provisions as contained now in Section 17, Laws of Missouri, 1945, supra.)

#### CONCLUSION

It is, therefore, the opinion of this department that Section 3757, Missouri Laws of 1945, page 2002, can and should be harmonized with Section 17, Missouri Laws of 1945, page 1982. The provisions of Section 3757 are intended to apply during each respective biennium as regards tax money received from the insurance carriers paid annually into the revenue department to the credit of the fund for the support of the Missouri Workmen's Compensation Division. At the end of such periods the unexpended balance remaining in such fund is to be governed by Section 17 and thus be transferred to the credit of the ordinary revenue fund of the state.

Respectfully submitted,

APPROVED:

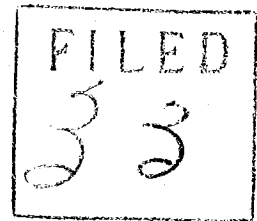
Wm. C. COCKRILL  
Assistant Attorney General

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J. E. TAYLOR  
Attorney General  
JCC:LR

FISH AND GAME: Construction of Section 20, Wildlife and Forestry  
CRIMINAL LAW: Code, page 664, Laws of Missouri, 1945.

October 23, 1947



Honorable Gerald W. Gleason  
Assistant Prosecuting Attorney  
Greene County  
Springfield, Missouri

Dear Sir:

This will acknowledge receipt of your request for an opinion which reads:

"We would like an opinion arising out of a question in Section 20 of the Wildlife Forestry Act.

"On Friday October 16, 1947, Clarence Taylor was tried in Greene County Circuit Court, Division One for feloniously dynamiting fish in Greene County, Missouri. The dynamiting occurred in a pond on a farm of the witness, L. C. Combs. Pond was privately owned and about two acres in size during dry weather and about ten acres in size during wet weather. In wet season it overflows to a river. This only occurred infrequently during the year. The pond was a natural pond.

"Mr. E. C. Curtis, who represents the defendant has filed a motion for a new trial after a jury verdict of guilty. The hearing on the motion will be largely on the question of interpretation of Section 20, above mentioned, that is, 'in any water of this State.'

"It is the prosecution contention that it included all waters, public and private. Whereas, attorney for defendant has cited Arkansas cases which seem to indicate that such a statute would not be extended to include ponds reservoir.

"We would appreciate your opinion on this

question before our hearing on Saturday morning October 25, 1947."

You stated in your request that you would like to have this opinion Saturday morning, October 25, 1947. We have not had time to do much research in this instance; however, we believe that the conclusion reached herein is the proper construction to be placed upon the words "in any of the waters of this state," as used in Section 20 of the Wildlife and Forestry Act passed by the 63rd General Assembly, page 669, Laws of Missouri, 1945.

*Answer* → You state the counsel for the defendant has cited Arkansas cases which seem to indicate that such words should not be extended to include ponds and reservoirs. Such construction is not binding upon the courts in this state (see Bowles vs. Smith, 111 Mo. 45). Apparently what the defendant is depending upon to support his contention is the decision of Milton vs. State, 221 S.W. 461, 144 Ark. 1, 1.c. 3, wherein the words "waters of this state" are construed under the Arkansas law. In that case, the appellant was charged with the offense of unlawful fishing in violation of the statute which made it unlawful to fish with a seine, net, trap or other device of that character in any waters of that state. The court, in holding that the defendant was not guilty by reason of the fact that the water he was fishing on did not come within the classification of "the waters of this state," said:

"The question presented is whether or not the body of water described is such as falls within the designation of the statute, 'the waters of this State.' We interpret the language of the agreed statement of facts to be, that Cogbill and Porter are the owners as tenants in common of the lands surrounding the lake, and are not separate owners. In other words, we find that the lake in question is an inland body of water wholly within the boundaries of certain owners, who hold title as tenants in common, and that it has no outlet or connection with any other body of water. In view of these facts, we are of the opinion that it does not fall within the terms, 'in any of the waters of this State.'

"The purpose of the statute was to protect and preserve fish in the public waters or such privately owned waters as were connected with other streams or bodies of water, and not to a private pond or lake wholly on the premises of an owner or common owners, which is not connected in any way with another stream or body of water. The former statute of this State regulating the taking of fish (Kirby's Digest, section 3600), contained an express provision exempting from the application of the statute waters 'wholly on the premises belonging to such person or persons using such device or devices.' This provision was omitted from the statute now in force, but, as before stated, we think that the term, 'in any of the waters of this State,' when considered in the light of the obvious design of the statute, excludes privately owned waters having no connection with other streams."

The court stated above that the former statute, regulating the taking of fish, contained an express provision exempting therefrom waters wholly on the premises belonging to persons using such devices. However, said provision is now omitted from the statute in force. We think the foregoing statutes of Arkansas should be construed in the following manner--that by deleting from the former statute the exception contained therein, the words "the waters of this state" should be all inclusive.

The primary rule of statutory construction is to ascertain from the language used the intent of the lawmakers, if possible, and to put upon the language its plain and rational meaning in order to promote its object. See *Donnelly Garment Co. vs. Keitel*, 193 S.W. (2d) 577. Another well established rule of statutory construction is that in construing statutes in *pari materia*, not only acts passed at the same session of the Legislature but also acts passed at prior and subsequent sessions may be considered. See *State ex rel. and to Use of Geo. B. Peck Co. vs. Brown*, 105 S.W. (2d) 909, 340 Mo. 1189. We find several Missouri decisions touching upon the question involved, such as *State vs. Lewis*, 73 Mo. App. 619, wherein the question of whether or not a slough was technically and, according to accepted legal definitions, a water of the state. However, the court in that case went off on the theory that



the defendant was seining with a prohibited seine and it was unnecessary to define a slough. In State vs. Blount, 85 Mo. 543, the Supreme Court of Missouri held that a bayou extending back from Lake Contrary, a public body of water in Buchanan County permitting fish to have free and uninterrupted access thereto, and not being wholly on the premises of the defendant, falls within the description "waters of this state." However, in that case, Section 1625 of the Revised States prohibited the erection and maintenance of any seine, net or trap in any water of the state, and contained a proviso that the prohibition therein shall not apply to waters wholly on premises belonging to persons using such devices. However, at that time, Section 1631 of the Revised Statutes of Missouri, defined "waters of the state" and specifically included in said definitions, sloughs.

- In Reid vs. Ross, 46 S.W. (2d) 567, l.c. 569, the Supreme Court of Missouri, en banc, in construing the words "in any waters of this state" as used in Section 8270, R. S. Mo. 1929, said:

"Section 8270 (the sections herein named are found in the revision of 1929) provides: 'It shall be unlawful for any person \* \* \* to take, catch, or kill, any fish in any of the waters of this state, by \* \* \* any \* \* \* means other than \* \* \* of the kind and at the time, and in the manner permitted by law.' The phrase, 'any of the waters of this state,' is used in various sections of article II, chapter 43, dealing with the preservation of fish and game. The words employed are broad and all-inclusive in their purport. That the Legislature intended them to be as all-comprehensive as their purport is clearly indicated by the exceptions it thought necessary to make. These exceptions are found in sections in pari materia with said section 8270. Section 8273, limiting the use of seines and nets, concludes as follows: 'Provided, that the restrictions of this section shall not apply to fish taken from private ponds and reservoirs when wholly upon the premises of owner or occupant. \* \* \*' Section 8275, prohibiting the sale of game fish, contains this proviso: 'Provided, that nothing in this section shall be construed so as to prevent the

the sale of artificially propagated fish held in captivity.' The article contains no other exceptions or provisos which operate as a limitation upon the meaning naturally to be given to the words, 'any of the waters of this state.' We therefore construe those words to mean any of the waters in this state in which fish do, or may, have a habitat, except private ponds and reservoirs when wholly upon the premises of owner or occupant, and waters in which fish are artificially propagated and held in captivity. Such an interpretation comports with the obvious purposes of the statute considered as a whole. See State v. Blount, 85 Mo. 543; Caldwell v. Erickson, 61 Utah, 265, 213 P. 182; People v. Miles, 143 Cal. 636, 77 P. 666." (Underscoring ours.)

From the above decision, it clearly indicates that had there been no exceptions in the laws dealing with the preservation of fish and game to Section 8270, providing that it shall be unlawful for any person to take, catch or kill any fish in any of the waters of this state, that the words "any waters of this state" would have been construed to include all waters, both public and private, in the State of Missouri.

The 63rd General Assembly, in enacting what is known as the Wildlife and Forestry Act, page 664 to 671 inclusive, outright repealed any provision in the law similar to the exceptions hereinabove referred to in Reid vs. Ross, supra, and did not include in the new Wildlife and Forestry Act any similar exceptions. Section 20 of said act reads:

"It shall be unlawful for any person to place any explosive substance or preparation in any of the waters of this state, whereby any fish which may inhabit said waters may be killed, injured or destroyed; and no person, by any such means, shall kill, catch or take any fish from said waters; provided, however, that explosive substances or preparations may be used in said waters, but only with the permission and under the supervision of the Commission. Any person violating any of the provisions of this section shall be deemed guilty of a felony, and upon conviction shall be fined

not less than two hundred dollars, nor more than one thousand dollars, or by imprisonment in the State Penitentiary for not more than two years, or by both such fine and imprisonment, for each such offense."

In view of the decision in Reid vs. Ross, supra, holding that the phrase "any of the waters of this state" when enacted was intended to be all-inclusive had it not been for certain statutory exceptions specifically mentioned in the decision, it clearly indicates that since all of those exceptions have been repealed that the words contained in Section 20, supra, "in any of the waters of this state" are inclusive and include all public and private waters in this state. Such conclusion is further fortified by the following facts. Section 4 of the act of the 63rd General Assembly, known as the Wildlife and Forestry Act, page 665, Laws of Missouri, 1945, provides that the ownership of and title to all wildlife of and within this state, whether resident, migratory or imported, dead or alive, are hereby declared to be in the State of Missouri. Furthermore, Section 26 of the same act provides that no wildlife shall be pursued, taken, killed, possessed or disposed of except in the manner, to the extent, and at the time or times permitted by rules and regulations of the Conservation Commission. Section 3 of the Wildlife and Forestry Code, 1947, adopted by the Conservation Commission of Missouri, provides no bird, fish, animal or other form of wildlife in this State of Missouri shall be molested, pursued, taken, enticed, poisoned, killed, transported, stored, served, bought, sold, given away or possessed, in any manner at any time, except as specifically permitted by these regulations and any laws consistent with Article IV, Sections 40-46 of the Constitution of the State of Missouri. The Conservation Commission has not defined waters of the state.

The courts in this state have often held that absolute ownership of wildlife is vested in the people of the state. In State vs. Heger, 194 Mo. 706, 1.c.c. 711, the court said:

"The authorities are uniform in holding that the absolute ownership of wild game is vested in the people of the State, and that such is not the subject of private ownership. As no person has in such game any property rights to be affected, it follows that the Legislature, as the representative of the people of the State, and clothed by them with authority to make laws, may grant to individuals the right to hunt and kill game at such times, and

upon such terms, and under such restrictions as it may see proper, or prohibit it altogether, as the Legislature may deem best. (Haggerty v. Ice Mfg. & Storage Co., 143 Mo. 238; Geer v. State of Connecticut, 161 U. S. 519; American Express Co. v. People, 133 Ill. 649; Ex parte Maier, 103 Cal. 476; State v. Rodman, 58 Minn. 393; Wagner v. People, 97 Ill. 320; Phelps v. Racey, 60 N. Y. 10.)"

#### CONCLUSION

Therefore, it is the opinion of this department that the words "in any of the waters of this state" contained in Section 20, page 669, Laws of Missouri, 1945, of the Wildlife and Forestry Act of the State of Missouri should be construed to include all waters of the state, both public and private.

Respectfully submitted,

AUBREY R. HAMMETT, Jr.  
Assistant Attorney General

APPROVED:

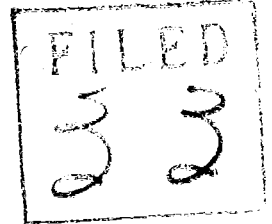
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J. E. TAYLOR  
Attorney General

ARH:VLM

FARMERS' FIRE AND : Farmers' mutual fire and lightning insur-  
LIGHTNING INS. COS. : ance companies may not write policies  
: against loss of personal property by theft.

November 17, 1947



Honorable William J. Gilwee  
Assistant Prosecuting Attorney  
of Jackson County  
Kansas City, Missouri

Dear Mr. Gilwee:

This opinion is in response to your letter of recent date, raising the question whether the Farmers and Merchants Mutual Fire Insurance Company of Jackson County, Missouri may insure its members against theft under the provisions of Section 6177, R.S. Mo. 1939, as amended in Laws of Missouri, 1943, page 612, etc. Your letter is as follows:

"In the rural parts of Jackson County, Missouri, the farmers are troubled increasingly with the loss by theft of their hogs, cattle, corn and other personal property, and they feel that if they were mutually insuring each others' property that it would serve toward bringing greater alertness and co-operation in preventing these thefts.

"We would appreciate an official opinion from your department as to whether their local Farmers' Mutual Insurance Company may mutually insure the hogs, cattle, corn and other personal property of their members against theft under the provisions of Section 6177, R.S. Mo. 1939, as amended in Laws 1943, at page 612."

Section 6177, R.S. Mo. 1939, was enacted as an exemption statute. It was passed as a new Act, Laws of Missouri, 1889, page 55, with two sections. The Act provided for the exemption of farmers' mutual fire and lightning insurance companies from the terms of general

insurance laws of Chapter 119 of the then Revised Statutes.

The new Act of 1889 was amended, Laws of Missouri, 1891, page 165, and still remained an exemption statute, numbered Section 5909, with the further provision that a farmers' mutual fire and lightning insurance company could be incorporated by filing a copy of its constitution and by-laws with the Secretary of State, and paying the sum of \$10.00 into the State Treasury.

Said Section 6177, R.S. Mo. 1939, has been carried through the several revisions of the statutes, and in amendments in the Session Laws, as an exemption statute, with the still existing proviso for organization as noted above, and was so retained in the amendment thereof, Laws of Missouri, 1943, pages 612, 613 and 614. Throughout all of these revisions and amendments Article 15, Chapter 37, including said Section 6177, by whatever number, was titled, and is now so denominated, as "Farmers' Mutual Fire Insurance Companies \* \* \*". There was no provision whatever in any amendment or revision of the statutes touching the subject matter of said Article 15, including Section 6177, authorizing such companies to include in a policy contract any risk upon the property of the members except loss by fire and lightning.

Article 15 of Chapter 37, R.S. Mo. 1939, furnishes in its several sections an interesting background for observation of the authority of farmers' mutual insurance companies to organize companies for different kinds of coverage. There are no less than three different kinds of farmers' mutual insurance companies that may be organized to carry on a mutual insurance business under said Article 15.

Said Section 6177 provides for the organization of farmers' mutual fire and lightning insurance companies.

Section 6181 of said Article 15, provides for the organization of farmers' mutual tornado, windstorm and cyclone insurance companies.

Section 6183 of said Article 15, provides for the organization of farmers' mutual hail insurance companies.

It is evident that the Legislature intended that the several kinds of farmers' mutual insurance companies, as identified by the three sections hereinabove mentioned, were to be confined strictly to writing risks covering only

the hazards mentioned in each of said sections.

The Legislature did not provide in said Article 15, or elsewhere, for the organization of farmers' mutual casualty insurance companies to cover loss by theft, nor has the Legislature included in any of said sections of said Article 15, the power of any of the three kinds of companies, fire, windstorm or hail, to engraft onto a contract against loss by any of such risks, the risk of loss by theft.

The amended Section 6177, Laws of Missouri, 1943, page 612, includes numerous changes by insertion of words, and elimination of words, but nowhere does it include authority for a farmers' mutual fire and lightning insurance company to write a policy against the hazard of theft nor to include a risk against theft in a fire and lightning policy contract.

Said Article 15 was again amended by the 64th General Assembly of this State in House Bill #351, which was truly agreed to and finally passed, by adding a new section to be known as Section 6177a immediately following Section 6177, R.S. Mo. 1939. Said Section 6177a is as follows:

"Farmers' mutual insurance companies organized in accordance with the provisions of this article are hereby authorized to issue extended coverage indorsements to their policies to insure the property of members against loss from windstorm, hail, explosion, riot, riot attending a strike, civil commotion, aircraft, vehicles, and smoke."

It will be observed that said amendment numbered Section 6177a, while authorizing extended coverage by indorsement in many particulars by companies organized under the named sections of said Article 15, does not include any coverage of theft in any of such classes of farmers' mutual insurance.

The writing of a risk against theft by any farmers' mutual fire and lightning insurance company in a fire policy or other policies in the present state of our statutes would, we believe, be ultra vires.

Section 5 of Article XI of the 1945 Constitution of this State is, in part, as follows:

"No corporation shall engage in business other than that expressly authorized in its charter or by law, \* \* \*".

There being no statute in this State permitting the writing of theft insurance by farmers' mutual insurance companies as a part of the risks provided for would, we think, under the above prohibitive clause of the Constitution, render such unauthorized coverage void, if included in a policy issued by such company.

The only recovery which may be had, as we read the authorities, for "theft" under a fire policy is where fire was the proximate cause of the loss, and theft occurred during or after the on-set of the fire. This subject is very interestingly treated in Wood on Insurance, Volume 1, pages 264, 265, Section 106, which so states the rule, and cites the case of Newmark vs. Insurance Company, 30 Mo. 160. The Newmark case was one where a loss occurred by fire on a stock of goods owned by plaintiff covered by a policy issued by the defendant. Some of such goods were stolen as a consequence of being exposed by the fire. The controversy was whether the company was liable for the theft of the goods after the fire was extinguished as well as during the fire. The Court, 1.c. 164, said:

"\* \* \* the precise time when a theft occurs is not important, if it be occasioned directly by the fire. \* \* \*".

There are numerous decisions by the Supreme Court and the Courts of Appeals of this State construing policies written on one line of risks with respect to health and accident, denying the right of recovery for a loss not strictly within the terms of the policy, for instance, death from typhoid under compensation insurance, as not being an accident causing an injury or death within the course of employment of the employee.

We find no Missouri case on the question of liability under a mutual fire policy for loss under any risk other than that of fire.

32 C.J. states, generally, the rule of liability of companies under the general head of "Mutual Companies", page 1018, 1.c. 1028, the following:



"\* \* \* The company may enter into a valid contract of insurance against such and only such risks as it is authorized to insure against by its charter, or articles, or the statutes under which it is created. \* \* \*".

The above Corpus Juris text cites, under footnote 47, numerous cases from many jurisdictions holding that a company authorized to insure property on one class of risks was not liable for a loss on an entirely different kind of risk. Such footnote, with comments on several of such cases, cites the following:

In the Wisconsin case of O'Neil vs. Mut. F. Ins. Co., 38 N.W. 345, it is held:

Under authority to insure detached dwellings, farm buildings, etc., a mutual company has no power to insure an incubator building.

In the Minnesota case of Delaware Farmers' Mut. Ins. Co. vs. Knuppel, 57 N.W. 656, it is held:

Authority to insure farm buildings, live stock, and grain against loss by fire does not cover the power to insure growing grain against hail.

In the Pennsylvania case of Knapp vs. North Wales Mut. Live Stock Ins. Co., 11 Montg. Co. (Pa.) 119, it was held:

Authority to insure furniture, goods, wares, merchandise, and effects does not cover live stock insurance.

In the Michigan case of Preferred Masonic Mut. L. Ins. Co. vs. Giddings, 70 N.W. 1026, it was held that:

Under authority to issue policies payable on the death of insured that a policy payable on the occurrence of total disability is unauthorized.

In the Massachusetts case of Knowlton vs. Bay State Beneficiary Assoc., 50 N.E. 929, it was held that:

Honorable William J. Gilwee -6-

Under a statute restricting casualty insurance on the assessment plan to cases of accidental death or disability such a company has no power to insure against disability from sickness.

So, it seems, considering the above, that Section 6177, R.S. Mo. 1939, as amended, Laws of Missouri, 1943, pages 612, 613 and 614, does not provide for the insurance of personal property by mutual fire and lightning insurance companies against loss by theft.

#### CONCLUSION

It is, therefore, the opinion of this Department that farmers' mutual fire and lightning insurance companies are not authorized by the terms of Section 6177, R.S. Mo. 1939, as amended, Laws of Missouri, 1943, pages 612, 613 and 614, or any other section of the statutes of the State of Missouri, to mutually insure the hogs, cattle, corn or other personal property of their members against theft.

Respectfully submitted,

GEORGE W. CROWLEY  
Assistant Attorney General

APPROVED:

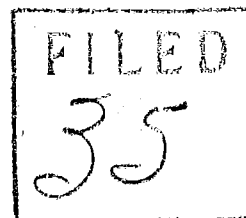
J. E. TAYLOR  
Attorney General

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FUNCTIONS OF BOARDS  
OF EDUCATION:

Powers and duties of the board of Education of consolidated school districts after organization of new district, and powers of board of directors of old district which form part of the consolidated district.

January 24, 1947



Honorable Percy W. Gullie  
Prosecuting Attorney  
Alton, Missouri

Dear Mr. Gullie:

This will acknowledge receipt of your letter of recent date and addressed to the Honorable J. E. Taylor, Attorney General, Jefferson City, Missouri, requesting answers to several questions, all relative to the consolidation of school districts, which said letter is in words and figures as follows:

"A consolidated school district comprised of five districts and more than fifty square miles has been organized in Oregon County Missouri as provided for in sections 10493 to 10500 inclusive. It is our understanding as set out in section 10498 that this organization does not take effect until July 1st following the organization. This brings several questions up regarding procedure:

First: Does the newly elected board of six directors as elected at the organization meeting have any authority before this date?

Second: Can a levy for the ensuing year be voted or a bond be voted?

Third: Can a school site be contracted for?

Fourth: Who will call the election for this coming April?

Fifth: Who has jurisdiction in employment of the teachers for the coming year and can the present teachers hold their contracts under the continuing contract law if not notified (more teachers are employed now than there will be teaching units for next year.)"

With your questions before us, we shall proceed to answer them in consecutive order as given and as follows:

First - Your letter states that the newly consolidated district

was organized under Section 10493 and 10500, inclusive, supra.

Section 10493 states, in part, as follows:

"\* \* \*When such new district is formed it shall be known as consolidated district No. \_\_\_\_\_ of \_\_\_\_\_ county, and all the laws applicable to the organization and government of town and city school districts, as provided in Article 5, Chapter 72, R. S. 1939, shall be applicable to districts organized under the provisions of sections 10493 to 10500, inclusive."

Section 10467, R. S. Mo. 1939, relative to the organization meeting, is pertinent, and in part as follows:

"First- \* \* \*When all present shall have voted, the chairman shall appoint two tellers, who shall call each ballot aloud and the secretary shall keep a tally and report to the chairman, who shall announce the result; and if a majority of the votes cast are 'for organization,' the chairman shall call the next order of business.

"Second- To elect six directors, as follows: Two shall be elected for three years, two for two years and two for one year, and each director shall be elected separately and the result announced in the manner prescribed for organization. If said election is held at a special meeting, from then until the next annual meeting shall be taken as one year, so far as relates to the terms of the directors elected. The directors chosen must comply with the requirements of section 10470 of this article. The chairman and secretary of such meeting shall keep a record of the proceedings thereof and turn the same over to the board of education of such district, to be entered upon its records by the clerk of such district."

Section 10470, R. S. Mo. 1939, provides, in part, as follows:

"Within four days after the annual meeting, (in this case a special meeting), the board shall meet, the newly elected members, who shall be qualified by the taking of the oath of office \* \* \* and the board organized \* \* \*. \* \* \*The president and secretary, except as herein specified, shall perform the same duties and be subject to the same liabilities as the presidents and clerks of the school boards of other districts."

The Springfield Court of Appeals in State ex rel. Fleener v. Consolidated School District No. 1 et al, 238 S. W. 819, 1. c. 820-21, in discussing this identical point said, in part, as follows:

"By section 11243 the board of education of any consolidated school district shall, except as therein provided, 'perform the same duties and be subject to the same restrictions and liabilities as the boards of other school districts acting under the general school laws of the State.' The tax levy of which complaint is made in the case at bar was under sections 11244, 11151, and 11209, all of which figures in the government of the consolidated district. We see, therefore, that many and various provisions of the school law must be considered in determining the power and authority of a consolidated district.

"\* \* \*We think that the reasonable and liberal construction to place on section 11252, (now 10498, supra) on which relators rely, is that the old districts which went to form the consolidated district would cease to function on June 30th after the consolidation, but that the section in no wise affects the functioning of the consolidated district. Any other construction would result in utter confusion and irreparable injury. Suppose it be, as relators urge, that the consolidated district could not

function until June 30th after its organization. The old districts were absorbed into the consolidated district on October 22, 1920, and thereafter had no power to do anything except to finish the business under way, and at the end of the school year, June 30th, make the turn over as required by section 11262. (Now Section 10498, supra.) There would be no annual meeting of the old districts, because they would have no powers left except to continue as provided in section 11262. If the consolidated district could not function till June 30th, there are many things that it might not do then, because certain things are required to be done at the annual meeting, and the statute fixes the annual meeting on the first Tuesday in April." (Underscoring ours.)

In this case, a consolidated school district was organized October 22, 1920, and at the annual school election, the following April, voted bonds, which were held valid, although the old districts continued to exist until the end of the school year for certain purposes.

Second - Section 10483, R. S. Mo. 1939 states, in part as follows:

"The qualified voters of such town, city or consolidated school district shall vote by ballot upon all questions provided by law for submission at the annual school meetings, and such election shall be held on the first Tuesday in April of each year, and at such convenient place or places within the district as the board may designate, beginning at 7 o'clock a. m. and closing at 6 o'clock p. m. of said day. The board shall appoint three judges of election for each voting place, and said judges shall appoint two clerks; said judges and clerks shall be sworn and the election otherwise conducted in the same manner as the elections for state and county officers and the result thereof certified by the judges and clerks to the secretary of the board of education, who shall record the same, and, by order of said board, shall issue

certificates of election to the persons entitled thereto; and the results of all other propositions submitted must be reported to the secretary of the board, and by him duly entered upon the district records. All propositions submitted at said annual meeting may be voted for upon one and the same ballot, and necessary poll books shall be made out and furnished by the secretary of the board: \* \* \*  
(Underscoring ours.)

Section 10328, R. S. Mo. 1939, is in part as follows:

"For the purpose of purchasing school house sites, erecting schoolhouses, library buildings and furnishing the same, and building additions to or repairing old buildings, the board of directors shall be authorized to borrow money, and issue bonds for the payment thereof, in the manner herein provided. The question of loan shall be decided at an annual school meeting or at a special election to be held for that purpose. \* \* \*  
(Underscoring ours.)

Our Supreme Court, in State ex rel v. Gordon, 261 Mo. 631 1. c. 646-7, in the interpretation of this identical section stated as follows:

"It is finally insisted that the Act of 1913 does not confer authority upon consolidated school districts organized thereunder to issue any bonds whatsoever.

"Literally speaking this insistence is true, but when we take into consideration the fact that the Legislature was dealing with the general education of its citizens and authorized this higher class of instruction, it is apparent that it intended that the general school laws of the State, in so far as applicable, should be read in connection with this class of schools,

- in order to carry out the general design and intention of the legislative body.

"The Legislature knew that this class of schools had no school property--lands, buildings or other instrumentalities-- with which to carry on the school work, no more than the ordinary public school has when first organized, without resort should be had to borrowing money for those purposes. That being true we must look at the general school laws of the State regarding this subject, and read it in connection with this incomplete act; and by so doing, we find that section 10777, Revised Statutes 1909, (now section 10328, supra) provides for the issuance of bonds for the purposes for which those in controversy were issued." (See State ex rel. Fleener v. Consolidated School District, supra.)

Third - Section 10471, R. S. Mo. 1939, provides, in part, as follows:

"When the demands of the district require more than one public school building therein, the board shall, as soon as sufficient funds have been provided therefor, establish an adequate number of primary or ward schools, corresponding in grade to those of other public school districts, and for this purpose the board shall divide the school district into school wards and fix the boundaries thereof, and the board shall select and procure a site in each newly formed ward and erect a suitable school building thereon and furnish the same; and the board may also establish schools of a higher grade, in which studies not enumerated in section 10627 may be pursued; \* \* \*."

Section 10348, R. S. Mo. 1939, provides, in part, as follows:

"Whenever any distirct shall select, at the



annual or any special meeting, one or more sites for one or more schoolhouses, or the board of education in city, town or consolidated school district, under the provisions of the statute applicable thereto, shall locate, direct and authorize the purchase of sites for schoolhouses, libraries, offices and public parks and playgrounds, or additional grounds adjacent to schoolhouse site or sites, and cannot agree with the owner thereof as to the price to be paid for the same, or for any other cause cannot secure a title thereto, the board of directors, or board of education aforesaid may proceed to condemn the same in the same manner as provided for condemnation of right of way in article 2, chapter 8, R. S. Mo. 1939, and upon such condemnation and the payment of the appraisal, as therein provided, the title of said lot or land shall vest in the board of directors or board of education aforesaid for use in trust for the district and the purpose for which the same was so selected and located. \* \* \* (Underscoring ours)

The Springfield Court of Appeals in Crow et al v. Consolidated School District No. 7 et al, 36 S. W. (2d) 676 l. c. 677, said, in part, as follows:

"\* \* \*The general law referred to in section 11243 (supra) is found in article 11 of the school laws. The only section of the general law having to do with the selection of school sites is section 11143, providing for condemnation proceedings, and as pointed out by the St. Louis Court of Appeals in the Gladney Case, supra. 'The language of this section clearly indicates that it was the intention of the Legislature that in a common school district the authority to select a schoolhouse site be vested in the resident taxpayers of the district, assembled in annual meeting, but that in a city, town or consolidated district such

authority be vested in the board of education. And when this section is considered with section 11241, supra, (now section 10471, supra) and with section 11238, Rev. St. 1919, vesting the government and control of town and city districts in a board of education, and it is borne in mind that the authority here in question is not, by any other statute applicable to a district of this character, vested in the qualified voters of the district, it seems quite clear that by section 11241, supra, it was intended to confer upon the board authority to select and acquire, or change, high school sites, as well as sites for schools of lower grade; that the authority to "establish schools of higher grade" was intended to carry with it the authority to select a site and provide a home for the school. " (Underscoring ours.)

In Consolidated School District No. 2 v. O'Malley, 125 S. W. (2d) 818, 1. c. 820, our Supreme Court said:

"Even so, the quoted part of Sec. 9333 provides that the board of education of a consolidated school district shall perform the same duties as the boards of school districts acting under the general school law. In other words, Sec. 9215 (now Sec. 10348, supra) of the general school law, by this reference, is incorporated into the statute relating to city, town and consolidated school districts. If so, plaintiff was authorized by Sec. 9215 (now Sec. 10348, supra) to condemn the lots in question for school purposes."

Fourth - It will not be necessary for anyone to call the annual school election. The date is set by law, Sec. 10483, supra. However, it will be necessary for the board of education of the newly formed consolidated school district to select the place for holding the annual school election, appoint the judges,

and otherwise decide on all the propositions to be voted on at the annual school election, give notice of the election, print the ballots etc., as provided for in sections 10469, R. S. Mo. 1939, and 10483, supra.

Fifth - (a) The newly elected board of education will employ the teachers and a superintendent for the newly created consolidated school district for the ensuing school year, as provided for in section 10342, R. S. Mo. 1939, which is in part as follows:

"The board shall have power, at a regular or special meeting called after the annual school meeting, to contract with and employ legally qualified teachers for and in the name of the district; all special meetings shall be called by the president and each member notified of the time, place and purpose of the meeting. \* \* \* All transactions of the board under this section must be recorded by and filed with the district clerk: Provided, that the board of education of any first-class high school may employ a superintendent either before or after the annual school election."

(b) It will be necessary for the board of education of the newly formed consolidated school district to notify the present teachers in writing that their services will not be needed for the ensuing school year; provided, of course, the services of any of them will not be required, or failed to be elected for the ensuing school year, as provided for in House Bill 63, Section 10342A, Page 890, Laws of Missouri 1943, which is, in part, as follows:

"\* \* \* It shall be the duty of each and every board having one or more teachers under contract to notify each and every such teacher in writing concerning his or her re-employment or lack thereof on or before the fifteenth day of April of the year in which the contract then in force expires. Failure on the part of a board to give such notice shall constitute re-employment on the same terms as those provided

in the contract of the current fiscal year; and not later than the first day of May of the same year the board shall present to each such teacher not so notified a regular contract the same as if the teacher had been regularly re-employed. \* \* \*"

It is the general rule in this State where one corporation goes out of existence by being annexed to or merged in another corporation that the subsisting corporation is entitled to all the property and answerable for all liabilities. Thompson v. Abbott, 61 Mo. 176, 1. c. 177, State v. Smith, 121 S. W. (2d) 160 1. c. 162.

#### CONCLUSION

It is therefore the opinion of this department:

1. That the board of education of the consolidated district has full power and authority to carry on the business of said district, such as:

- (a) Providing for funds for maintaining the school for the ensuing school year.
- (b) The voting of bonds to erect a new school building, repair old school buildings, equip new or old school buildings.
- (c) To select, contract for, and/or condemn land for new sites.
- (d) To select the place and hold the annual school election.
- (e) To elect teachers and a superintendent for ensuing school year, and to notify teachers now teaching in the old districts that he or she has been elected to teach in the consolidated school district, or has failed to be elected to teach in the said consolidated

Honorable Percy W. Gullic

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school district for ensuing school year.

2. That the old districts which merged into the consolidated school district, remain in operation, without any powers or functions, except to carry on its respective school until the end of the school year and then at that time turn over all of the property of the old districts to the board of education of the consolidated school district..

Respectfully submitted,

HARRY J. SALSURY  
Assistant Attorney General

APPROVED:

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J. E. TAYLOR  
Attorney General

HJS:EH

ESTATE TAX: Intangible personal property estate of nonresident subject to Missouri estate tax.

October 29, 1947

Honorable James W. Griffin  
Circuit Attorney  
City of St. Louis  
St. Louis, Missouri



Dear Sir:

Reference is made to your inquiry of recent date requesting an official opinion of this department upon the following question:

Is the estate of a nonresident which consists solely of intangible personal property subject to the Missouri estate tax?

The Missouri estate tax is imposed under the provisions of Section 574, R. S. Mo. 1939, as reenacted, Laws of 1945, page 66, which reads as follows:

"In the event that the total of the estate, inheritance, legacy and succession taxes imposed upon the several interests and property comprising the estate of the decedent, by law, less exemptions allowed by law, and all other state inheritance and estate taxes, shall not equal the maximum credit now or hereafter allowable to the estate of such decedent against the United States federal estate tax imposed with respect thereto, whenever the federal estate tax is determined, an additional tax shall then be imposed upon the value of the net estate of said decedent as of the date of such determination equal to the difference between the total of the tax imposed under said section 573, including all other state inheritance and estate taxes, and the credit for estate, inheritance, legacy and succession taxes allowable to the estate of such decedent against the United States federal estate tax."

Honorable James W. Griffin

You will note that no exemption from this tax appears in the act. It, therefore, by its own terms, is applicable to all estates subject to administration within the State of Missouri, whether of residents or nonresidents, and without regard to the nature of the property comprising the assets of the estate.

While it is true that a primary rule for the construction of revenue statutes is that they must be most strongly construed against the taxing power, yet a different rule prevails with respect to those who claim exemption from statutes imposing valid taxes. Your attention is directed to *In re First National Safe Deposit Co.*, 173 S.W.2d 403, wherein the Supreme Court of Missouri said, citing *State ex rel. v. Gehner*, 11 S.W.2d 30, 1.c. 34:

"\* \* \* "Such statute and constitutional provisions are construed with strictness and most strongly against those claiming the exemption. \* \* \* the burden is on the claimant to establish clearly his right to exemption." \* \* \*"

We note in the letter accompanying your request for this opinion that it is urged that by reason of a certain amendment having been made to the inheritance tax statute, which had the effect of exempting estates of the nature here under consideration from that tax, a similar exemption has also been made with respect to the estate tax. This theory has many aspects of verity, but we believe that a complete examination of the applicable statutes and appellate court decisions discloses it to be erroneous.

At the outset, it may be well to point out that in Missouri there exists two distinct types of succession taxes. The first, commonly known as the "inheritance" tax, is one based upon the right to receive the property of a decedent by a legatee or devisee. See *In re McKinney's Estate*, 173 S.W.2d, 898. Secondly, under the statute now under consideration, there is imposed upon the right to transmit property at death what is commonly known as the "estate" tax. See *Brown v. State*, 19 S.W.2d 12. The legal power to transmit property at death or privilege of succession, or both, may be the basis of classification for inheritance tax purposes. See *Stebbins v. Riley*, 45 S.Ct. 424, 268 U.S. 137, 69 L.Ed. 884.

With these distinctions in mind, we now examine the legislative enactment said to form the grounds for holding estates of nonresidents consisting solely of intangible personal property exempt from the Missouri Estate Tax Act.

Honorable James W. Griffin

Prior to 1941, Section 571, R. S. Mo. 1939, and prior similar statutes, if literally construed, had the effect of subjecting the estates of nonresidents to the Missouri inheritance tax without regard to the nature of the property comprising such estates. However, in *Missouri v. Baldwin*, 19 S.W.2d 732, reversed, *Baldwin v. State of Missouri*, 50 S.Ct. 436, 281 U.S. 586, 74 L.Ed. 1056, the Supreme Court of the United States held that to the extent the Missouri Inheritance Tax Act sought to impose an inheritance tax upon the intangible personal property of nonresident decedents, it was in conflict with the Fourteenth Amendment of the Federal Constitution and void. This decision of the Supreme Court of the United States represented a complete departure from a long line of prior decisions by that court, culminating in *Blackstone v. Miller*, 188 U.S. 189, 47 L.Ed. 439, 23 S.Ct. 277.

It was after this decision that the General Assembly of Missouri amended Section 571, R. S. Mo. 1939, which is the statute enumerating the transfers of property subject to the Missouri inheritance tax, by adding thereto the following proviso:

"\* \* \* and provided further that nothing herein contained shall be construed as imposing a tax upon any transfer as defined in this Act, of intangibles, however used or held, whether in trust or otherwise, by a person, or by reason of the death of a person, who was not a resident of this state at the time of his death."

It is apparent that this action on the part of the General Assembly has specifically relieved the estates of nonresidents of the Missouri inheritance tax when such estates consist solely of intangible personal property. No such action, however, was taken with respect to the statute, quoted supra, imposing the Missouri estate tax, which is at least indicative of an intention on the part of that body that such exemption should not be extended with respect to that distinct tax.

In view of the holding in *Baldwin v. Missouri*, cited supra, it might be urged at this point that to construe the Missouri Estate Tax Act as we have herein would render it subject to the same vice of unconstitutionality as was found in the Missouri Inheritance Tax Act. This, we do not believe to be true, however, as the entire effect of the opinion in *Baldwin v. Missouri* has been completely overturned by the subsequent cases of *Curry v. McCanless*, 307 U.S. 357, 83 L.Ed. 1339, 59 S.Ct. 900, and *Tax Commission v. Aldrich*, 316 U.S. 174, 86 L.Ed. 1358, 62 S.Ct. 1008.



Honorable James W. Griffin

These cases have had the effect of restoring the taxation of intangible personal property to the status it occupied prior to Baldwin v. Missouri. We quote from Tax Commission v. Aldrich, supra:

"\* \* \*In other words, we restore these intangibles to the constitutional status which they occupied up to a few years ago. See Greves v. Shaw, 173 Mass. 205, 53 NE 372; Larson v. MacMiller, 56 Utah 84, 189 P 579; and cases collected in 42 ALR pp. 365 et seq."

We now examine the historicity of the Missouri Estate Tax Act.

By an Act of the Congress, approved February 26, 1926, the Federal estate tax was imposed. Among other provisions found in the act was one permitting an exemption against the tax imposed thereunder to the extent of eighty per cent in the event that state succession taxes amounted to that sum or more. To take advantage of this provision, the General Assembly of Missouri immediately thereafter enacted what now appears as Section 574, R. S. Mo. 1939, as reenacted, Laws of 1945, page 66. The original act is found in Laws of 1927, page 100.

The intent and purpose of the enactment are plain. The State of Missouri thereby secured for itself revenue which otherwise would have been paid to the Federal Government, and did not impose any additional tax burden upon the estate of the decedent. As appears from its provisions, the estate tax in each instance is merely computed as the difference between the sum total of all inheritance taxes payable by an estate and the maximum credit allowable under the Federal Estate Tax Act.

Because of the distinct nature of this tax, and since it is not imposed upon the right to receive property, but upon the right to transmit property, we think the reason is clear why the General Assembly did not see fit to amend the act at the time of the amendment of the Inheritance Tax Act. The Inheritance Tax Act, insofar as it sought to impose a tax upon the transfer of intangible personal property of nonresident decedents, was voided by Baldwin v. Missouri, supra, but the Estate Tax Act had not been so affected.

Honorable James W. Griffin

CONCLUSION

In the premises, we are of the opinion that the estate of a nonresident decedent consisting solely of intangible personal property is subject to the Missouri estate tax, computed at eighty per cent of the basic Federal estate tax, less credit for all other state, inheritance and estates taxes.

Respectfully submitted,

WILL F. BERRY, Jr.  
Assistant Attorney General

APPROVED:

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J. E. TAYLOR  
Attorney General

SCHOOLS:

School election where a majority of voters favored annexation not held invalid because order of board of school directors calling election not set out in minutes.

SCHOOL ELECTIONS:

OPINION NO. 37

April 9, 1947



Mr. Lane Harlan  
Prosecuting Attorney  
Boonville, Missouri

Dear Mr. Harlan:

This is in reply to your letter of March 31, 1947, requesting an opinion from this department, which reads as follows:

"With regard to our conversation this morning here are the facts as I understand them to be. School District No. 32 of Cooper County known as the Lowland School District voted to annex with the Woolbridge School District, District No. 34. The election was held pursuant to Section 10484 R.S. Mo. 1939. This was in response to a petition signed by sixteen or seventeen residents of the district. None of the members of the school board of the district signed the petition. After the petition was signed and presented to the board of District No. 32 notices were posted and an election was held. The election carried by a small majority. On election day a clerk of the election was elected who counted the ballots and the clerk of the election then certified the result to the County Clerk. This was sometime along in the middle of February.

"The contention seems to be that no formal order of the board is contained in the minutes with regard to ordering such an election. In fact no minutes were kept of the meeting and I understand it has been the practice of that board not to keep any minutes of its proceedings.

"There is the case I mentioned to you this morning in 54 Missouri Appeals 202 which seems to indicate that failure to show the minutes would render the election void.

"Saturday our County Treasurer, Mr. Laurence White,

Mr. Lane Harlan

received a letter from Schaumburg and Martin to the effect that the election was void and that there was no merger or consolidation and that any interference on his part would subject him to liability.

"The basic question seems to me to be whether or not said election was valid. If the election was valid then the school board of District No. 32 is no longer in existence and it necessarily follows that it has no authority to issue warrants for payment of funds.

"However, if the election was void then there had been no merger or consolidation, the board of District No. 32 still retains its legal entity and it necessarily follows that it does have authority to issue warrants.

"My view on the subject, if it may be of any assistance, is that the election is valid because the petition was signed and presented to the members of the board of District No. 32. By the above enumerated section it is mandatory that the board upon presentation of the petition call a special election. It is reasonable to deduce from that I believe that the function of the board's ordering a special meeting is purely ministerial and that the refusal of the board to order one would either subject the board to dismissal or would not invalidate an election held pursuant to notices posted properly and signed by the clerk of said board with regard to the election. The fact that the notices were posted and were signed by the clerk of the board would possibly indicate that the order was in due form. Certainly it is being presumed that an administrative official will act lawfully thus the mere presence or absence of the minutes would not per se invalidate the election.

"The case up here can I believe be distinguished on the facts from the case cited in 54 Missouri Appeals because in that case as I understand the facts there had been no minutes of the board and that the clerk of the board himself had initiated all proceedings.

Mr. Lane Harlan

"Mr. White, of course, is in the position of not knowing how to proceed. If he fails to issue a warrant on District No. 32 and the election was void he will be subjected to liability. If on the other hand he honors a warrant issued by District No. 32 and the election was void he will again be subjected to liability.

"My interest in the case is concerned only with the liability of Mr. White, our County Treasurer."

The specific question for consideration is whether an election decreeing the annexation of one school district to another should be held invalid because the order of the board of school directors calling such an election was not formally set out as minutes of the board meeting. We think not. The statute under which this election was held was Section 10484, R. S. Mo. 1939.

It appears that no minutes were kept of the meeting of the board of directors. Consequently, there was no record of an order of the board at that meeting and in fact it has evidently been the practice of the board not to keep minutes of its proceedings at any of the board meetings. Section 10484 does not expressly require such minutes to be kept, but the general statutes relating to meetings of school directors do require that some record be kept of the proceedings. However, we believe that the question submitted can be resolved without going into the question of the failure of the board of directors to keep a record of any of its proceedings.

We submit that there is a presumption that public officers properly perform their duties when there is no record present and in absence of a contrary showing. This rule is set out in the case of Henry v. Dulle, 74 Mo. 443, at pages 450, 451 and 452:

" \* \* \* The position taken by counsel that under the above section a resolution adopted by the board of education of a city attaching territory outside of its corporate limits for school purposes, remains inoperative till the secretary of the said board transmits copies of the same to the clerk of each township affected thereby, and till the township clerks perform their duty under the section, is not maintainable. The statute does not so declare, and such a construction of it would put it in the power of the secretary of the board and

Mr. Lane Harlan

township clerks to nullify the action of the board, by failing to perform the ministerial duties imposed upon them by the statute.\* \* \*

" \* \* \* the presumption may be justified and indulged that the secretary of the board of education of Jefferson City did his duty in certifying the resolution of the board to the township clerk, and that the township clerk acted upon it and made the sub-districts of the township to conform to it. School Directors v. School Directors, 73 Ill. 255; State ex rel. v. Board of Education, 64 Mo. 54; Long v. Joplin M. & S. Co., 68 Mo. 431. \* \* \*"

This view is supported in the case of State v. McKown, 290 S.W. 123, page 126:

" \* \* \* It was the duty of the clerk to sign the notices. The presumption obtains in the absence of evidence to the contrary that he performed this duty. \* \* \*"

Therefore, we must assume that the district school directors in their meeting properly performed their duty and made the required order calling said election.

Our attention is directed to the case of State ex rel. White v. Lockett, 54 Mo. 202, where it was held that the vote on the question of annexation was without authority and amounted to nothing as the relators failed to show that the board of directors authorized the vote and that the notices were posted in obedience to the order of such board. That case cannot be taken as authority in the present case, as there was no pretense there that the board met and took any action as a board. A petition was circulated to the directors as individuals but no unified action was taken. In the case at bar the school directors met and considered the proposition at a regular meeting. However, no record was made of an order calling an election.

We find this statement in the above case:

"Even though the proof offered had shown a meeting of the directors of the district for the purpose of taking action on the petition, the action of the board thereon could only have been shown by the record which the statute required the clerk of the board to make."

This statement is obiter dictum and cannot be given weight or considered as authority.

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In Decker v. School District No. 2, 101 Mo. App. 715, we find this statement at page 119:

" \* \* \* It seems to us that when all the members of a school board meet at some place in the district, whether in obedience to notice or by accident, they may if they choose, hold a board meeting and proceed to transact any ordinary business pertaining to the district and that a failure on their part to make and preserve minutes of their proceedings will not affect the rights of a party with whom they have made a valid settlement at such meeting.

"The evidence conclusively shows that, in making the settlement of plaintiff's account with him, they did not act individually but collectively and as the board of directors of the school district, and we think the district is conclusively bound by their action on that occasion."

There it was held that even though no record was kept of the action of the school board this fact will not effect the rights of someone who has relied on such action. This case is analogous to the case at bar where the majority of the voters favored annexation and have relied on the action of the school board and the election proceedings.

In Peter v. Kaufmann, 38 S. W. (2d) 1062, minutes of the school board meeting were recorded, but there was no mention of a formal order of the board calling an election. It was said at page 1064:

"As to the plaintiff's contention that no proper notice had been given embodying these propositions to be voted on at the annual meeting in April, 1927, at which meeting these levies were voted, his contention seems to be only that the school board did not specifically order notices to be posted embodying these propositions to be voted on.  
\* \* \* \*

"It is true that the minutes of the board meeting on March 1, 1927, do not show a formal order of the board directing the secretary of the board to post these notices or prescribing what the notices should contain, but we decline to hold that this is a fatal defect.  
\* \* \* \* \*"

Mr. Lane Harlan

We believe that also under the ruling of this case the absence of a formal order incorporated in the minutes should not effect the validity of the election or the will of the majority of the voters.

Section 10484 by its terms requires the board of directors to order an election as it provides that the directors "shall order a special meeting for said purpose." We believe that this provision is mandatory leaving no discretion to the directors.

57 C. J. pages 549, 550, Section 4 referring to the word "shall" says:

" \* \* \* It has the invariable significance of excluding the idea of discretion, and has the significance of operating to impose a duty which may be enforced, particularly if public policy is in favor of this meaning, or when addressed to public officials, or where a public interest is involved, or where the public or persons have rights which ought to be exercised or enforced, \* \* \* \* \*

The word "shall" is also construed to be mandatory in the case of State v. Wurdeman, 246 S. W. 189, page 194:

" \* \* \* Usually the use of the word 'shall' indicates a mandate, and unless there are other things in a statute it indicates a mandatory statute. \* \* \*"

We submit that the recording of the order that is complained of as being omitted from the formal record is merely a ministerial duty, while the election is actually called by giving notice as provided by Section 10418, R. S. Mo. 1939 and that this notice is a mandatory requirement.

In the case at bar notice was actually given and the election proceeded in the regular and proper manner, thus the board's function was sufficiently performed and further there has been a substantial compliance with the statutory requirements and formalities especially in view of the fact that the majority of residents voting in the election favored annexation. The important thing is for the voters to be notified of the election and of the proposition to be voted upon.

In Mason v. Kennedy, 89 Mo. 23, election notices were filed by the clerk and properly posted but did not describe the entire territorial boundaries of the new district. The court held that as the voters



Mr. Lane Harlan

were informed of the proposition to be voted upon that was sufficient.

And in *Tucker v. McKay*, 131 Mo. App. 728 the court held that even though the clerk failed to make a full and complete record this should not defeat the will of the voters when they have approved the proposition. It was said there that minutes and records of a meeting were evidence to be considered but were not conclusive and that they may be aided or contradicted by parol evidence.

School laws are liberally construed and proceedings thereunder are generally upheld even though all formalities and technicalities have not been observed. In 56 C. J., page 340, Section 213, it is said:

" \* \* \* Irregularities or informalities in an order or resolution made or adopted by a board of education, or of directors, trustees, or the like, of a school district or other local school organization, do not affect its validity where the intention is manifest."

The case of *State v. Begeman*, 2 S. W. (2d) 110, holds that if there is enough present to show regularity in a school election it should not be overturned because of the failure to comply with certain technicalities. In this case it is said, 1.c. 111, 112:

"In the first place, it is the salutary law that our courts must give a liberal construction to the working of the school laws. Indeed, the section of the statute, supra, requires no records to be kept of many of the jurisdictional prerequisites, and the fair presumption is indulged that preliminary steps have been complied with when the county superintendent entertains jurisdiction on appeal. *State ex rel. v. Andrea*, 216 Mo. 617, 116 S. W. 561; *School District v. Chappel*, 155 Mo. App. 498, 135 S. W. 75.

"In the latter case, this court held that it is our policy not to require extreme technical compliance of the school laws, but only a substantial compliance with the statutes, and that the efforts of laymen who carry into effect the laws pertaining to schools is accomplished when a substantial compliance has been had. As said in *School District v. School District*, 181 Mo. App. 583, 164 S. W. 688, technical niceties should be brushed aside, and we should rather

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'seek to effectuate the beneficent spirit revealed, in aid of the efforts of well-meaning laymen. Because of this, substantial compliance will suffice.'

"And, so, while it does not appear from the records actually preserved by the superintendent in the case at bar that the petitions for the change were signed by the requisite number of resident taxpayers, it is not denied by the school district that such a petition did exist, and in fact it was proffered as evidence in the trial of this case. The return itself disclosed such facts. The pleadings disclosed that there was an election, resulting in opposite views of the respective districts, and an appeal was taken to the superintendent. The return shows that Morris was a resident taxpayer of school district No. 46, and one of the ten qualified voters of said district who petitioned for a change of boundaries. The petition for a writ of certiorari shows the petition, duly signed by the requisite number of residents, was presented, calling for a vote of the two districts on the proposition, and also shows how the districts voted on same. We think therefore that we have enough here to show a regularity in the election of the districts and in the appeal to the superintendent of schools."

This view is also taken in the case of State v. McKown, 290 S. W. 123, at page 126:

"As to the contention of the impropriety in addressing the petitions to the board of directors, it may be said generally, that if error, it was devoid of prejudice. The boards of directors constitute the legal administrators, charged with the management and control of matters relating to the district; and, in the absence of a statute on the subject, it was a reasonable conclusion, especially in the minds of laymen, that petitions seeking to effect a change in the districts should be addressed to these boards. Regardless, however, of what may have prompted this action, the clerks found no difficulty in promptly complying with the duties imposed upon them by the statute. Informalities in proceedings of this character, especially in regard to the public schools, are entitled to little consideration, if the material portions of the governing statute are complied with.

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School Dist. v. New London School Dist., 181 Mo. App. 589, 164 S. W. 688, and cases. Although the proceedings may be informal if conceived in honesty, and thus conducted, they will not be set aside. School Dist. 14 v. School Dist. 27, 195 Mo. App. 504, and cases 507, 193 S. W. 634."

It is assumed that the school directors performed their mandatory duties in connection with calling the election particularly in view of the fact that said election was actually called. The statutory procedure was substantially complied with and the residents of the school district have expressed favor of the proposition for which the election was called.

#### CONCLUSION

Therefore, in view of the foregoing authorities, it is the opinion of this department that a school election, where a majority of the voters favor annexation, should not be held invalid because an order of the board of school directors calling said election was not formally set out as minutes of the board meeting.

Yours very truly

David Donnelly  
Assistant Attorney General

APPROVED

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J. E. TAYLOR  
Attorney General

PROSECUTING ATTORNEYS: }  
SCHOOL DISTRICTS: }

School district may employ attorney.  
Prosecuting Attorney may defend school  
district in civil actions, in his private  
capacity.

June 14, 1947



Honorable Lane Harlan  
Prosecuting Attorney  
Cooper County  
Boonville, Missouri

Dear Mr. Harlan:

This is in reply to your letter of June 5, 1947,  
requesting an opinion from this department, which reads as  
follows:

"Lowland School District is bringing  
suit for a declaratory judgment against  
Wooldridge School District to ask that  
an election held on February 5 annexing  
Lowland District with Wooldridge District  
be declared null and void.

- "1. The question is can Wooldridge  
School District use school funds  
to employ an attorney for this  
particular suit?
- "2. Assuming that the district can  
use school funds for this pur-  
pose can I as prosecuting attor-  
ney be retained by said Wooldridge  
School District to defend the suit  
and accept the money from the  
school fund?"

In answering your first question we would direct  
your attention to an opinion of this department rendered to  
Honorable Marshall Craig, Prosecuting Attorney of Mississippi  
County, under date of November 14, 1946, a copy of which is  
enclosed, holding that directors of common school districts

may employ attorneys to defend themselves against a mandamus action and pay such attorneys out of the school money so long as they act in good faith in refusing to do the things sought to be compelled by such mandamus action. We submit that said opinion is authority for the ruling that a school board may employ attorneys when situations arise which make it necessary for the school district to have the services of an attorney. It follows, of course, that said attorneys should be compensated from school money.

With respect to whether a school district may employ the prosecuting attorney of the county for the purpose of defending a suit against the district, we must determine whether such employment is incompatible with the official duties of the prosecuting attorney. In an opinion rendered to Honorable George A. Spencer, Prosecuting Attorney of Boone County, under date of September 4, 1943, this department ruled that a prosecuting attorney is not authorized or required to render legal services in his official capacity as prosecuting attorney to the school districts in his county.

Section 12928, R. S. Mo. 1939, provides that a prosecuting attorney may not accept employment by any party other than the state, except in civil cases. It is as follows:

"It shall be unlawful for either of the officers specified in the preceding section, during the term of office for which he shall have been elected or appointed and qualified, to accept any employment by any party, except in civil cases, other than the state of Missouri. Any violation of the provisions of this section shall be deemed a misdemeanor, to be punished as in this act prescribed."

Under the provisions of Section 12944, R. S. Mo. 1939, a prosecuting attorney is required to prosecute or defend all civil cases in which the county is interested. It reads, in part, as follows:

"He shall prosecute or defend, as the case may require, all civil suits in which the

county is interested, represent generally the county in all matters of law, investigate all claims against the county, draw all contracts relating to the business of the county, and shall give his opinion, without fee, in matters of law in which the county is interested, and in writing when demanded, to the county court, or any judge thereof, except in counties in which there may be a county counselor. He shall also attend and prosecute, on behalf of the state, all cases before justices of the peace, when the state is made a party thereto: \* \* \*

According to the above provisions a prosecuting attorney is permitted, in his private capacity, to prosecute or defend any civil action in which the county or state is not interested. It is clear then that the employment by a school board of a prosecuting attorney for the purpose of defending the school district in a civil action, is not incompatible with the official duties required to be exercised by the prosecuting attorney.

#### Conclusion

Therefore, it is the opinion of this department that the school district may employ attorneys when a situation arises which makes such action necessary. It is further the opinion of this department that a prosecuting attorney may accept employment, in his private capacity, from a school district in his county for the purpose of defending a civil action against said school district, provided neither the county nor the state is interested in such suit.

Respectfully submitted,

DAVID FONNELLY  
Assistant Attorney General

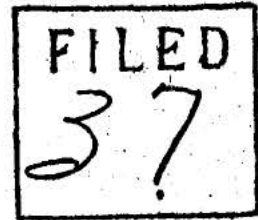
APPROVED:

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J. E. TAYLOR  
Attorney General

*H. sent*  
TAXATION: Under Section 6, Article X, Constitution of  
CONSTITUTION: Missouri, 1945, property of the City of Sedalia,  
CITIES: Missouri, is exempt from taxation.

July 10, 1947



*7/15*  
Honorable Leo J. Harned  
Prosecuting Attorney  
Pettis County  
Sedalia, Missouri

Dear Sir:

This will acknowledge receipt of your request for an official opinion, which reads:

"I would appreciate it if you would give me an opinion on the following: (1) The city of Sedalia owns some nine hundred acres of land of which a part is being used for an air port and is being leased to an individual who operates a flying school; the other part of the land is being rented to farmers who are farming it and are paying rent to the city. The question I have is:

"Is this land that is being rented subject to school taxes in the local school district in which said land is located?"

Section 6, Article X of the Constitution of Missouri, 1945, specifically exempts all property of the state, counties and other political subdivisions thereof, and reads:

"All property, real and personal, of the state, counties and other political subdivisions, and non-profit cemeteries, shall be exempt from taxation; and all property, real and personal, not held for private or corporate profit and used exclusively for religious worship, for schools and colleges, for purposes purely charitable, or for agricultural and horticultural societies may be exempted from taxation by general law. All laws exempting from taxation property other than the property enumerated in this article, shall be void."



"Other political subdivisions," as used in Section 15, Article X, Constitution of Missouri, 1945, have been defined to include cities, and reads:

"The term 'other political subdivision', as used in this article, shall be construed to include townships, cities, towns, villages, school, road, drainage, sewer and levee districts and any other public subdivision, public corporation or public quasi-corporation having the power to tax."

As we read your request, there can be no question but that the City of Sedalia does own the 900 acres of land in question.

Section 6, Article X of the Constitution of Missouri, 1945, supersedes Section 6, Article X of the Constitution of Missouri, 1875, which specifically exempted from taxation all property of the state, counties and other municipal corporations and cemeteries. The Supreme Court of this state construed Section 6, Article X of the Constitution of Missouri, 1875, as it affected property belonging to drainage districts. It held that drainage districts come within the purview of other municipal corporations as used in that provision, and furthermore, held that said property involved was used exclusively in the discharge of its prescribed governmental function, and, therefore, was exempt from taxation. In the case of Grand River Drainage District vs. Reid, 111 S.W. (2d) 151, 152, the court said:

"State ex rel. Caldwell v. Little River Drainage District, Dec. 19, 1921, 291 Mo. 72, 81, 236 S.W. 15, 17 (4), held personal property (office furniture, engineering instruments, et cetera) owned by a drainage district and used exclusively in discharging its governmental functions was exempt from taxation for state and county purposes, stating: 'Our conclusion is that the defendant is a municipal corporation within the meaning of that term as used in the provision of the Constitution dealing with tax exemptions, and that its property, used exclusively in the discharge of its prescribed governmental function, is exempt from taxation.' So, too, State ex rel. Kinder v. Little River



Drainage District, Dec. 31, 1921, 291 Mo. 267, 236 S.W. 848, 850, held that drainage districts are 'municipal corporations' within the meaning of said section 6, art. 10, Mo. Const., 291 Mo. 267, loc. cit. 278 (IV), 236 S.W. 848, loc. cit. 851 (IV), 852; and, also, that the portions of a drainage district's detention basins 'necessary to store the surplus water in flood time' but devoted to cultivation when not needed for storage purposes was acquired for authorized purposes and was exempt from general state and county taxes, stating, with reference to such cultivated realty: 'It would be the duty of the district to husband its resources in that way and obtain any revenue it could by the use of such land, and such use would not subject the land to taxation.' Loc. cit. 282 of 291 Mo., loc. cit. 852 (3) of 236 S.W. respectively. However, the opinion points out, loc. cit. 276, of 291 Mo., loc. cit. 850, of 236 S.W. respectively, that drainage district legislation authorizes such districts to protect against the injurious effect of water and does not authorize them, as corporate entities, to engage in commercial or money-making enterprises, or to acquire property, real or personal, for speculative or commercial purposes."

See also State ex rel. Caldwell vs. Little River Drainage District, 291 Mo. 72, l.c. 81, and State ex rel. Kinder vs. Little River Drainage District, 291 Mo. 267, l.c. 273, 281, 282.

Just why the court went so far as to determine if said drainage districts were holding said property under authority of law of their creation, we can not determine. The court might have concluded that question would necessarily follow and, therefore, it decided to pass on both questions at the same time.

Section 6, Article X of the Constitution of Missouri, 1945, is definitely a prohibition against the Legislature of the state taxing any land of the state, county or other

political subdivision thereof. Said provision does not require the property of other political subdivisions to be used for any certain purposes, but it is an unqualified exemption, the only prerequisite being that it is property of other political subdivisions. However, the same constitutional provision does exempt certain other property belonging to anyone when used for certain specified purposes.

#### CONCLUSION

In view of the foregoing constitutional tax exemption on property belonging to state, counties and other political subdivisions, and decisions construing similar provisions, it is the opinion of this department that Sedalia, Missouri, comes within the purview of Section 6, Article X of the Constitution of Missouri, 1945, as "other political subdivision" and, therefore, the land in question is exempt from taxation for all purposes.

Respectfully submitted,

AUBREY R. HAMMETT, Jr.  
Assistant Attorney General

APPROVED:

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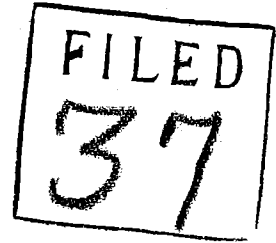
J. E. TAYLOR  
Attorney General

ARI:VLM

CHIROPODY:

One who is not licensed to practice chiropody who advertises and holds himself out as a "Cuneiform Specialist" violates the provisions of Section 9800 R.S.Mo. 1939.

November 3, 1947



L. A. Hansen, D.S.C.  
Secretary  
Missouri State Board of Chiropody  
702 Shukert-Building  
Kansas City, Missouri

Dear Sir:

This is in answer to your letter of October 25, 1947, in which you requested an opinion of this department. Said letter reads as follows:

"As Secretary of the Missouri State Board of Chiropody, I am confronted with a situation on which I shall appreciate your opinion, and particularly as to whether or not under the facts stated, there is a violation of Section 9796, Missouri Revised Statutes 1939, defining the word, 'chiropody'.

"A clerk in a shoe store is selling shoe pads known as 'Cuneiforms'. In order that you may better understand the situation I am sending along a sample pair which I shall appreciate your returning at the time your opinion is rendered. The particular clerk designed these shoe pads and has applied for a patent on them. He has a business card bearing his name, the name of the store, and the words inscribed below his name 'Cuneiform Specialist.'

"Question No. 1 Is it unlawful for him to use the words, 'Cuneiform Specialist' following his name?

"Question No. 2 Is the use of the same words 'Cuneiform Specialist' in the same manner on a business card by some other person specializing in the sale of 'Cuneiforms' a violation of law?

"For your information, the human body has certain bones which are known as 'cuneiforms'.

Three of them are located at the anterior part of the tarsus, which is the instep of the foot.

"I presume he has given the name 'Cuneiforms' to these shoe pads because of their relationship to the cuneiforms in the foot.

"If it is your opinion that either of the matters covered in questions Nos. 1 and 2 is a violation I intend to see that charges are filed by the Prosecuting Attorney unless the practice is stopped."

Section 9801, R.S.Mo. 1939, reads as follows:

"It shall be deemed prima facie evidence of the practice of chiropody, or of holding oneself out as a practitioner within the meaning of this article, for any person to treat in any manner the human foot by medical, mechanical or surgical methods, or to use the title 'chiropodist' or 'registered chiropodist,' or any other words, or letters, which designate, or tend to designate, to the public that the person so treating or holding himself or herself out to treat, is a chiropodist."

Section 9800, R.S.Mo. 1939, reads in part as follows:

"\* \* \* any person not being lawfully authorized to practice chiropody in this state and registered as aforesaid, who shall advertise as a chiropodist, in any form, or hold himself out to the public as a chiropodist, shall, upon conviction thereof, for each offense be punished by a fine of not less than one hundred nor more than two hundred dollars, or by imprisonment for not less than three months nor more than one year, or by both such fine and imprisonment.\* \* \*"

As defined by Section 9796, R.S.Mo. 1939, "chiropody" shall be taken to mean the local, medical, mechanical or surgical

treatments for the ailments of the human foot, and massage in connection therewith except amputation of the foot or toes, or the use of anaesthetics other than local, or use of drugs or medicine other than local antiseptics. The 63rd General Assembly created and established a State Board of Chiropody for the purpose of licensing and registering all practitioners of chiropody in this state, which board is to consist of four members. Certain qualifications and requirements are required before an applicant is granted a license and permitted to practice chiropody in this state. This is but an attempt on the part of the Legislature to regulate and control this field for the benefit and protection of the public in general, which is similar in many respects to the licensing of physicians and surgeons.

Under a statute making it an offense to practice medicine without a license, cases are numerous upholding the conviction of such an offender, an example of which is State v. Evertz, 202 S.W. 616, where the court said at l.c. 617:

"Neither is there any merit in the contention that the court below should have sustained appellant's demurrer to the evidence. It was shown by abundant evidence: That defendant held himself out as being authorized to treat the sick, or those afflicted with bodily or mental infirmities. That he maintained an office, near the entrance to which was a large sign in the following language, viz.: 'Evertz School of Suggestion. Oscar Evertz, S. D. Suggestionist. Treatment. Instruction.' That he circulated advertising matter concerning his method of treatment which is said to have been that of 'auto-suggestion,' and that he offered to treat the witness, Leonor Howes, in consideration of the sum of \$45 to be paid him in advance. And it is conceded that he was not a licensed physician. It cannot be doubted that a violation of the statute was shown."

Under Section 9801, R.S.Mo. 1939, supra, any person advertising or holding himself out to the public by using any of the titles listed therein, or other words or titles which may designate or tend to designate to the public that he is a chiropodist constitutes prima facie evidence of his holding himself out as a practitioner of chiropody. And Section 9800, R.S. Mo. 1939, supra, makes such advertising or holding oneself out



to the public as a chiropodist an offense to be punished by a fine or imprisonment, or both. As you pointed out in your letter, certain bones in the human foot are known as "cuneiforms." A person, then, who advertises and holds himself out as a "Cuneiform Specialist" would, we feel, come within the terms of Section 9801, R.S.Mo. 1939, ~~supra~~, as being one who is using words to designate or tend to designate to the public that he is so treating or holding himself out to treat as a chiropodist.

#### CONCLUSION

Therefore, it is the opinion of this department that it is a violation of Section 9800, R.S.Mo. 1939, for one to use the words "Cuneiform Specialist" following his name when such person is not licensed to practice chiropody in the State of Missouri. It is further the opinion of this department that any person specializing in the sale of "Cuneiforms" a patented shoe pad bearing that name, is violating the provisions of Section 9800, R.S.Mo. 1939, if such person advertises and holds himself out as a "Cuneiform Specialist," and is not licensed to practice chiropody in this state.

Respectfully submitted,

Wm. C. Cockrill  
Assistant Attorney General

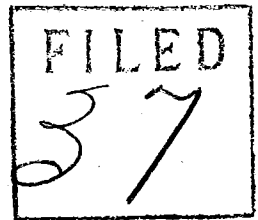
APPROVED:

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J. E. TAYLOR  
Attorney General

6-18-48  
11-18-48

SCHOOLS: Compensation of county superintendent for preparing budgets is part of his annual salary for the purpose of calculating his expense account.



December 3, 1947

12/15

Honorable Floyd E. Hamlett  
County Superintendent  
Caruthersville, Missouri

Dear Sir:

We have your letter of recent date which reads as follows:

"Senate Bill # 177 of the 64th General Assembly provided \$955. per year to Pemiscot County to compensate the County Superintendent of Schools for additional duties in the preparation of a Budget for each school under his supervision. May this sum be considered a part of his annual salary in determining the amount allowed him for traveling expense as provided by Senate Bill # 41 of the 63rd. General Assembly."

The expense accounts of county superintendents in third class counties are provided for by Section 2 of act found at page 1709, Laws 1945. Said section reads in part as follows:

"The county superintendent of public schools shall be allowed out of the county treasury not to exceed twenty-five per cent of his annual salary for actual and necessary traveling expenses. \* \* \* The county court shall, upon presentation of his bill properly setting forth his actual and necessary expenditures for traveling expenses draw a warrant upon the county treasury for the payment of same. \* \* \* Provided, when the county superintendent shall furnish his own conveyance, the rate allowed for mileage shall be four cents per mile for each mile actually and necessarily traveled \* \* \*"

It will be observed by the foregoing provisions that the county superintendents are required to present bills to the county court setting forth their actual and necessary expenditures and traveling expenses, and the county courts are required to pay such bills, subject, of course, to the limitation in the first sentence of said Section 2 that the total traveling expenses for any one year shall not exceed twenty-five per cent of the annual salary of such superintendents. It, therefore, becomes necessary to determine what the "annual salaries" of the county superintendents are.

Section 1 of the act above mentioned provides for compensation of the county superintendent. Said section reads as follows:

"In counties of the third class in this state, having less than 7,000 population, the county superintendent of schools shall receive \$1050.00 per annum; in those having a population of 7,000 and less than 10,000, he shall receive \$1200.00 per annum; in those having a population of 10,000 and less than 12,000, he shall receive \$1350.00 per annum; in those having a population of 12,000 and less than 15,000, he shall receive \$1600.00 per annum; in those having a population of 15,000 and less than 25,000, he shall receive \$1800.00 per annum; in those having a population of 25,000 and less than 36,000, he shall receive \$2000.00 per annum; and in those having a population of 36,000 or more, he shall receive \$2100.00 per annum. The State of Missouri shall appropriate annually, out of the general revenue fund of State of Missouri, \$400.00 to each and every county of the third class. The county superintendent of schools shall receive his salary monthly from the county revenue fund in the form of a warrant drawn upon the county treasury."

It should be noted that in setting the amounts the county superintendent shall receive, said amounts are not designated either as salary or compensation. The act merely says that the county superintendent of schools shall receive a certain amount per annum. The last sentence of said Section 1 refers to the amount so received as his "salary".



S. B. No. 177 of the 64th General Assembly, about which you inquire, provides compensation to the county superintendent of schools for services required of him in preparing or causing to be prepared a budget for each school district under his supervision. The portion of said act dealing with his compensation reads as follows:

"As compensation for such services in counties of the third class having less than 7,000 population, the county superintendent of schools shall receive \$775.00 per annum; in those having a population of 7,000 and less than 10,000, he shall receive \$805.00 per annum; in those having a population of 10,000 and less than 12,000, he shall receive \$835.00 per annum; in those having a population of 12,000 and less than 15,000, he shall receive \$865.00 per annum; in those having a population of 15,000 and less than 25,000, he shall receive \$895.00 per annum; in those having a population of 25,000 and less than 36,000, he shall receive \$925.00 per annum; in those having a population of 36,000 or more, he shall receive \$955.00 per annum. The county superintendent of schools shall receive said compensation monthly from the county revenue fund in the form of a warrant drawn on the county treasury. The State of Missouri shall pay annually to each county of the third class \$600.00 pursuant to an appropriation out of moneys regularly appropriated and set aside for the support of the free public schools."

It will be observed that the act last referred to provides certain amounts to the county superintendent "as compensation" for his duties in the preparation of budgets. The amount is not designated as salary, but it is merely an amount per year. The act provides that he shall receive "said compensation" monthly from the county revenue fund. By Section 3 of the 1945 Act, the county superintendent is allowed additional compensation over that provided by Section 1 of said act to pay him for services as supervisor of school transportation.

It will, therefore, be seen that the county superintendent is entitled to the compensation provided by Sections 1 and 3 of the 1945 Act and also the compensation provided by S. B. 177 of the 64th General Assembly. The question to be determined is whether the compensation as supervisor of transportation and for services in preparing the school budgets are a part of the "annual salary" of the superintendent referred to in Section 2 of the 1945 act which provides for his expense account. We have heretofore ruled that the compensation as supervisor of transportation is to be considered as a part of the annual salary of the county superintendent for the purpose of setting the limit of the expense account of the superintendent.

Salary is defined as follows:

"Recompense, usually periodically, for services rendered." Webster's New Standard Dictionary

"A stipulated recompense for services rendered, usually fixed for one year and paid pro rata, at varying periods, as weekly, monthly, etc.; hire; wages." Webster's Twentieth Century Dictionary

From the foregoing definitions it appears that a salary is merely a stipulated compensation payable periodically. Annual salary would be one fixed by the year, although payable at different periods during the year. A monthly salary would be one fixed by the month. When, therefore, S. B. 177 provides a compensation per year it, in effect, provides an annual salary whether it denominates the compensation "salary" or merely "compensation". By said act the compensation for county superintendent for his duties in preparing the budgets for the various school districts is fixed at a stipulated sum per year, and it is provided that said sum shall be paid to him monthly. Said compensation is, therefore, an annual salary, payable monthly.

We think the following cases support the above conclusion:

In Kellogg v. Story County et al, 257 NW 778 (Iowa), the court was considering a statute regarding the salary of a county superintendent of schools. In the opinion the court said:

"It is provided by section 5232 of the code that each county superintendent of schools shall receive an annual salary of not less than \$1,800 per year and such additional compensation as may be allowed by the board of supervisors in each particular county.

The question is strictly one of statutory construction. It is true that both the words "salary" and "compensation" are used in section 5232. They are, it seems to the court, used without differentiation. The compensation to be awarded to the county superintendent is in the nature of salary, and any amount added by the board to the minimum provided by the statute must be treated as a part of such salary."

In Spokely v. Haaven, 237 NW 11 (Minn.), the court was considering a statute which limited campaign disbursements for county offices to a sum of not exceeding one-third of the salary to which such person would, if elected, be entitled during the first year of his incumbency in such office. Said statute further provided that if such person would not receive a salary, then the limit would be one-third of the compensation which his predecessor received during the first year of such predecessor's incumbency. The county officer involved in that case was a sheriff whose compensation was a salary plus certain fees, and the question was whether in determining the limit of campaign expenditures for that office both the salary and fees should be added together. The court, after quoting various definitions of "salary" and "compensation" said:

"We are of the opinion that the legislature intended to base its restriction on such disbursements, at least in a measure, in proportion to the gross official income. It seems apparent that it was the intention of the legislature to limit the authorized campaign expenses to one-third of the official income for the first year in office. Compensation was the controlling element. From a practical viewpoint and for the purpose

of the particular law there could be no reason for making a distinction between 'salary' and 'fees', and we hold that the word 'salary' used in this legislative enactment was used in its flexible broad sense of compensation including both 'salary' and 'fees'."

In *United BoxBoard and Paper Co. v. McEvan Bros. Co.* 76 A. 550, 554 (N.J.) the court said:

"I see no difference between salary paid for services and compensation rendered or allowed for services. Salary in its general sense is a compensation for services rendered by one to another, but because it may be stipulated for beforehand the word gives to the thing no dignity, force, or operation which is not included in the word 'compensation'."

When, therefore, the legislature by Section 2 of the 1945 Act used the words "annual salary", we think it meant the total annual compensation. This would include both the salary as provided by Section 1 of said act and the compensation provided for added duties by various other acts, including S. B. 177. The provisions as to expenses were evidently designed to reimburse the county superintendent for money expended by him in traveling while performing his duties. There would be no reason to assume that the legislature intended that the county superintendent should bear his own expenses while traveling in connection with a part of his duties but should be reimbursed for his expenses while traveling in the performance of other duties. We believe the provisions as to reimbursing him for his traveling expenses were designed to guarantee that the county superintendent should receive his compensation for his own use and that he would not be required to use any part of same for traveling expenses.

Conclusion

It is, therefore, the opinion of this office that the compensation provided for the county superintendent of schools by S. B. 177 of the 64th General Assembly for services in preparing the budgets for the various school districts is to be included as a part of the "annual salary" of the county superintendent for the purpose of calculating the maximum amount which he may be allowed for traveling expenses.

Yours very truly,

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Harry H. Kay  
Assistant Attorney General

APPROVED:

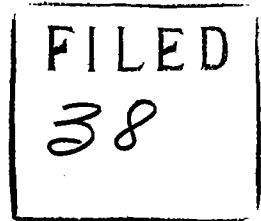
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J. E. Taylor  
Attorney General

HHK/vlv

COMMON SCHOOL DISTRICTS: Power to sell school property vested in voters of district at annual school meeting.

May 16, 1947



Honorable Clyde V. Hastings  
Prosecuting Attorney  
Worth County  
Grant City, Missouri

Dear Mr. Hastings:

This is in reply to your letter of May 10, 1947, requesting an opinion from this department, which reads as follows:

"On the 29th day of April 1947 a tornado crossed this, Worth County, and destroyed the frame school house of a common school district. So far as being a building it is a total wreck but there is some salvage.

"This district has not been having any school and will not during the next school year, and like a great many schools in the country, may not need a school house for a long time. For this reason they do not intend to rebuild at this time.

"The directors can sell the wreckage but are not sure they have that right without a special election since the time for the Annual Election has past. Of course if the wreckage lies out in the weather it will soon become worthless and will be carried away by vandals unless it is stored.

"Would like to have your opinion as to what should be done in this matter."

The first question presented is whether the Board of Directors of a common school district is authorized to sell a schoolhouse belonging to the district without first submitting the proposition for vote at a school meeting. Your attention is directed to Section 10403, R. S. Mo. 1939:

"The title of all schoolhouse sites and other school property shall be vested in the district in which the same may be located; and all property leased or rented for school purposes shall be wholly under the control of the board of directors during such time; but no board shall lease or rent any building for school purposes while the district schoolhouse is unoccupied, and no schoolhouse or school site shall be abandoned or sold until another site and house are provided for such school district."

Under the provisions of the above section title to the schoolhouse under consideration is vested in the school district, that is, in the people and not in the board of directors. Said section further provides that "no schoolhouse or school site shall be abandoned or sold until another site and house are provided for such school district." For our purpose, we must construe the words "schoolhouse or school site" to read "schoolhouse and school site," in order for them to be consistent with the remainder of the phrase, that is, "shall be abandoned or sold until another site and house are provided for such school district." The court said in *Ex parte Lockhart*, 171 S.W. (2d) 660, at page, 666:

"The word "or" in statutes or documents is frequently interpreted to mean "and," and this interpretation is given to it whenever required to carry out the plain purpose of the act or contract and when to adopt the literal meaning would defeat the purpose or lead to an absurd result.' State ex rel. Stinger v. Krueger, 280 Mo. 293, loc. cit. 309, 217 S.W. 310, loc. cit. 315. Also, see *City of St. Louis v. Murta*, 283 Mo. 77, 222 S.W. 430."

If this construction were not given, said portion of the statute would be confusing and possibly ineffective, as a schoolhouse could not be sold unless another house and site were provided. By construing that portion of Section 10403 as we do, it imposes no limitation on the present case where there is no intention to sell or abandon the site but only to sell the schoolhouse. This construction is in line with the intention of the Legislature as said section was apparently intended merely to restrict the sale of both a schoolhouse and the site until another house and site have been provided.

Section 10419, Mo. R.S.A., provides in part as follows:

The qualified voters assembled at the annual meeting, when not otherwise provided, shall have power by a majority of the votes cast:

\* \* \*

"Eighth--To direct the sale of any property belonging to the district but no longer required for the use thereof, to determine the disposition of the same and the application of the proceeds.

\* \* \*

Title to said schoolhouse is vested in the school district, and under the provisions of the above section the voters of the district are the proper parties to direct its sale, in other words, to authorize the board of directors to sell said schoolhouse on such conditions and under such limitations as may be imposed. The board of directors is therefore precluded from selling said schoolhouse without authorization from the voters of the district. This conclusion is strengthened by the fact that there is no other provision relative to the sale of a schoolhouse in the law pertaining to common school districts.

Now that it is settled that the board of directors can sell the schoolhouse only on direction of the voters at a



school meeting, the question arises as to the propriety of calling a special meeting for this purpose. The statute providing for special meetings is Section 10361, R. S. Mo. 1939, which is as follows:

"Special school meetings for the transaction of business authorized by this chapter, and not restricted to the annual meeting or otherwise provided for, shall be called by the board when a majority of the qualified voters of the district sign a petition requesting the same, and designating therein the purpose for which said meeting is desired. Upon the reception of such petition, the board shall call said special meeting, by notices thereof to be given in the same manner as is provided in section 10418; and when assembled, the meeting shall be organized by the election of a chairman and a secretary, who shall keep a correct record of the transactions of the meeting, said record to be signed by the secretary, attested by the chairman, and filed with the district clerk, who shall enter the same upon the records of the district; but said meeting shall have no power to act upon any proposition not contained in the petition and submitted in the notices." (Emphasis ours.)

The application of the above statute is limited inter alia to the transaction of business which is not restricted to the annual meeting. It will be noted that Section 10419 sets out the powers of the voters at the annual meeting and among these express powers is the power to direct the sale of property belonging to the district. Thus, it seems that the proposition to sell said schoolhouse cannot be submitted to the voters of the district at a special meeting but can be presented only at the annual school meeting. The procedure for said sale is set out in Section 10419 and must be followed as there is no other provision made for such a sale. In the case of *In re Farmers' & Merchants' Bank of Chillicothe*, 63 S. W. (2d) 829, where the board of directors of a school district exceeded its authority in executing an assignment, the court said at page 830:

"The school district did not have power to sell its property or authority to dispose of its public revenue save in the manner provided in chapter 57, R. S. Mo. 1929 (section 9194 et seq. (Mo. St. Ann. Sec. 9194 et. seq., p. 7066)). \* \* \*"  
(Chapter 72)

We submit therefore that it is mandatory that a proposal to sell a schoolhouse belonging to the school district be presented at the annual meeting.

In the case of Richardson v. McReynolds, 114 Mo. 641, the school board called a meeting for the purpose of borrowing money and issuing bonds therefor to erect and furnish a schoolhouse under the provisions of Section 7981, R. S. Mo. 1889 (now Section 10328). However, the propositions voted on were also for the purpose of buying a schoolhouse site. It was held there that the election was illegal and void because it did not conform to Section 7979, R. S. Mo. 1889 (now Section 10419) which was the only provision made for the purpose of purchasing a schoolhouse site. The court said at pages 650-651:

"It is also contended by plaintiff that as the propositions voted on May 9, 1891, were not only to borrow money and issue bonds in payment thereof, for the purpose of building a schoolhouse, but were also for the purpose of buying a schoolhouse site, and furnishing the schoolhouse when builded, that the election was without authority of law, and therefore illegal and void. There is no provision made by statute for the purpose of purchasing a schoolhouse site, except by section 7979, supra, and that is by taxation as therein provided. There was no authority for the election to borrow money, and to issue the bonds of the district in payment thereof for the purpose of buying a site. Such bonds when issued would have been void;  
\* \* \* \*"

Recognizing the problem there, the Legislature in 1903 enacted a new section which extended the scope of the election to include that of purchasing schoolhouse sites.

The situation in the Richardson case involved a portion of Section 10419 and is analogous to the present situation because there is no other provision made for the sale of a schoolhouse belonging to the common school district, and therefore the provisions in Section 10419 must be observed. A special election for said purpose would be without authority of law.

The questions presented arose out of extraordinary circumstances and the conclusion reached may result in a certain amount of hardship in view of the fact that the time for the annual school district meeting has recently past. However, under the provisions of Section 10337, R. S. Mo. 1939, the board of directors is charged with the care and keep of all property of the district and must keep the schoolhouse and other buildings in good repair. Under this authority the board is evidently empowered to store as much of the equipment and property contained in the schoolhouse as possible and take such other protective measures as they see fit in order to preserve all of the school property involved until the voters of the district at the next annual school meeting determine what action should be taken with regard to a sale.

#### CONCLUSION

Therefore, it is the opinion of this department that the board of directors of a common school district cannot sell a schoolhouse or other property which belongs to the school district without authorization of the voters of the district. And further, said proposition can be presented to the voters only at the annual school meeting.

Respectfully submitted,

DAVID DONNELLY  
Assistant Attorney General

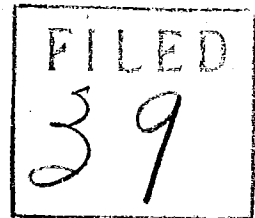
APPROVED:

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J. E. TAYLOR  
Attorney General

MAGISTRATE COURTS: Magistrates may hold court in towns other than the county seat but are not entitled to travel expenses; the clerk of the magistrate court should be present while court is in session.

January 17, 1947



Honorable Cline C. Herren  
Judge of the Probate Court  
Webster County  
Marshfield, Missouri

Dear Sir:

We are in receipt of your letter of November 19, 1946, in which you request an opinion from this department. Your letter reads in part as follows:

"Webster County has a peculiar situation in that about half of our urban population live in towns which are from 12 to 25 miles from the county seat. As a matter of economy in costs and as a convenience to the public, I propose to hold magistrate court in these other towns at intervals which in my discretion may seem necessary, after obtaining the above court order.

"I intend to interest civic organizations in these other towns to furnish a place to hold court so that this will not be a burdensome expense to the county. Also, it is my contention that I shall be able to hold such hearings without the presence of my clerk; that minutes of such proceedings may be transferred from a temporary record to my permanent minute book when I return to my office; and that I shall need to use only the records permanently retained at the county seat office.

"Please advise at your earliest convenience if the above intended procedure meets all requirements. If it is found to be satisfactory what expense will the county court be authorized to pay me in

the way of mileage incurred in holding court in these other towns."

Your letter presents two questions for consideration. First, is a magistrate entitled to expenses incurred while traveling to and from various towns in the county, designated by the county court as additional places for holding court? Second, may a magistrate hold court in such additional places as designated by the county court without the presence of the clerk of the magistrate court?

In view of the provisions of Section 18, Senate Bill 207 of the 63rd General Assembly, authorizing an additional place or additional places in the county for holding magistrate court, there should be no objection to the Magistrate of Webster County holding court in towns other than the County Seat when it is deemed necessary in the light of geographical conditions, economy in costs, and convenience to the public. Of course, these additional places must first be authorized by the County Court. Section 18 of Senate Bill 207 reads as follows:

"The county seat shall be the seat of the magistrate court, and the county court may, by proper order, provide an additional place or places in the county for holding of magistrate court; provided however that in counties of the first class the county court may by proper order establish the seat of any magistrate court at some place within the county other than at the county seat."

It has been held in an opinion from this department to Honorable Erwin F. Vetter, dated October 18, 1946, that "it is the duty of county courts to establish and maintain out of the county funds the offices of the magistrate courts in their respective counties."

Following this authority, all additional places in the county designated by the county court for holding magistrate court should be maintained out of county funds, but it does not follow that magistrates should be reimbursed for travel expenses. Article V, Section 24 of the 1945 Constitution, provides that

"judges may receive reasonable traveling and other expenses allowed by law." However, there is no provision in the magistrate law allowing such expenses and such expenses cannot be considered incidental to maintaining the offices of a magistrate in these other towns. Therefore, in absence of such a provision, the magistrate is not entitled to travel expenses.

In order to answer the second question it must be noted that the magistrate courts are courts of record under Section 19 of Senate Bill 207. Certain clerical and administrative duties are imposed upon the clerks of those courts by this bill. These duties and functions were considered necessary and sufficiently important by the Legislature in passing this law to warrant providing a clerk to handle them. If this clerk is not present while court is in session many of these duties will not be performed.

Therefore, it necessarily follows that it was the intention of the Legislature that a person appointed as clerk of the magistrate court should be present during the time court is in session in order to perform the duties and functions as are set out by law with regard to clerks of the magistrate court. This position is further strengthened by Section 12828, R. S. Mo. 1939, which provides that both elective and appointive officers are subject to removal from office upon their failure to devote their time to the performance of the duties of such office.

However, the situation arising in view of the above letter may be remedied under the provisions of Section 21, Senate Bill 207, which reads in part:

"In all counties each magistrate shall by an order duly made and entered of record appoint and fix the salary of a clerk of his court and may appoint such deputies and employees as may be necessary for the proper dispatch of the business of his court and fix their salaries at such sum as in his discretion may seem proper. The total salaries of clerk, deputies and other employees paid by the state shall in no event exceed the annual amount fixed in this act for clerk and deputy clerk hire of such courts, \* \*"

Following this section, a magistrate authorized to hold court in places other than the county seat could appoint

such deputy clerks as needed to perform the duties of clerk of the magistrate court in those additional places. These deputy clerks could be residents of those places, thereby doing away with traveling expenses to and from the places where court is held. Of course the appointment of additional clerks would necessarily be limited by the amount of funds allotted by the state to the magistrate for this purpose, as provided for in Section 22 of Senate Bill 207,

If it is found that said funds are too limited to employ a sufficient number of clerks, Section 21 of Senate Bill 207 provides another possibility:

"\* \* \* provided, that in any county where need exists, the county court is hereby authorized, at the cost of the county, to provide such additional clerks, deputy clerks or other employees as may be required. All such clerks, deputies and employees shall serve at the pleasure of the magistrate. \* \* \*"

Under this provision the county court is authorized to provide such additional clerks or deputy clerks as the particular situation may require. These clerks are to serve at the pleasure of the magistrate and shall be compensated by the county court from county funds.

#### Conclusion

Therefore, it is the opinion of this department that a magistrate may hold court in towns other than the county seat when he considers it necessary, upon order of the county court, but is not entitled to be reimbursed for expenses incurred in travel to said other towns. It is further the opinion of this department that a clerk or deputy clerk should be present while court is in session to perform such duties as are set out by law in regard to clerks of the magistrate court.

Respectfully submitted,

APPROVED:

DAVID DONNELLY  
Assistant Attorney General

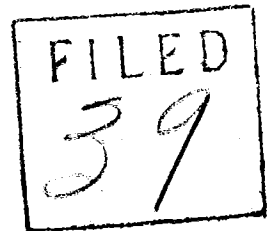
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J. E. TAYLOR

Attorney General  
DD:EG

*C. Smith*  
SALARIES: Sheriffs not entitled to fee for arrests made by  
FEES: highway patrol; may collect fee for trial or con-  
SHERIFFS: fession, but must turn same into revenue fund.

August 13, 1947



*8/26*  
Honorable Cline C. Herren  
Judge and Ex-Officio Magistrate  
Webster County  
Marshfield, Missouri

Dear Judge:

This is in reply to your letter of recent date wherein you submit the following statement of facts and request an official opinion thereon:

"It has been the practice of most Magistrate Courts to charge a warrant fee of \$1.00 and a plea or confession fee of \$1.00 on behalf of the Sheriff's office in cases brought in by the Highway Patrol for traffic violations and P.S.C. violations whether or not the Sheriff has anything to do with the case.

"Section 8357 (1943) and Senate Bill 19 recently passed provide, among other things, that 'no fee shall be allowed to any person or officer for the arrest and transportation of persons arrested and transported by members of the Patrol.'

"In view of the above section and amended by Senate Bill 19, should not this practice of collecting Sheriff's fees be abandoned?"

In order for an officer to be entitled to compensation, he must point to the statute authorizing such compensation.

Section 13413, R. S. Mo. 1939, which relates to fees of sheriffs, contains the following provisions:

"Sheriffs, county marshals or other officers shall be allowed fees for their services in criminal cases and for all proceedings for contempt or attachment as follows:

For serving and returning each capias,  
for each defendant. . . . . \$1.00



For every trial in a criminal case or  
confession. . . . . \$1.00"

It appears by the provisions of Section 8357 of Senate Bill No. 19, passed by the 64th General Assembly, that the lawmakers did not intend for the sheriff to collect or retain the fees for arresting and transporting persons who have been arrested by the highway patrol. The portion of this section applicable to this question reads as follows:

"\* \* \* No fee shall be allowed to any person or officer for the arrest and transportation of persons arrested and transported by members of the patrol, and no witness fees shall be granted or allowed members of the patrol in criminal cases. \* \*"

The salary and fees allowable to sheriffs in counties of the fourth class is provided for in Laws of Missouri 1945, page 1547. Section 3 of this Act, page 1548, which relates to the duties of the sheriff with respect to collecting and reporting fees, provides in part as follows:

"It shall be the duty of the sheriff in counties of the fourth class to charge and collect in all instances every fee, both civil and criminal, including mileage, accruing to his office by law, except such criminal fees as are chargeable to the county, and such sheriff shall, at the end of each month, file with the county court a report of all fees charged and collected during said month, stating for what act or service said fees were charged and collected, together with the names of the state or counties on charge of venue cases or persons paying or who or which are liable for same, which report shall be verified by the affidavit of such sheriff. \* \* \*"

It would appear from this section and said Section 13413, supra, that in criminal cases in which the defendant is liable for the costs it would be the duty of the sheriff to collect the fee for a plea or confession and to report it and pay it into the county treasurer. However, the fees which are chargeable for arrests and transportations of persons in criminal cases in which such arrests and transportations have been made by the highway patrol should not be collected, reported and

Hon. Cline C. Herren - 3

remitted by the sheriff, because under said Senate Bill No. 19, no such fees are allowed to any person or officer for such services when they are made by the highway patrol.

#### CONCLUSION

It is, therefore, the opinion of this department that the fee for a plea or confession in cases brought by the highway patrol for traffic violations and Public Service Commission violations should not be collected and paid to the sheriffs in cases in which the county is liable for the costs. However, if they are cases in which the defendants pays the costs, then the fee should be collected and paid to the sheriff if he or his deputy made the arrest, and he should report and remit it to the county treasurer. It is further the opinion of this department that the fee for serving a warrant or transporting a person arrested, if such service is performed by the highway patrol, should not be collected and paid to the sheriff.

Respectfully submitted,

TYRE W. BURTON  
Assistant Attorney General

APPROVED:

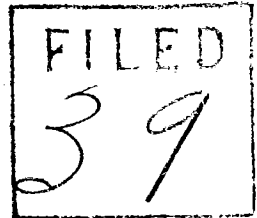
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J. E. TAYLOR  
Attorney General

TWB:VLM

WORKMEN'S COMPENSATION: Division may make an order commuting compensation. Such order is reviewable by Commission. Commission or Division may order inspection of employer's premises, subject to limitations. Such order, if made by Division, is subject to review by the Commission.

August 19, 1947



Mr. Carl J. Henry, Chairman  
Industrial Commission of Missouri  
Dept. of Labor and Industrial Relations  
Jefferson City, Missouri

Dear Sir:

This is in reply to your letter dated July 18, 1947, wherein you requested an opinion of this department relative to the Commission's jurisdictional powers in certain procedures in Workmen's Compensation cases. Said letter reads in part as follows:

"In Section 3748 of the Workmen's Compensation Law the Attorney-General is designated as legal adviser for the Commission. Under Sections 3730 and 3731, the Commission has power to review awards of the Division of Workmen's Compensation. Under Section 3736, the Commission (meaning Industrial Commission as defined in Section 3744) may commute compensation. Under Section 3744a, the Commission may delegate powers to the Division, and in Regulation A on page 71 of the Workmen's Compensation Law the Commission has delegated powers generally to the Division.

"Acting under authority of Section 3736 and Regulation A (page 71) and Rules 21-28 (pages 74-75), a referee has made an order commuting compensation. The employer has filed a formal application for review of this order. The award in this case was made May 16 - request for commutation June 19 - order to commute July 2 - application for review of order filed July 11 - all apparently in proper order and within time. The question is - does the Industrial Commission have power to review this commutation order?

"Another question - under Section 3740, the Commission (and the Division by delegation of powers) has power to issue process and so forth. Does the Commission or Division have power under this or any other section to order an inspection of employer's premises? And if such order is made or denied by the Division does the Industrial Commission have power to review such order?"

In order to make more clear, for the purpose of this opinion, the organization of the Industrial Commission and the terms used relating thereto, we herewith quote Section 3744, Missouri Laws of 1945, page 2000, which is as follows:

"As used in Chapter 29 of the Revised Statutes of Missouri, 1939, and all acts amendatory thereof, the term 'Commission' or 'Workmen's Compensation Commission of Missouri' shall hereafter be construed as meaning and referring exclusively to the Industrial Commission of Missouri, and the term 'Superintendent of Insurance' shall hereafter be construed as meaning the Superintendent of the Insurance Department of the State of Missouri or such agency of government as shall exercise the powers and duties now conferred and imposed upon the Insurance Department of the State of Missouri. The term 'division' as used in this Act, means the division of Workmen's Compensation of the Department of Labor and Industrial Relations of the State of Missouri."

As you have indicated in your letter of request, under Section 3744a, Missouri Laws of 1945, page 2000, the Commission may delegate powers to the Division of Workmen's Compensation. Said section reads as follows:

"The division shall have and exercise such of the powers and functions of the Commission in the administration of the Workmen's Compensation law as the Commission may by regulation prescribe; provided, however,

that the power and duty to review any award made under the Workmen's Compensation law, as authorized by Sections 3730 and 3731 R.S. Mo., 1939, may not be delegated, but such power and duty shall be exercised exclusively by the Commission; and provided further, that the Commission shall exercise no authority with respect to the selection or tenure of office of any individual appointed or employed by the division in the administration of the Workmen's Compensation law."

On page 71 of the Workmen's Compensation Law, by regulation A, the Commission has delegated powers generally to the Division. Said regulation A reads as follows:

"It is hereby provided and ordered by the Industrial Commission of Missouri that the Division of Workmen's Compensation shall be and is hereby authorized to exercise all the powers and functions of the Commission in the administration of the Missouri Workmen's Compensation Law, except the power and duty to review any award made under said law or hold any hearing or rehearing as authorized by Sections 3730 and 3731, R. S. Missouri, 1939, and except such other powers and functions for the exercise of which provision is hereinafter made. It is intended by this provision to delegate all such powers to the Division of Workmen's Compensation and to designate said Division as the agency of the Commission to receive and file claims for compensation, reports, answers, settlements, agreements, applications for review, and notices as may be required by the Workmen's Compensation Law."

Section 3747, Missouri Laws of 1945, page 2001, reads in part as follows:

"The division shall appoint such number of referees as it may find necessary, but not exceeding twelve in number, who shall be duly licensed lawyers under the laws of this state. Any referee may be discharged or removed only by the governor. The referees appointed by the division shall only have jurisdiction to hear and determine claims

upon original hearing and shall have no jurisdiction whatsoever upon any review hearing either in the way of an appeal from an original hearing or by way of re-opening any prior award. With respect to original hearings the referees shall have such jurisdiction as heretofore has devolved upon the Workmen's Compensation Commission, or one of its members, under other sections of this chapter, and wherever in this chapter the word commission or commissioners is used in respect to any original hearing, those terms shall mean the referees appointed under this section. When a hearing is necessary upon any claim the division shall assign a referee to such hearing. Any referee shall have power to approve contracts of settlement between the parties to any claim under this chapter, to the same extent as elsewhere provided for the commission or one of its members. Any award by a referee upon an original hearing shall have the same force and effect, be subject to the same review and appellate procedure, and enforceable in the same manner as provided elsewhere in this chapter for similar awards by the commission or any member thereof. \* \* \* \*

Is a commutation order such a hearing as to be termed a re-opening of a prior award so as to preclude the referee of the Division from having jurisdiction? In *State ex rel. Missouri Gravel Co. v. Missouri Workmen's Compensation Commission*, 113 S.W. (2d) 1034, the St. Louis Court of Appeals said at l.c. 1039:

"It is contended by respondent that the finding of the commission that the claimant in a case under the Workmen's Compensation Law is entitled to compensation and the fixing of some amount to be paid by the employer in weekly installments is the final award from which alone an appeal will lie.

"This argument is based on the contention that there can be only one final judgment

or award in a case, therefore, only one appeal can in any event be allowable. However, after a finding by the commission that the claimant is entitled to compensation and the fixing of the periodical payments of same, the commission retains jurisdiction of the case, and where, later, the claimant seeks a lump sum payment, and it is upheld by the commission, such action is a radical change in the original award, which affects the interests and rights of the claimant and the employer, who is thus required to pay in a lump sum. This order is then the last order of the commission, and may properly be deemed the final award in respect to the method of payment."

Section 3736, R.S. Mo. 1939, provides:

"The compensation herein provided may be commuted by said commission and redeemed by the payment in whole or in part, by the employer, of a lump sum which shall be fixed by the commission, which sum shall be equal to the commutable value of the future installments which may be due under this chapter, taking account of life contingencies, such payment to be commuted at its present value upon the basis of interest calculated at four per centum with annual rests, upon application of either party, with due notice to the other, if it appears that such commutation will be for the best interests of the employee or the dependents of the deceased employee, or that it will avoid undue expense or undue hardship to either party, or that such employee or dependent has removed or is about to remove from the United States or that the employer has sold or otherwise disposed of the greater part of his business or assets. In determining whether the commutation asked for will

be for the best interest of the employee or the dependents of the deceased employee, or so that it will avoid undue expense or undue hardship to either party, the commission will constantly bear in mind that it is the intention of this chapter that the compensation payments are in lieu of wages and are to be received by the injured employee or his dependents in the same manner in which wages are ordinarily paid. Therefore, commutation is a departure from the normal method of payment and is to be allowed only when it clearly appears that some unusual circumstances warrant such a departure."

In these cases where a hearing is conducted on the question of a lump sum payment there has previously been a finding that the claimant is entitled to compensation and a fixing of the periodical payments of the same. The hearing on the question of commutation is not in the nature of an appeal from an original hearing, nor is it in the nature of re-opening any prior award so as to preclude the referee from exercising jurisdiction to hold the hearing. It is, rather, an original hearing to determine from the facts whether the claimant is to receive his compensation in a lump sum rather than in the periodical payments as previously determined. There is no determination as to the increase, decrease or continuation of the periodical payments as such. There would, therefore, appear to be little doubt that a referee acting for the Division has the delegated authority to hear and make an order commuting compensation in accordance with Section 3736, R.S. Mo. 1939, supra.

Section 3730, R.S. Mo. 1939, provides:

"Upon its own motion or upon the application of any party in interest on the ground of a change in condition, the commission may at any time upon a rehearing after due notice to the parties interested review any award and on such review may make an award ending, diminishing or increasing the compensation previously awarded, subject to the maximum or minimum provided in this chapter, and shall



immediately send to the parties and the employer's insurer a copy of the award. No such review shall affect such award as regards any moneys paid."

Section 3731, R.S. Mo. 1939, reads as follows:

"If an application for review is made to the commission within ten days from the date of the award, the full commission, if the first hearing was not held before the full commission, shall review the evidence, or, if deemed advisable, as soon as practicable hear the parties at issue, their representatives and witnesses and shall make an award and file same in like manner as specified in the foregoing section."

Assuming then, as you state in your letter, that the employer has filed a formal application for review of this commutation order, in proper order and within time, does the Industrial Commission have power to review said commutation order? It is to be noted that Section 3747, hereinabove quoted, says:

"\* \* \* Any award by a referee upon an original hearing shall have the same force and effect, be subject to the same review and appellate procedure, and enforceable in the same manner as provided elsewhere in this chapter for similar awards by the commission or any member thereof. \* \* \*" (Underscoring ours.)

The Missouri Gravel Company case, supra, was an original proceeding in mandamus where the employer and insurer sought to compel the Missouri Workmen's Compensation Commission to allow an appeal to the Circuit Court of Pike County directly from an order of the Commission commuting into a lump sum a weekly award. The St. Louis Court of Appeals allowed the appeal, and said at l.c. 1037:

"\* \* \* A number of appeals have been taken from the action of the Workmen's Compensation Commission in changing an

award from a periodical payment allowed the dependents of an employee into a lump sum payment. Appeals from such lump sum commutation orders have found their way through the circuit court to the appellate courts, and they have been considered uniformly by the appellate courts as if such an appeal was proper and authorized by the statute. Therefore, it would follow that the appellate courts have sub silentio held that the appeal was permissible from such orders of the Workmen's Compensation Commission.  
\* \* \* \*

The court continued at l.c. 1038:

"The commission is required to pass on many facts under the terms set out in said section 3346 in making a commutation to a lump sum payment. It must find whether any unusual circumstances exist which would require such a departure. It must find whether it will be of any real benefit to the dependent receiving such lump sum payment. Many dependents would, following the well-known weakness of human kind, speedily and injudiciously spend the lump sum payment and therefore become dependent on charity for subsistence. If the dependant receives the compensation weekly, such a result is not so probable. This is against the purpose and the spirit of the Workmen's Compensation Law. The compensation allowed the injured employee, or the dependents of a deceased employee, in a way represents wages. Society and the state are interested. Besides, the lump sum payment plan might create an undue hardship and a needless expense on the employer. It might cause him to sell a part or all of his equipment to meet the lump sum payment and head him in the direction of the bankruptcy courts. It is generally the case

that it is easier to pay in installments than in amounts which might be called 'coarse' money. In the finding of facts justifying commutation to a lump sum payment the Workmen's Compensation Commission exercises a judicial function."

Hanley v. Carlo Motor Service Company, 130 S.W. (2d) 187, involved a similar question, which was before the St. Louis Court of Appeals, involving the award by the Commission of a commutation to a lump sum payment. No appeal had been taken from the final award of the periodical payments, and payments were made in compliance therewith. Subsequent thereto, the employer filed a request for a lump sum settlement of said award. A hearing was had and the lump sum settlement was awarded. The order of commutation of the Commission was duly appealed to the circuit court by the employer and insurer, which court entered a judgment affirming it. Appeal was taken to the St. Louis Court of Appeals. The wording of the court would indicate that it felt this order of commutation was an award in the nature of an original hearing, an example of which is found at l.c. 190 where they said:

"We have emphasized in the above-quoted portion of the statute the ground on which we think the commission was authorized under the evidence herein to make the award of commutation. It will be noted that the statute provides four grounds upon which commutation may be awarded. \* \* \* \*"

And the court affirmed the fact that appeal in such a case was proper. Section 3732, R.S. Mo. 1939, provides that the final award of the Commission shall be conclusive unless an appeal is taken therefrom within thirty days from the date of the final award. Said section sets out the grounds for reversal and specifies the procedure for such an appeal. By allowing appeal to the courts from an order of commutation it would follow that, in accordance with the rules of procedure hereinabove mentioned in regard to review and appeal, on an application for review of a commutation order the Industrial Commission has the authority to review such an order of a referee. It is an axiomatic rule, as applied to these administrative agencies, that the person seeking judicial review of a final decision on a contested issue must first exhaust all administrative remedies.

Your next question relates to Section 3740, R.S. Mo. 1939, which reads as follows:

"The commission, or any commissioner, shall have power to issue process, subpoena witnesses, administer oaths, examine books and papers, and require the production thereof, and to cause the deposition of any witness to be taken and the costs thereof paid as other costs under this chapter. Any party shall be entitled to process to compel the attendance of witnesses and the production of books and papers, and at his own cost to take and use depositions in like manner as in civil cases in the circuit court. Subpoena shall extend to all parts of the state, and may be served as in civil actions in the circuit court, but the costs of such service shall be as in other civil actions. Each witness shall receive the fees and mileage prescribed by law in civil cases, but the same shall not be allowed as costs to the party in whose behalf the witness was summoned unless the persons before whom the hearing is had shall certify that the testimony of such witness was necessary. All costs under this chapter shall be approved by the commission and paid out of the state treasury from the fund for the support of the Missouri workmen's compensation commission: Provided, however, that if the commission shall determine that any proceedings before it or any of its members, have been brought, prosecuted or defended without reasonable ground, it may assess the whole cost of the proceedings upon the party who so brought, prosecuted or defended them. The commission may permit a claimant to prosecute a claim as a poor person as provided by law in civil cases."

The question is, whether under this section the Commission (and the Division by delegation of powers) has power to order an inspection of employer's premises; and, if such order is made or denied by the Division, does the Industrial Commission have power to review such order?

I think we may safely assume from the foregoing discussion that the Division, by delegation of authority, may equally have such power to issue process, and so forth, as is granted to the Commission by Section 3740, supra. It is to be noted that Section 3740 indicates that the general procedure for compelling the attendance of witnesses and the production of books and papers is the same as that prescribed for civil cases. Section 86 of the Code for Civil Procedure, Missouri Laws of 1943, at page 379, says:

"Upon motion of any party showing good cause therefor and upon notice to all other parties, the court in which an action is pending may (1) order any party to produce and permit the inspection and copying or photographing, by or on behalf of the moving party, of any designated documents, papers, books, accounts, letters, photographs, objects, or tangible things, not privileged, which constitute or contain evidence material to any matter involved in the action and which are in his possession, custody, or control; or (2) order any party to permit entry upon designated land or other property in his possession or control for the purpose of inspecting, measuring, surveying, sampling, or photographing the property or any designated relevant object or operation thereon. The order shall specify the time, place, and manner of making the inspection and taking the copies and photographs and may prescribe such terms and conditions as are just."

We feel the interpretation given to this section by the courts would likewise apply to an administrative agency such as the Division or Industrial Commission. Such provisions relating to the production of books and papers by parties to the hearing are a modern conception enacted for the purpose of supplanting the outmoded procedure for acquiring material facts and evidence, and are felt necessary and desirable in keeping with the spirit of the relatively new administrative agencies with which we are now dealing, which perform a quasi judicial function. Such rules of procedure facilitate and expedite the preparation of cases for trial and, in a measure, guard against unreasonable surprise and delay. Though these rules of procedure evidence a more liberal

policy, they will not, of course, permit an unbridled investigation or so-called "fishing expedition" into an adversary's books and papers or upon his premises; and the courts do recognize the constitutional declaration that "the people shall be secure in their persons, papers, homes and effects, from unreasonable searches and seizures." Constitution of Missouri, Article I, Section 15. The General Assembly has defined and permitted reasonable searches and seizures of books, papers and documents in the possession of parties to a pending cause when containing evidence material to the cause.

As we have pointed out above, Section 3731, R.S. Mo. 1939, supra, provides for review by the Commission of an award by the Division. And, as we have mentioned above, a person seeking judicial review must first exhaust his administrative remedies. If, then, this person seeks an appeal from a decision of the Division, the Commission would be authorized to review said award. Just as courts on judicial review may hear and consider evidence of alleged irregularities in procedure or of unfairness by the agency, so would the Commission be allowed to review an order by the Division relative to a ruling under Section 3740, R.S. Mo. 1939, supra. In keeping with the spirit of the law which established administrative agencies, such as the one in question, we feel that it was the intention of the Legislature to hear and make awards on these claims in the most expeditious manner. This, we feel, would not allow a separate review on every decision made by the Division relative to the granting or refusing of an award of compensation. It would thus logically follow that any ruling the referee might make with regard to Section 3740, R.S. Mo. 1939, supra, would not justify a continuation of the original hearing in order that a review on that particular ruling be had by the Commission at that time. This does not deprive either party of any right to review since such a ruling by the referee, under Section 3740, supra, would be considered by the Commission when they review the final award as made by the referee. As is stated in 71 C. J., page 1204, relating to Workmen's Compensation Act:

"Under a general application for a rehearing on specified grounds without limiting the issues raised by the request, the whole subject matter is reopened for further consideration and determination, and the issues raised are as broad as those raised in the original application for compensation.\* \* \*"

Section 3732, R.S. Mo. 1939, specifically provides that upon the filing of an appeal from the ruling of the Commission, "the

Mr. Carl J. Henry

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commission shall under its certificate return to the court all documents and papers on file in the matter, together with a transcript of the evidence, the findings and award, which shall thereupon become the record of the cause."

#### CONCLUSION

In view of the foregoing, it is the opinion of this department that the Division of Workmen's Compensation has the delegated authority to make an order commuting compensation in accordance with Section 3736, R.S. Mo. 1939, and that such an order is subject to review by the Industrial Commission. It is further the opinion of this department that the Commission (or Division by delegation of authority) has power to order an inspection of employer's premises, subject to the same limitations as contemplated in Section 86 of the Code for Civil Procedure, Missouri Laws of 1943, page 379. Such an order for inspection, if made by the Division, is subject to review by the Commission as provided in Sections 3730 and 3731, R.S. Mo. 1939.

Respectfully submitted,

Wm. C. COCKRILL  
Assistant Attorney General

APPROVED:

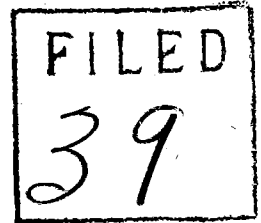
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J. E. TAYLOR  
Attorney General

WCC:LR

COUNTY ASSESSORS: County assessors in second class counties not entitled to additional compensation for acting as member of the county board of equalization.

August 23, 1947



Mr. Chris F. Hessler  
County Assessor  
Buchanan County  
St. Joseph, Missouri

Dear Sir:

This will acknowledge receipt of your request for an opinion which reads:

"I wish to obtain your opinion on Section 11309, Page 1840, Laws of Missouri, 1945, commencing on the fifty-fourth (54) line.

"The County Assessor in all counties with less than 100,000 population, and the township assessors in all counties under township organization shall receive as compensation for services in taking the statements herein required and entering them in the book herein provided for, the sum of Twenty-five cents for each statement, and the members of the county board of equalization shall receive the same per diem for services under this article as provided by law for services in equalizing real and personal property, and the sum of the valuation of the statements as equalized by the county board of equalization shall be included in and made a part of the total valuation of property taxable for all purposes."

"I would like to know whether or not, I am entitled to such compensation, as described above, as a member of the Board of Equalization."

There are two well established rules of statutory construction that should be invoked in answering your request. The first is that a public official claiming compensation must point to the statute authorizing such compensation. In *Nodaway County vs. Kidder*, 129 S.W. (2d) 857, 1.c. 860, 344 Mo. 795, the court said:

"It is well established that a public officer claiming compensation for official duties performed must point out the statute



authorizing such payment. State ex rel. Buder v. Hackmann, 305 Mo. 342, 265 S.W. 532, 534; State ex rel. Linn County v. Adams, 172 Mo. 1, 7, 72 S.W. 655; Williams v. Chariton County, 85 Mo. 645."

See also Smith vs. Pettis County, 136 S.W. (2d) 282, 345 Mo. 839. The second rule referred to is that statutes granting a public official compensation should be strictly construed against the public official. In Ward vs. Christian County, 111 S.W. (2d) 182, 1.c. 183, the court in so holding said:

"It is well-settled law that a right to compensation for the discharge of official duties is purely a creature of statute, and that the statute which is claimed to confer such right must be strictly construed." State ex rel. Linn County v. Adams, 172 Mo. 1, 72 S.W. 655, 656. \* \* "

See also Maryland Casualty Company vs. Kansas City, Missouri, 128 F. (2d) 998.

Under Section 11001, page 1776, Laws of Missouri 1945, the county assessor is specifically made a member of the county board of equalization and said section reads:

"In every county in this state, except as otherwise provided by law, there shall be a county board of equalization consisting of the judges of the county court, the county assessor, the county surveyor, and the county clerk who shall be secretary of the board without vote. This board shall meet at the office of the county clerk on the second Monday in July, 1946, and on the second Monday of July of each year thereafter: Provided, that in any county having township organization the sheriff of said county shall also be a member of the board of equalization."

Section 11008, page 1778, Laws of Missouri 1945, provides that all members of the county board of equalization shall receive compensation at the rate of five dollars per day and that they are present and act in the performance of their duties with this condition that any county officers who are members of said board who now or hereafter may be compensated by salaries shall not be entitled to the compensation of five dollars per day. That section reads:

"The judges of the county court, the county surveyor, the county assessor, the sheriff, the county clerk, and those sitting as members as may otherwise be provided, shall receive five dollars per day for each day they shall be present and act in the performance of their duties as members of the county board of equalization. Provided, that the above county officers who are now or may hereafter be compensated by salary shall not be entitled to the compensation provided in this section."

The foregoing provision in restricting members of said board who are county officers and compensated by salaries from receiving the per diem does not specify the particular services for which the salary is paid to said county officer.

Section 1, page 1552, Laws of Missouri 1945, fixes the compensation for county assessors in counties of the second class and provides that the assessor in such counties shall charge a fee of twenty-five cents for each merchants tax statement taken as provided in Section 11309, page 1840, Laws of Missouri 1945, and also refers to other fees that said county assessors shall receive. Section 2 of the same act further provides that the county assessor shall receive for his services as provided in Section 1 of said act \$5,000.00 annually in lieu of fees provided in Section 1. Section 4 of the same act allows the county assessor for attending annual assessors' meetings called by the state tax commission the sum of five dollars per diem for time actually and necessarily spent in going to and returning from said meeting, and further makes provision for mileage, not to exceed five cents per mile. The foregoing sections read in part:

"Section 1. The fees for services of the county assessors in counties of the second class shall be thirty cents per list and six cents per entry for making real estate and tangible personal books, all the real and tangible personal property assessed to one person to be counted as one name; twenty-five cents for each merchants tax statement taken and entered in the tax book as required by Section 11309 of an act of the Sixty-third General Assembly known as House Committee Substitute for House Bill No. 536; twenty-five cents for each manufacturers tax statement taken and entered in the tax book as required

by Section 1 of an act of the Sixty-third General Assembly known as House Committee Substitute for House Bill No. 539 approved November 30, 1945; \* \* \*

"Section 2. The county assessor in counties of the second class shall receive as compensation for his services as provided in Section 1 of this act the sum of \$5,000.00 annually in lieu of the fees provided in said Section 1, to be paid in equal monthly installments out of the county treasury. All fees to be paid by the state as provided in said Section 1 shall be paid into the county treasury and shall be used to pay the compensation of the assessor and his deputies as provided in this act."

"Section 4. The county assessor in counties of the second class shall be allowed, for attending the annual assessors' meeting called by the state tax commission as provided in sub-section 14 of Section 15 of an Act of the 63rd General Assembly known as House Bill No. 528, approved December 19, 1945, the sum of \$5.00 per diem for the time actually and necessarily spent, including going to and returning from such meeting, and shall be reimbursed for transportation expense actually and necessarily incurred in going to and returning from said annual meeting, not to exceed 5 cents per mile."

Ordinarily when the Legislature places a public official upon a salary with the intent that said official shall receive no further compensation, the act usually provides for a certain annual salary in lieu of all fees, compensation, etc., by virtue of any statute or some similar provision. Section 2, page 1552, Laws of Missouri 1945, fixing the salary of the county assessor in counties of the second class at \$5,000.00 annually in lieu of fees provided in Section 1 of such act, might be construed to allow said assessor additional fees for services rendered other than those mentioned in Section 1 of said act, if it were not for Section 4, page 1553, Laws of Missouri 1945, supra, making only one exception to the salary provided for under Section 2 of the same act which entitles said assessor to receive \$5.00 per diem for attending meetings called by the state tax commission under House Bill No. 528,

passed by the 63rd General Assembly. Applying that familiar maxim "expressio unius est exclusio alterius" meaning the expression of one thing in a statute is the exclusion of another, this indicates that the Legislature fully intended county assessors of second class counties shall receive an annual salary of \$5,000.00, and in addition thereto, \$5.00 per diem while attending meetings called by the state tax commission, and no further compensation. See Kansas City Power and Light Company vs. Smith, 111 S.W. (2d) 513, 342 Mo. 75.

#### CONCLUSION

Therefore, it is the opinion of this department that while the county assessor in second class counties is also a member of the board of equalization in view of Section 11008, page 1778, Laws of Missouri 1945, prohibiting any county officer who is a member of said board who now or hereafter may be compensated by salary from receiving compensation provided for in Section 11008, supra, that the county assessor of your county, who now receives an annual salary, is not entitled to \$5.00 per day, that he is present and acting in performing the duties as a member of the county board of equalization.

Respectfully submitted,

AUBREY R. HAMMETT, Jr.  
Assistant Attorney General

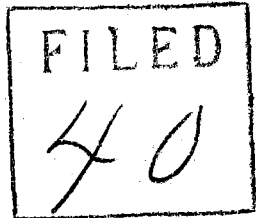
APPROVED:

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J. E. TAYLOR  
Attorney General

ARR:VLM

NEPOTISM: Appointment of deputy whose great-grandfather was also sheriff's great-grandfather and whose grandfather was brother of sheriff's grandfather, not in violation of nepotism provision.



March 11, 1947

4/7

Honorable Wilson D. Hill  
Prosecuting Attorney  
Ray County  
Richmond, Missouri

Dear Sir:

This will acknowledge receipt of your letter of March 6, 1947, requesting an opinion from this department, which reads as follows:

"May the Sheriff of a 3rd class county appoint as deputy sheriff a person who is related to him in this wise: their great-grandfather was one and the same person, and their grandfathers were brothers?"

Your attention is directed to Section 6 of Article VII of the 1945 Constitution of Missouri, relative to the practice of nepotism in public office in Missouri. It is as follows:

"Any public officer or employee in this state who by virtue of his office or employment names or appoints to public office or employment any relative within the fourth degree, by consanguinity or affinity, shall thereby forfeit his office or employment."

The relationship involved here is that of consanguinity as both parties descend from the same ancestor. The definition is set out in 12 C. J., at page 510:

"Consanguinity or kindred is the connection or relation of persons descended

from the same stock or common ancestor, \* \* \*

There are two methods of computing the degrees of consanguinity, one by the canon law and the other by the civil law. In our opinion to Marjorie Neff Hoy, County Superintendent of schools, Marshall, Missouri, under date of October 31, 1933, this department adopted the civil law rule of computing the degrees of consanguinity. This rule is found in 12 C. J., footnote (c), page 511, as follows:

"Methods of computing the degrees of consanguinity.--" \* \* \* \* \*  
By the civil law, the computation is from the intestate up to the common ancestor of the intestate, and the person whose relations ip is sought after, and then down to that person, reckoning a degree for each person, both ascending and descending. \* \* \*"

A reference is made in the above footnote to 2 Coke Lit p. 158 (Thomas Md., p. 129) in which an example of the civil law method is found:

"\* \* \*Therefore, if we will know in what degree two of kindred do stand according to the civil law, we must begin our reckoning from one by ascending to the person from whom both are branched, and then by descending to the other to whom we do count, and it will appear in what degree they are. For example, in brothers' and sisters' sons, take one of them and ascend to his father, there is one degree; from the father to the grandfather, that is the second degree; then descend from the grandfather to his son, that is the third degree; then from his son to his son, that is the fourth. \* \* \*"

Therefore, by using the civil law method, the degree of relationship by consanguinity between the two persons under consideration here, is as follows:

Ascending from the sheriff to his father is one degree; from his father to his grandfather, that is the second degree; from his grandfather to his great-grandfather, that is the third degree; then descending from his great-grandfather to the great-grandfather's other son, that is the fourth degree; from the great-grandfather's son to his son, that is the fifth degree; and then to the son in question here, that is the sixth degree. The degree of relationship by consanguinity between the two persons under consideration here, is in the sixth degree, and since the degree of relationship is more distant than the fourth degree, it is not within the prohibition against nepotism which is set forth in the Missouri Constitution.

#### Conclusion

Therefore, it is the opinion of this department that the appointment by a sheriff of a person as his deputy whose great-grandfather was also the sheriff's great-grandfather and whose grandfather was the brother of the sheriff's grandfather, is not in violation of Section 6 of Article VII of the 1945 Constitution of Missouri.

Respectfully submitted,

DAVID DONNELLY  
Assistant Attorney General

APPROVED:

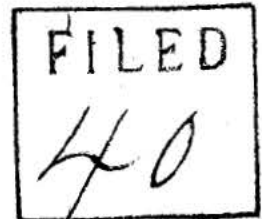
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J. E. TAYLOR  
Attorney General

DD:EG

7  
SCHOOLS: In order to qualify under Section 10420, R.S. Mo. 1939, a school director elected must be a taxpayer, who shall have paid a state and county tax within one year next preceding his election.

*copy to Mr. John*  
May 8, 1947



Honorable Wilson D. Hill  
Prosecuting Attorney  
Ray County  
Richmond, Missouri

Dear Sir:

This is in reply to your letter dated April 25, 1947, in which you requested an opinion on the qualification of a school director. Said letter reads as follows:

"Could a person elected as a School Director qualify, if he owns no property, either real or personal within the County or State, and pays only a sales tax?"

Section 10420, R.S. Mo. 1939, sets out the qualifications of school directors as applied to common schools. The part of said section pertinent to our question reads as follows:

"The government and control of the district shall be vested in a board of directors composed of three members, who shall be citizens of the United States, resident taxpayers of the district, and who shall have paid a state and county tax within one year next preceding his, her or their election, and who shall have resided in this state for one year next preceding his, her or their election or appointment, and shall be at least twenty-one years of age. \* \* \* \* \*

The court in State v. Heath, 132 S.W. (2d) 1001, 345 Mo. 226, in commenting on Section 9287, R.S. Mo. 1929, which is now Section 10420, supra, said at l.c. 1004:

"Section 9287, R.S. 1929, Mo. St. Ann. Section 9287, p. 7148, provides that common school districts shall be governed by a board of three directors 'who shall



be citizens of the United States, resident taxpayers of the district (21 years of age), and who shall have paid a state and county tax within one year next preceding his, her or their election, and who shall have resided in this state for one year next preceding his, her or their election.' The decisive question here is whether or not respondent, under the admitted facts, has complied with the above italicised part of the section prescribing qualifications essential to his eligibility to the office of school director. Sec. 9328, R.S. 1929, Mo. St. Ann. Section 9328, p. 7168, prescribes this same qualification for directors of City, Town and Consolidated schools; see also Sec. 9517, R.S. 1929, and Sec. 9572, R.S. 1929, Mo. St. Ann. Sec. 9517, p. 7281, and Section 9572, p. 7307, for qualifications in larger cities where strangely this requirement is relaxed or abolished. It should also be noted that substantially the same provision is made concerning qualifications of members of both houses of the General Assembly. Const. Art. 4, Sec. 4 and Sec. 6, Mo. St. Ann. The evident purpose of this requirement is to have such officers, who impose taxes on others and determine how they shall be spent, chosen from among those citizens who have been paying, and will likely continue to pay, taxes. It is said, however, that such 'statutes imposing qualifications should receive a liberal construction in favor of the right of the people to exercise freedom of choice in the selection of officers.' 46 C.J. 937, Sec. 32. The Missouri decisions have given a liberal construction to this and similar sections prescribing requirements of eligibility to elective offices.

"In State ex inf. Bellamy ex rel. Harris v. Menengali, 307 Mo. 447, 270 S.W. 101, this court held that a married woman was qualified to be a common school director, under

this section, if she actually owned taxable property in the district upon which taxes were paid for the year prior to her election, although the property was assessed in the name of her husband and the taxes were paid by him. \* \* \* \* \*

The court continued at l.c. 1004:

"In State ex rel. Circuit Attorney v. Macklin, 41 Mo. App. 335, the court construed a statute which made the requirement for eligibility for the office of school director in St. Louis, that such person must have 'paid a school tax therein for two consecutive years immediately preceding his election.' The court held that considering the method of assessment and collection of taxes that this meant a person was eligible 'who shall have paid, at any time preceding his election, a tax for the benefit of schools within said city for the two consecutive calendar years, next preceding the year of his election, assessed on property in which he has an interest subject to taxation, at the date of assessment or date of payment.' The court held that a director was eligible who had, during the month prior to his election in 1889, 'bought a small piece of property in the city of St. Louis, on which there were delinquent school taxes for the years 1887 and 1888 and paid them,' saying 'he did pay taxes for the benefit of schools within the city of St. Louis for two consecutive years immediately preceding his election. \* \* \* an extensive examination of this subject has failed to bring to our notice a case, where the mere fact that the person affected has paid taxes immediately preceding an election with the sole object of obtaining thereby a qualification as elector or officer, which he did not otherwise possess, was treated as a fraud upon the law.'"

At l.c. 1005, the court said:

"\* \* \* Surely Sec. 9287, Mo. St. Ann. Sec. 9287, p. 7148, was not intended to make eligibility depend upon the payment of any state and county tax within one year's time before the date of the election. To so construe it would make one eligible, who paid, within such period of one year, a tax three or four years delinquent, even though he had paid no taxes for any other year after such tax paid became delinquent and had no taxable property thereafter. In view of our method of assessing and collecting property taxes and the time when common school elections are held, we think it contemplated the payment of the current taxes payable during the calendar year preceding the school election since no other property taxes could become due between the end of that year and the school election. We, therefore, hold that the reasonable construction of the statutory requirement, 'shall have paid a state and county tax within one year next preceding his \* \* \* election,' is that a person, to be eligible to serve as a common school director, shall have paid the state and county tax which was due and payable within the calendar year next preceding his election. \* \* \* \* \*

In State ex inf. Sutton v. Fasse, 189 Mo. 532, the court in commenting on that part of the section which said that the directors, in order to qualify, must be resident taxpayers of the district, said at l.c. 536:

"Appellant insists the requirement that a school director must be a resident taxpayer of the district means that he must have paid taxes for school purposes within the district. That contention cannot be adopted without enlarging the language of the statute and changing its intention. The meaning is that a person who is a qualified voter of the district and also a taxpayer is eligible. A qualified voter is

defined in the same section to be one who, under the general laws of the State, would be allowed to vote in any county for State and county officers and who has resided in the district thirty days preceding the school district meeting at which he offers to vote. Any person who possesses those qualifications is a qualified voter as defined in section 9798 (9759?) in regard to the qualifications of school director. If he is also a taxpayer (that is, a person owning property in the State subject to taxation and on which he regularly pays taxes) he is eligible to the office of school director whether he has in fact paid a tax within such school district or not; \* \* \* \* \* (Underscoring ours.)

Although, as indicated in the Heath case, supra, the section setting forth the qualifications has been given a liberal construction, we feel that such construction is only applicable to the extent it was employed in the Menengali case, referred to in the Heath case, where the court was determining whether the woman elected school director was owner of property, and they held she was, even though the property was assessed in the name of her husband and the taxes were paid by him. In the Menengali case, 307 Mo. 447, the court, in referring to Section 11213, R.S. Mo. 1919, which is now Section 10420, supra, said at l.c. 453:

"It was admitted at the trial that respondent possessed all the qualifications required by the above section, to fill the position of school director, except the disputed issue as to whether she was a taxpayer of said school district, and as to whether she had paid, or caused to be paid, a state and county tax within one year next preceding her election in April, 1922.

"In Webster's New International Dictionary, a taxpayer is defined as: 'One who pays a tax.' In Funk & Wagnall's New Standard Dictionary, a taxpayer is defined as: 'One who pays any tax, or who is liable for the payment of any tax.' The evidence is clear

and undisputed that respondent on June 1, 1920, was the legal owner of the property heretofore described, and that it was not exempt from taxation."

Thus from the above it would appear that there can be no doubt but that it was intended that the qualification requirement that a school director be a taxpayer meant a person who owns property in this state subject to an assessment which he regularly pays. But, under the facts as presented in your letter, you state that this person elected school director owns no property, either real or personal, within the county or state and pays only a sales tax. Under such circumstances, there apparently is no question, as was presented in the Menengali case, as to any claim that he has paid any tax so as to have complied with the prescribed qualifications of Section 10420, R.S. Mo. 1939, essential to his eligibility to the office of school director.

#### CONCLUSION

It is, therefore, the opinion of this department that under Section 10420, R.S. Mo. 1939, a person elected as a school director does not qualify as a resident taxpayer of the district who shall have paid a state and county tax within one year next preceding his election if he owns no property, either real or personal, within the county or state and pays only a sales tax.

Respectfully submitted,

Wm. C. COCKRILL  
Assistant Attorney General

APPROVED:

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J. E. TAYLOR  
Attorney General

WCC:LR

TAXATION:  
COUNTY LIBRARY:  
ELECTION:

Majority vote only is necessary for establishment of county library under provisions of Sec. 14767, R.S. Mo. 1939. Senate Bill 370, 63rd General Assembly, is authorization for levy of library tax in addition to constitutional limit and does not require two-thirds vote.

May 22, 1947



Honorable Wilson D. Hill  
Prosecuting Attorney  
Ray County  
Richmond, Missouri

Dear Sir:

This is in reply to your letter of recent date, requesting an official opinion of this department and reading as follows:

"May I have an opinion based upon the following facts:

"On March 14, 1946, a petition in due form was presented to the County Court of Ray County, a third class County, based upon Section 14767 Revised Statutes 1939 and containing the signatures of the required number of petitioners for the establishment of a free County Library and asking for the imposition of a one mill tax on real estate in this County to support the same.

"Under the provisions of the law, there was a proper election held on 2nd of April, 1946, and in the County Clerk's report, on April 5, 1946, it was certified that the following votes were cast:

For the establishment of a Library,	1268 votes
Against the establishment of a Library,	544 votes
For one mill tax,	1217 votes
Against one mill tax,	570 votes

"Thereupon, the County Court on April 5, 1946, made its order, declaring the said Library duly established and a body corporate.

"A few public utilities have refused to pay the one mill tax assessed against their property, because the New Constitution of Missouri became effective, 1 April, 1945, and some of its provisions seem to conflict with the above cited Statute, especially Art. X, Sec. 11 'C'.

"The question is, whether or not it now requires a two-thirds vote to establish a library District and two-thirds vote under Article X, Section 11, 'c' to increase the tax rate one mill, instead of the majority as provided for in Section 14767."

Two questions are presented in your request: (1) Is a two-thirds vote necessary to establish a library district, and (2) is a two-thirds vote necessary to authorize the imposition of a tax for the support of such a library?

Since the answer to both questions is "no," it is not necessary in this opinion to discuss the effect of an actual two-thirds majority vote in your election for establishing a library district and for imposing a tax of one mill, since a majority vote is all that is required in such election.

Section 14767, R.S. Mo. 1939, which provides for the establishment of a county library district, reads, in part, as follows:

"\* \* \* And if, from returns of such election, which shall be certified to the county court, the majority of all the votes cast on such propositions at such election shall be

'for establishing \_\_\_\_\_ county library district,'

and for the tax for a free county library, the county court shall enter of record a brief recital of such returns and that there has been established

'\_\_\_\_\_ county library district,'

and thereafter such

' \_\_\_\_\_ county library district'

shall be considered and held to be established, shall be a body corporate, and known as such; and the tax specified in such notice shall, subject to provisions herein below of this section, be levied and collected, from year to year, in like manner with other taxes in the rural school districts of said county. \* \* \*

It is obvious that a majority vote only is necessary for the establishment of a library district and for the authorization of the imposition of the tax levy.

Section 14767 further provides as follows:

"\* \* \* that such taxes shall cease, in case the regular voters of any such district shall so determine by a majority vote at any annual election held therein, after petition, order of court, and notice of such election and of the purpose thereof, first having been made, filed and given, as in the case of establishing such county library district."

It will be seen that such tax levy will continue until a majority vote shall be cast against such levy at an annual election. No limit on the length of time the tax is authorized to be levied is found except that quoted above.

Section 14767 has never been repealed by the Legislature, and we are unable to find any section or clause of the Constitution or of any statute of this state which repeals such section by implication, or which is inconsistent with Section 14767.

We are enclosing a copy of an official opinion of this department rendered under date of April 1, 1947, to Joe N. Brown, in which we held that Senate Bill No. 370 of the 63rd General Assembly, which bill became effective May 13, 1946, was the authorizing by the Legislature of the tax levy provided for in Section 14767, above the constitutional limit found in Section 11 (b) of Article X of the Constitution, and that Senate Bill No. 370 was enacted pursuant to the second clause of Section 11 (c) of Article X of the Constitution.



We are also enclosing a copy of an official opinion of this department rendered under date of March 28, 1947, to Marshall Craig, which clearly points out that the two-thirds vote required under the first clause of Section 11 (c) of Article X of the Constitution has nothing whatsoever to do with the second clause of such section. This will be found on pages 6 to 10, inclusive, of the opinion to Mr. Craig.

The Legislature, under authority of the second clause of Section 11 (c) of Article X of the Constitution, can enact, and did in Senate Bill No. 370 enact legislation with regard to library taxes in addition to the limit found in Section 11 (b) of Article X, and such action is not affected in any way by the first clause of Section 11 (c) of Article X and the two-thirds vote requirement found therein.

Since Section 14767 was in effect on April 5, 1946, and a majority of the voters voted for the establishment of a county library district and for a one mill tax, and since Senate Bill No. 370 became effective May 13, 1946, the one mill levy authorized at such election for a period lasting until such levy should be repealed at an annual election is in addition to the constitutional limit found in Section 11 (b) of Article X, and such an election is a valid authorization for the levy of such tax.

#### CONCLUSION

The one mill tax voted April 5, 1946, in Ray County under authority of Section 14767, R. S. Mo. 1939, is a tax levy in addition to the limit found in Section 11 (b) of Article X of the Constitution, and is a valid authorization for the imposition of a one mill tax. A majority vote at such election was sufficient to authorize the levy of such tax.

Respectfully submitted,

C. B. BURNS, Jr.  
Assistant Attorney General

APPROVED:

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J. E. TAYLOR  
Attorney General

CBB:HG

ELECTIONS:  
TAXATION  
ROADS AND BRIDGES:

*Comp. Law*

Under the provisions of Sec. 8529, Laws of 1945, page 1480, the county court may designate the places of voting for the tax increase in a general or special road district authorized by the first paragraph of Sec. 12, Art. X of the Const.

June 28, 1947

FILED

40

2/15

Honorable Wilson D. Hill  
Prosecuting Attorney  
Ray County  
Richmond, Missouri

Dear Sir:

This is in reply to your letter of recent date, requesting an opinion of this department, and reading as follows:

"May I have an opinion as to the legality of a Special Election held under authority of R. S. 8529 (laws 1945) in which the tax rate for a general road district of this third class county was increased? The facts are as follows:

"A petition in proper form with more than ten qualified voters and taxpayers residing in Ray County, outside of any special road district, was presented to the County Court requesting an election under R. S. 8529. The County Court has always exercised jurisdiction and supervision over the roads and bridges included in this area, and it has become known as the 'County Road District' and the funds set aside for the same have been kept in 'The County Road and Bridge Fund.' The area so affected comprises eight voting precincts, which are long established and always used during County and State elections.

"There are no newspapers published within the boundaries of this area, hence three certified copies of the court order calling the election were posted within the district. The notices stated that voting would be held at two of the precincts between the hours provided for in the statute 8529. The election

was held, a majority of the votes cast favored the increase, and in due time the County Court made the authorized levy for said area.

"Several interested taxpayers and citizens who reside within the area affected, have since remonstrated with the County Court, maintaining that they were deprived of a right to vote on the proposition (1) because they had no notice of the election, inasmuch as the three certified copies of the court order were posted at areas unknown to them (2) voting was held at only two precincts, which were at points inaccessible to the voters.

"The specific question which I wish answered is this: May a County Court in a third class county, designate one or two precincts in a general road district as voting places under R. S. 8529 (1945), and hold a valid election upon the proposition of increasing tax levy, or should such election be held in each of the precincts regularly used for voting in such an area?"

We are enclosing a copy of an official opinion of this department rendered to Hon. Julian L. O'Malley under date of May 16, 1947, and copies of opinions to Hon. E. H. Stark dated February 1, 1944, and to Hon. W. W. Crockett dated January 25, 1935, referred to in the opinion to Mr. O'Malley, in order for you to determine whether or not, under the circumstances existing in your county, that part of Ray County outside of any special road district is a general road district in the contemplation of the Constitution and Section 8529, Laws of Missouri, 1945, page 1480. However, in rendering this official opinion to you, we proceed on the assumption that the part of Ray County outside of special road districts does, as a matter of fact, constitute a general road district.

Section 8529, Laws of Missouri, 1945, page 1480, provides, in part, as follows:

" \* \* \* Such call shall be made by an order entered of record setting forth the date and place of holding such election, the manner of voting and the rate of tax the court will levy,

which rate shall not exceed thirty-five cents on the hundred dollars assessed valuation on all taxable real and tangible personal property in the district. \* \* \* "  
(Emphasis ours.)

We believe that it is clear from the language of the statute above quoted that it is the duty of the county court, in ordering an election under Section 8529, to designate the place where the voting is to be held, and since the statute is clear and specific on this, it is not necessary that the county court should designate the precincts regularly used in other state and county elections.

Section 652, R. S. Mo. 1939, provides as follows:

"When any subject-matter, party or person is described or referred to by words importing the singular number or the masculine gender, several matters and persons, and females as well as males, and bodies corporate as well as individuals, shall be deemed to be included." (Emphasis ours.)

Under the provisions of this section, it is clear that the reference to "place of holding such election" includes places of holding such election, and under such section the county court was authorized to designate one or more places in the road district at which the voting should be conducted.

#### CONCLUSION

It is the opinion of this department that the county court may designate one or two precincts in a general road district as voting places for an election held under the provisions of Section 8529, Laws of Missouri, 1945, page 1480, and that it is not necessary that the county court designate as voting places each of the precincts regularly used for voting in other state or county elections.

Respectfully submitted,

C. B. BURNS, Jr.  
Assistant Attorney General

APPROVED:

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J. E. TAYLOR  
Attorney General

CBB:HR

TAXATION AND REVENUE: Missouri Power & Light Company not liable for Missouri income tax upon refunds ordered paid to consumers.

FILED

41

June 11, 1947

6/12

Mr. Haskell Holman, Supervisor  
Income Tax Unit  
Division of Collection  
Department of Revenue  
Jefferson City, Missouri

Dear Sir:

Reference is made to your letter requesting an official opinion of this office and reading as follows:

"Enclosed herewith is the carbon copy of a letter from Mr. Lester G. Seacat, an attorney for the Missouri Power & Light Company.

"After studying this letter will you please advise whether or not in your opinion the Department of Revenue would be permitted to enter into such agreement with the Missouri Power & Light Company."

The letter referred to by you in your inquiry reads, in part, as follows:

"The facts are these: In 1942 the Federal Power Commission issued an order reducing the rate chargeable by the Panhandle Eastern Pipe Line Company for gas sold by it to the Missouri Power & Light Company (and other distributors) for resale to the customers of the Missouri Power & Light Company. The Panhandle Company prosecuted a proceedings to obtain a judicial review of that order. The order lowering the rates was stayed pendente lite on condition that the Panhandle Company pay to a custodian appointed by the court that part of the

amount received by it from time to time in payment for gas at the old rate which represented the difference between the old rate and the new rate fixed by the Federal Power Commission.

"In conformity with the stay order, during the balance of 1942, all of 1943 and 1944 and part of 1945, the Missouri Power & Light Company, in the usual course of business, paid for the gas it purchased for resale from the Panhandle Company at the old rate. After the receipt of those payments the Panhandle Company determined the difference between the amounts payable under the old and new rate and paid that difference to the court's custodian. The amounts so deposited with the court by the Panhandle representing excess payments made by the Missouri Power & Light Company aggregated \$595,843.26.

\* \* \* \* \*

"In 1945, the Supreme Court of the United States affirmed the order of the Federal Power Commission, and remanded the case to the Circuit Court of Appeals for the Eighth Circuit for further action in accordance with that decision. Later, in 1945, the Department of Justice, on behalf of the United States of America, intervened in the proceedings then pending in the Circuit Court of Appeals for the Eighth Circuit and asserted in substance that the moneys in the impounded fund belong in equity to the ultimate consumers of the gas represented thereby and sought an order that such moneys be distributed directly from the court's custodian to the individuals who were customers of the Missouri Power & Light Company while the fund was being accumulated.

"In connection with its intervention, the Government also sought and procured an order from the court requiring the Missouri Power & Light Company (and other distributors similarly situated) to claim or disclaim any interest in the fund. In response to that

order the Missouri Power & Light Company filed with the court a limited disclaimer wherein it declared that it was willing to disclaim any interest in the impounded fund in favor of its customers who were consumers of the gas represented thereby on condition that it could effect a determination by the taxing authorities of the United States and the State of Missouri that there would be no liability for income tax asserted against the Missouri Power & Light Company in the event the court should order this money to be distributed directly to the consumers.

\* \* \* \* \*

"So far as the State of Missouri is concerned, the question arises as to whether or not the fact that the legal title to that portion of the impounded fund which represents excess payments made by the Missouri Power & Light Company during the pendency of the litigation may have reverted by operation of law to the Missouri Power & Light Company upon the affirmation of the order of the Federal Power Commission by the Supreme Court of the United States created income of the Missouri Power & Light Company which is taxable under Article 21 of Chapter 74, Revised Statutes of Missouri, 1939, and the amendments thereto, even though the Court may hold that the ultimate consumers have a superior equitable title thereto and order its custodian to distribute the fund directly to such ultimate consumers."

We are further informed that the Missouri Power & Light Company uses the accrual system of bookkeeping for income tax purposes. We also understand that the several proposed plans of distribution of the impounded funds each contemplate their direct distribution to the consumers of the Missouri Power & Light Company, and that no part of such moneys will come into the hands of the Missouri Power & Light Company.

At the outset, we wish to point out that there is no provision in the Missouri state income tax law authorizing "closing agreements" such as are permitted under Section 3760 of the Internal Revenue Code of the United States. Therefore, this opinion necessarily will consider only the legal effect of the facts

set out herein, and is not to be construed as amounting to such a "closing agreement."

We think the question presented must be resolved by determining whether or not the holding of the naked legal title to the funds representing the overcharge made by the Panhandle Eastern Pipe Line Company constitutes "income" to the Missouri Power & Light Company. Throughout this opinion we assume that ultimately all of such excess charges will be distributed directly to the consumers based upon their equitable title to such impounded funds. Of course, if in fact any portion of such impounded funds is returned to the Missouri Power & Light Company for its own use and benefit, then certainly such funds must be treated as income to that company.

We have no appellate court decisions in Missouri declaring when income may be said to have "accrued." However, there are several decisions construing the Internal Revenue Laws on this subject, and we feel that they are strongly persuasive. Your attention is directed to *H. Liebes & Co. v. Commissioner of Internal Revenue*, 90 Fed. (2d) 932, 1. c. 937, 938:

"From the above expressions, it is apparent that the general definition of 'accrued' is limited when taken in connection with income returns. We may conclude that income has not accrued to a taxpayer until there arises to him a fixed or unconditional right to receive it.

\* \* \* \* \*

"The complete definition would therefore seem to be that income accrues to a taxpayer, when there arises to him a fixed or unconditional right to receive it, if there is a reasonable expectancy that the right will be converted into money or its equivalent.

\* \* \* \* \*

"It is clear that where a claim exists, no income may accrue, in the absence of a settlement, so long as a judgment has not been entered. \* \* \* "

With this in mind, it seems that there will be no accrual of income to the Missouri Power & Light Company of any portion



of the impounded funds in the event that such funds are ultimately ordered distributed direct to the consumers of the Missouri Power & Light Company. We, therefore, are led to the view that no liability for Missouri state income tax will be incurred by the Missouri Power & Light Company.

As we have already considered the lack of statutes authorizing the Department of Revenue or any other state department or official to enter into "closing agreements" similar to those contemplated by the Federal statutes, we think it unnecessary to further discuss that phase of your inquiry.

#### CONCLUSION

In the premises, we are of the opinion that no liability will be incurred by the Missouri Power & Light Company with respect to funds impounded in the registry of the Federal Court, representing excess charges made by a wholesaler of gas to said company, to the extent that such impounded funds are ordered by the Federal Court to be distributed directly to the ultimate consumers.

We are further of the opinion that neither the Department of Revenue nor any other state department or official has the authority to enter into a "closing agreement" with a taxpayer similar to such agreements executed under Section 3760 of the Internal Revenue Code of the United States.

Respectfully submitted,

WILL F. BERRY, Jr.  
Assistant Attorney General

APPROVED:

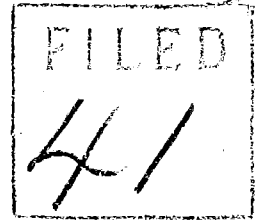
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J. E. TAYLOR  
Attorney General

WFB:HR

REAL ESTATE COMMISSION: No license required for person merely soliciting the listing of real estate.

September 17, 1947



Honorable J. W. Hobbs, Secretary  
Missouri Real Estate Commission  
222 Monroe Street  
Jefferson City, Missouri

Dear Mr. Hobbs:

This is in answer to your request for an opinion as to whether a person who solely solicits the listing of real estate in Missouri for a licensed broker must secure a license as a real estate broker or salesman, as provided under Section 8300.1, Mo. R.S.A., Laws of 1941, page 425.

The applicable statutes to be considered in connection with the above question are as follows:

"Section 8300.1 Real estate brokers and salesmen--license required

"After January 1, 1942, it shall be unlawful for any person, copartnership, association or corporation, foreign or domestic, to act as a real estate broker or real estate salesman, or to advertise or assume to act as such without a license first procured from the Missouri Real Estate Commission. Laws 1941, p. 425, Sec. 1."

"Section 8300.3 Definitions--application of act

"A real estate broker is any person, copartnership association or corporation, foreign or domestic, who advertises, claims to be or holds himself out to the public as a real estate broker or dealer and who for a compensation or valuable consideration, as whole or partial vocation, sells or offers for sale, buys or offers to buy, exchanges or offers to exchange the real estate of others; or who leases or offers to lease, rents or

offers for rent the real estate of others; or who loans money for others or offers to negotiate a loan secured or to be secured by a deed of trust or mortgage on real property. A real estate salesman, within the meaning of this act, is any person, who for a compensation, or valuable consideration becomes associated, either directly or indirectly with a real estate broker to do any of the things above mentioned, as a whole or partial vocation. This act shall not apply to rent collectors or counter clerks employed in the rental department of the office of a real estate broker. This act shall not apply to any person, copartnership, association or corporation who as owner or lessor performs any of the acts aforesaid, with reference to property owned or leased by them, nor to their employees in the regular course of the ownership and management of such property; nor shall this act be construed to include in any way the service rendered by an attorney-at-law in the performance of his duties as such; nor shall this act apply to a receiver, trustee in bankruptcy, administrator, executor, or any person selling real estate under order of any court, nor to a trustee acting under a trust agreement, deed of trust, or will, nor to the regular employees thereof; nor any bank, trust company, building and loan association, insurance company or farm-loan association, organized under the laws of this state or of the United States when engaged in the transaction of business on its own behalf and not for others; nor shall this act apply to any person who does not advertise or hold himself out to the public as a real estate broker or dealer and who might, occasionally, buy or offer to buy, or sell or offer to sell, or rent or lease or offer to rent or lease any real estate, or to loan or offer to loan money secured by real estate. As amended Laws 1945, p. 1422."

We shall scrutinize the statutes involved and the decisions of other courts than Missouri dealing with this subject, as the question has not been covered by the Missouri appellate courts, so as to determine whether a person engaged solely in soliciting the listing of real estate in Missouri for a licensed broker comes within the provisions of our real estate brokers' law.

It is apparent that the statutes were enacted, not to provide revenue, but to provide for registration and regulation of those engaged in the real estate business. The license fee (\$5.00 per year) is so nominal that no other conclusion is tenable. Koeberle v. Hotchkiss, 8 Calif. App. (2d) 634, 48 Pac. (2d) 104, 107, states:

"\* \* \* The primary purpose of the Real Estate Brokers' Act was to require real estate brokers and salesmen to be 'honest, truthful and of good reputation.' \* \* \*"

By its inherent nature, real estate business requires confidence in and honesty of those delegated with authority to list, rent, supervise or sell real estate belonging to others. Public criticism of real estate rackets and unscrupulous and unworthy brokers and agents has caused the respectable and reliable real estate brokers and salesmen throughout the land to promote and demand legislative supervision and regulation of those engaged in this business. A casual examination of the statutes of different states discloses that many have enacted real estate brokers' laws which are similar to those of Missouri. While the statutes of the different states vary in some details, yet in general provisions and purposes they are very much alike. Practically all the laws have been enacted, not for revenue, but for supervision and regulation. They require a license of real estate brokers and real estate salesmen, and, like the Missouri law, they give a definition of broker and real estate salesman similar to Section 8300.3, supra.

We must keep constantly in mind that acts creating boards or commissions, with numerous officials and paid employees, complicated legal machinery, and elaborate plans for the purported purpose of regulating businesses and callings, well known and understood by the public, the expenses of which come out of the pockets or earnings of those engaged in the business or calling, should be viewed and examined with diligence to ascertain whether such acts and regulatory measures are designed to safeguard the public welfare, or for other purposes not sanctioned by law and beyond the limitations prescribed by the letter of the constitution and by judicial interpretation. Schneider v. Duer, 184 Atl. 914, 917.

Whereas a literal reading of Section 8300.3, supra, would include anyone not specifically exempted therein, who, for compensation, was in any manner connected with a transaction involving real estate, as for instance a stenographer in a real estate brokers office who contacted people desiring a listing, we are of the opinion that such is not the intent or meaning of this section. A reading of the statutes regulating real estate brokers makes it apparent they were enacted for the benefit of the public to protect them from dishonest and unscrupulous real estate agents. Such protection of the public is not needed from the casual or remote influence of a stenographer or of a person who introduces a real estate broker to one who may wish to deal with him. Neither the stenographer nor the man who introduces the broker in the examples we have mentioned are active participants in any contract affecting real estate or any liability of the persons entering into such contracts or listings. The dealings which the statutes aim to protect the public in are those which result in legal liabilities between the parties. Nothing the stenographer or the man who introduces the real estate broker does has that effect. This is true, even though the real estate broker contracts to pay the man who introduces him a part of his commission in the event he makes a sale or to pay him a regular salary. *Andersen v. Johnson*, (Utah) 167 A.L.R. 768, 160 Pac. (2d) 725.

#### CONCLUSION

Therefore, it is the opinion of this department that a person who solely solicits the listing of real estate in Missouri for a licensed broker is not required to be licensed by the Missouri Real Estate Commission.

Respectfully submitted,

ARVID OWSLEY  
Assistant Attorney General

APPROVED:

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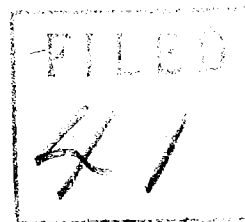
J. E. TAYLOR  
Attorney General

AO:LR

REAL ESTATE COMMISSION: Section 14 includes misdemeanors as well as felonies.

A judgment upon an insufficient information is not a conviction within the meaning of Section 14.

October 30, 1947



Mr. John W. Hobbs, Secretary  
Missouri Real Estate Commission  
Jefferson City, Missouri

Dear Mr. Hobbs:

This is in reply to your letter of October 15, 1947, in which you requested an opinion from this department, reading, in part, as follows:

"Pursuant to the visit of Commissioner O'Flaherty and myself with you yesterday afternoon and the conversation in regard to Section 14 of the Missouri Real Estate License Law. May the Commission request an opinion from you on the following complaint.

"This office received a letter of complaint and the Certified copy of the Circuit Court of Scott County, Missouri, copy of which is enclosed and self explanatory.

"You will notice that the plea of guilty is to a misdemeanor instead of a felony as originally filed in the above suit.

\* \* \*

We will answer your request in two parts: (1) Does Section 14 include the crimes listed even though they are only misdemeanors, and not felonies under the criminal statutes? (2) Does the enclosed copy of the record show conviction of a crime within Section 14?

Section 14, Laws of 1941, page 430, reads, in part, as follows:

"Where during the term of any license issued by the commission the licensee shall be convicted in a court of competent jurisdiction in the state of Missouri or any state (including federal courts) of forgery, embezzlement, obtaining money under false pretenses, extortion, criminal conspiracy to defraud, or other like offense or offenses and a duly certified or exemplified copy of the record in such proceedings shall be filed with the commission, the commission shall revoke forthwith the license by it theretofore issued to the licensee so convicted."

That the Commission has no discretion in a proceeding under this section does not appear to be questioned. The plain wording of the section indicates that when a duly certified copy of a record in the criminal proceedings against a broker or salesman is filed with the Commission, it is mandatory that the Commission revoke the license theretofore issued. It was so considered in the case of Meyer v. Missouri Real Estate Commission, 183 S.W. (2d) 342, wherein the Court said, l.c. 343:

" \* \* \* Many specific grounds are prescribed in Section 10 of the statute on which the Commission may revoke such licenses. Proceedings under this section contemplate a hearing on the question of the guilt of the person proceeded against but, under the provisions of Section 14, it is made mandatory for the Commission to revoke such licenses 'where during the term \* \* \*'"

In Section 14, the Legislature did not qualify the crimes listed nor even limit them to the ones named, but included "or other like offense or offenses." There are no exceptions set out, and to say now that the Legislature intended to except conviction of misdemeanors would be doing violence to the act and its plain wording. In McPike v. Friedman Loan and Mercantile Company, 206 Mo. App. 187, the Court stated, l.c. 191:

" \* \* \* And no citation of authority is necessary for the proposition that a case

which falls within the purview of a statute cannot be excepted from its operation unless it comes clearly within an exception named therein, that is to say courts cannot sua sponte except cases from the operation of a law but must take the law and apply it as the Legislature made and intended it and this is the rule even when the exception would be an equitable one. \* \* \*

Throughout the act, it is plainly indicated that the Legislature desired to bring under rigid control those who deal in the buying and selling of real estate, as witness the wording of Sections 7 and 10 of the act. The purpose of these acts may be found in an expression of the Utah Supreme Court in a recent case, *Andersen v. Johnson*, 167 A.L.R. 768, which dealt with the Utah Real Estate Brokers' Act, l.c. 771:

"By its inherent nature, real estate business requires confidence in and honesty of those delegated with authority to list, rent, supervise or sell real estate belonging to others. Public criticism of real estate rackets and unscrupulous and unworthy brokers and agents has caused the respectable and reliable real estate brokers and salesmen, throughout the land, to promote and demand legislative supervision and regulation of those engaged in this business. \* \* \*

In a Missouri case, *State ex rel. Lentine v. State Board of Health*, 65 S.W. (2d) 943, concerned with the action of the State Board of Health in revoking the license of a physician, the Court said, l.c. 949:

" \* \* \* Given the construction for which relator contends since such conduct does not come within any of the acts enumerated in our statute a physician licensed in this state could follow such a reprehensible and immoral practice with impunity so far as his right to practice medicine is concerned and without being subjected to deprivation of his license. We have heretofore touched upon this contention and indicated



that we do not think the statute should be given such a narrow or restricted construction. \* \* \*

If misdemeanors were not included under this section, there are many offenses listed in Section 14 for which a broker or salesman could be convicted and still retain his license, because they are only misdemeanors, and not felonies under the criminal statutes, for example, the following, all from the Revised Statutes of Missouri, 1939:

Section 4490 - Fraudulent conveyance;  
" 4491 - Executing second deed fraudulently;  
" 4598 - Destroying wills and other instruments;  
" 4599 - Accessories before the fact;  
" 4631 - Forcible entry and detainer;  
" 4632 - Conspiracy.

Brokers and salesmen are confronted with these offenses constantly in their work, and due to the nature of their work, even more so than the general public.

We think that to follow the rules of construction and give effect to the purpose and intent of the act, the language of the statute includes the crimes listed in Section 14, even though they are only misdemeanors in some instances, and when a duly certified copy of the record of conviction is before the Commission, it is mandatory that the license of the person offending be revoked. We fully realize that injustices may some times be worked by such a construction, but as was said by the Court in Robinson v. Union Electric Light & Power Co., 43 S.W. (2d) 912, 1.c. 914:

"We can imagine cases where this interpretation of the statute will doubtless work an injustice, and for all we know this may be such a case; \* \* \* At any rate, our duty is only to interpret the statute as written, and, if there are any inequalities in its practical application, those are matters which the Legislature in its wisdom will soon correct."

The second part of your inquiry is directed to a specific case now before the Commission. A copy of the court record in the case has been filed and is before the Commission for determination. It is the duty of the Commission to inquire into the

record to see if all the provisions of Section 14 have been complied with before the license is revoked. By this, we do not mean to intimate that the merits of the criminal proceeding may be inquired into, but that a record must be scrutinized to see if Section 14 is applicable. If one of the conditions for revocation are not met, the Commission may not revoke under Section 14. The pertinent parts of the record, for our purposes, are as follows:

"FIRST AMENDED  
"INFORMATION FOR A MISDEMEANOR  
"CIRCUIT COURT

\* \* \* \* \*

"\* \* \* the said defendant \_\_\_\_\_  
did then and there wilfully and unlawfully,  
conspire, combine and confederate with one  
\_\_\_\_\_ to commit an offense, to-wit:  
to unlawfully, wilfully and feloniously  
forge the signature of \_\_\_\_\_ to a  
written instrument purporting to convey an  
interest in real property, contrary to the  
form of the Statutes in such cases made and  
provided and against the peace and dignity  
of the State.

\* \* \* \* \*

"AND THEREAFTER, TO-WIT:

\* \* \* \* \*

"\* \* \* whereupon the Defendant waives arraignment and enters a plea of guilty to the charge of Conspiracy as charged in the First Amended Information heretofore filed in this cause, and this cause is now taken up and submitted to the Court so that judgment may be rendered against him according to law.

"And the Court being sufficiently advised of and concerning the premises, doth fix his punishment at a Fine of \$100.00.

"IT IS THEREFORE, SENTENCED, ORDERED AND ADJUDGED BY THE COURT, That said Defendant,

\_\_\_\_\_ having entered a plea of guilty as aforesaid, be assessed a Fine of \$100.00, together with the costs herein."

You will note that the judgment of the Court is upon the "plea of guilty to the charge of Conspiracy as charged in the First Amended Information."

Section 4075, R.S. No. 1939, reads as follows:

"In trials for conspiracy, in those cases where an overt act is required by law to consummate the offense, no conviction shall be had, unless one or more overt acts be expressly alleged in the indictment and proved on the trial; but other overt acts, not alleged in the indictment, may be given in evidence on the part of the prosecution." (Underscoring ours.)

Section 4633, R.S. No. 1939, reads as follows:

"No agreement, except to commit a felony upon the person of another, or to commit arson or burglary, shall be deemed a conspiracy, unless some act besides such agreement be done to effect the object thereof, by one or more of the parties to such agreement." (Underscoring ours.)

The charge of conspiracy has been set out above, but we think that the charge was fatally defective in that it did not allege an overt act pursuant to the agreement as required by the sections above.

Has the defendant in that proceeding been convicted of any crime, and if so, of what crime has he been convicted? A determination of these questions is necessary in order to ascertain whether or not Section 14 applies to the instant case.

Webster's New International Dictionary defines the word "convict" as follows:

"To prove or find guilty of an offense or crime charged or of wrong; to pronounce or find guilty, as of a crime by legal decision, \* \* \*" (Underscoring ours.)

Black's Law Dictionary defines the word "convict" thusly:

"To find a man guilty of a criminal charge.  
\* \* \*" (Underscoring ours.)

Therefore, in order to say that a person has been convicted, it follows that he must have been charged with a crime. The information in the instant case does not charge a crime, for the reason that it does not allege facts sufficient to constitute a crime as required in Sections 4075 and 4633, above. In the case of Ex parte Sydnor, 10 S.W. (2d) 63, the Court said, l.c. 644:

"Now, is the information wholly a nullity because it does not charge that the offense was committed during the period of one year preceding the filing of the information? The rule which we adopt, and which we think is clearly correct and in accord with our decisions in this jurisdiction, is that although much of imperfection of an indictment or information may be disregarded after judgment, yet the information or indictment must always, whether time be of the essence of the offense or not, state in some manner that the crime is charged as having been committed within the period so as to avoid the operation of the bar of the statute. If the information, though omitting the day and month, yet showed the year or a period within a year, it would be sufficient, since it would show that the prosecution is not barred. \* \* \*

\* \* \* \* \*

"It is true there are cases in which language is used in a broad sense which might lend support to the view that this information is sufficient at this stage of the case. Yet the direct authorities and the general rule are clearly to the effect that the instant information is no charge upon which a conviction either by plea of guilty or upon trial may be permitted to stand. Petitioner discharged."

In 42 C. J. S., at page 835, the rule is stated:

"There can be no trial, conviction, or punishment for a crime without a formal and sufficient accusation. \* \* \* The accusation must charge an offense; it must charge the particular offense for which accused is tried and convicted; and it must be made in the particular form and mode required by law. \* \* \* \*"  
(Underscoring ours.)

In State v. Biven, 151 S.W. (2d) 1114, the Court said, l.c. 1118:

" \* \* \* An indictment or information will not be held bad after verdict unless it fails in some essential averment necessary in description of the crime. \* \* \* "

In view of Sections 4075, 4633 and cases cited above, we think that the judgment of the Court was upon an information which did not allege an offense, and, therefore, the licensee in this case does not now stand convicted of a crime listed in Section 14. If a person has not been charged with a crime he cannot be said to stand convicted of a crime.

#### Conclusion.

It is the opinion of this department that:

(1) When a duly certified copy of the proceedings wherein a licensee has been convicted of one of the offenses enumerated in Section 14 is filed with the Commission, it is mandatory that the Commission revoke the license of the offending person, even though the offense is only a misdemeanor under the criminal statutes.

(2) The license of the broker should not be revoked on the record now before the Commission, for the reason that the record does not show that he has been convicted of a crime under Section 14 of the act.

Respectfully submitted,

APPROVED:

JOHN R. BATY  
Assistant Attorney General

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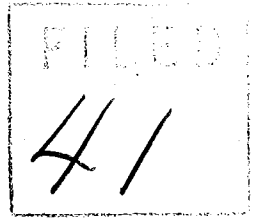
J. W. TAYLOR  
Attorney General

JRB:ml

MISSOURI REAL ESTATE COMMISSION:  
LICENSES:

A previous conviction of arson  
does not disqualify one from  
obtaining a broker's license or  
a real estate salesman's license.

November 6, 1947



Missouri Real Estate Commission  
222 Monroe Street  
Jefferson City, Missouri

Attention: Mr. John W. Hobbs, Secretary

Gentlemen:

This will acknowledge receipt of your request for an  
opinion which reads:

"This office requested an opinion from the  
Attorney General's Office in 1942 in  
regard to Section 14 of the Missouri Real  
Estate License Law pertaining to the re-  
vocation of a license when an applicant  
or a licensee has been convicted of for-  
gery, embezzlement, extortion and other  
like offenses.

"The opinion this office received was  
that the Commission deny licenses to  
applicants having been convicted and re-  
voke the licenses of the licensees under  
the same circumstances.

"An applicant has requested this office  
to again request an opinion from your  
office with the following statement as to  
his conviction. In 1934 the applicant was  
convicted of a crime of arson (two charges)  
and sentenced to imprisonment in jail for  
a term of two years.

"The applicant contends that the offense  
should not be considered a like offense  
of the various offenses set out in the  
License Law. May this Commission request  
an opinion from your office on this matter."

Your request requires a construction of Section 14, page  
430, Laws of Missouri, 1941, of what is known as the Real  
Estate Act of the State of Missouri. This provision requires

the Real Estate Commission to revoke a license of any licensee upon conviction in any court in this state or federal court of forgery, embezzlement, obtaining money under false pretenses, extortion, criminal conspiracy to defraud or other like offenses, and further provides that said Commission shall not issue any license to any person having been convicted of such crimes or other like offenses. Section 14, supra, reads:

"Where during the term of any license issued by the commission the licensee shall be convicted in a court of competent jurisdiction in the state of Missouri or any state (including federal courts) of forgery, embezzlement, obtaining money under false pretenses, extortion, criminal conspiracy to defraud, or other like offense or offenses and a duly certified or exemplified copy of the record in such proceedings shall be filed with the commission, the commission shall revoke forthwith the license by it theretofore issued to the licensee so convicted. No license shall be issued by the commission to any person known by it to have been convicted of forgery, embezzlement, obtaining money under false pretenses, extortion, criminal conspiracy to defraud, or other like offense or offenses, or association or co-partnership of which such person is a member, or to any association or copartnership of which such person is an officer, or in which as a stockholder such person had or exercises a controlling interest either directly or indirectly."

The applicant in the instant case has been convicted of the crime of arson, back in 1934. Arson was not specifically mentioned in the Real Estate Act as an offense, the conviction of which would disqualify an applicant for obtaining a license. The question now to be determined, is arson one of the offenses referred to in Section 14 that comes within "other like offenses." There is a well established rule of statutory construction, known as the "ejusdem generis" rule, which is that wherein a statute general words follow particular words, the general words will be considered as applicable only to persons or things of the same general character or class, and can not include wholly different things. See *Zinn vs. City of Steelville*, 173 S.W. (2d) 398, 351 Mo. 431. However, that rule

need not be invoked in this instance because by the very wording of the statute in question, the Legislature in unambiguous terms clearly indicated its intent that other offenses shall be like those enumerated.

We must not lose sight of the fact that the Real Estate Act is not a revenue measure but is a regulatory measure. It was enacted to require real estate brokers and real estate salesmen to be honest, truthful and of good reputation. In *Anderson vs. Johnson*, 167 A.L.R. 768, 160 P. (2d) 725, the court in construing the Real Estate Act of the State of Utah, which is very similar to that of Missouri, said:

"It is apparent that the statutes were enacted, not to provide revenue, but to provide for registration and regulation of those engaged in the real estate business. The license fee is so nominal that no other conclusion is tenable. In *Koeberle v. Hotchkiss*, 8 Cal App 2d 634, 48 P 2d 104, 107, Justice Crail stated: 'The primary purpose of the Real Estate Brokers' Act was to require real estate brokers and salesmen to be "honest, truthful and of good reputation."'

"By its inherent nature, real estate business requires confidence in and honesty of those delegated with authority to list, rent, supervise or sell real estate belonging to others. Public criticism of real estate rackets and unscrupulous and unworthy brokers and agents has caused the respectable and reliable real estate brokers and salesmen, throughout the land, to promote and demand legislative supervision and regulation of those engaged in this business. A casual examination of the codes of the states discloses that many have enacted Real Estate Brokers' laws which are similar to those of Utah. While the statutes of the different states vary in some details, yet in general provisions and purposes they are very much alike. Practically all the laws have been enacted, not for revenue, but for supervision and regulation. \* \* \* "



It is not likely that when the Real Estate Act of Missouri was passed that the framers of said act intended for the phrase "other like offenses," as used in Section 14 thereof, to include the crime of arson, unless it would be for having been convicted of arson as defined in Sections 4431 and 4432, R. S. Mo. 1939. Under those provisions, the defendant, in order to be convicted, must have committed the crime with intent to injure or defraud someone, and they read as follows:

"Sec. 4431. Any person who shall willfully set fire to, burn or cause to be burned any house, building, barn, stable, boat, vessel or any office or depot, railroad car, any house of public worship, college, academy, schoolhouse or building used as such or any public buildings belonging to the United States or of this state, or to any county, state, town or village not mentioned in the preceding sections, or any barrack, cock, rack, stack of hay, corn, wheat, oats, barley or any grain or vegetable produce of any kind, or any field of standing hay or grain of any kind, or any pile of coal, wood or other fuel or any pile of planks, boards, posts, rails or lumber, or any street car, railroad car, ship, boat or other water craft, automobile or motor vehicle or any goods, wares or merchandise or any other property not specifically named herein and being the property of another; and, any person who shall willfully set fire to, burn or cause to be burned any of the buildings or property of the kind and character above mentioned in this section and of which said property he is the owner or of which he owns an interest therein, with the intent to injure or destroy any other property, or with the intent to injure or defraud any person, co-partnership or corporation, government, state, county, city, school district or municipality, shall be deemed guilty of a felony and upon conviction therefor shall be punished by imprisonment in the penitentiary for a term of not less than two years nor more than five years."

"Sec. 4432. Any person who shall willfully and with the intent to injure or defraud the insurer set fire to, burn or cause to be burned any goods, wares, merchandise or other chattels or personal property of any kind which shall at the time be insured by any person, persons, co-partnership or corporation against loss or damage by fire shall be deemed guilty of a felony and upon conviction therefor be punished by imprisonment in the penitentiary for not less than two nor more than five years."

We make the foregoing assertion because all of the offenses specifically mentioned in Section 14, supra, that disqualify a person from obtaining a real estate license or real estate salesman's license, or that are grounds for the revocation of such licenses, deal primarily with misrepresentations, dishonesty or shady dealings. In all probability, when the Legislature passed Section 14, supra, they specifically named all the objectionable crimes and included the words "other like offenses" as an afterthought or safeguard in case there might be some similar offense they had overlooked.

#### CONCLUSION

Therefore, it is the opinion of this department that a previous conviction of arson, unless the conviction was had under Section 4431 or Section 4432, R. S. Mo. 1939, will not of itself prevent a person so convicted from applying and receiving a license as a real estate broker or real estate salesman; neither is it sufficient grounds to revoke such licenses.

Respectfully submitted,

AUBREY R. HAMMETT, Jr.  
Assistant Attorney General

APPROVED:

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J. E. TAYLOR  
Attorney General

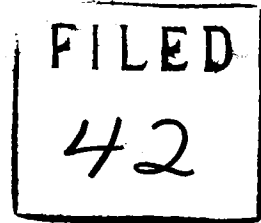
ARR:VLM

EXCESS FEES:  
PROBATE JUDGES:

Disposition of excess fees earned by probate judges prior to January 1, 1947.

March 4, 1947

Honorable A. B. Hoy  
Judge of the Probate Court  
Saline County  
Marshall, Missouri



Dear Sir:

This is in response to your letter of recent date wherein you submitted a request for an official opinion upon the following statement of facts:

"I have been somewhat in doubt as to what disposition to make of Probate fees earned during my preceding term which expired December 31, 1946. The maximum which I was allowed to retain has been paid me and I turned over about \$500.00 less 10% to the County Treasurer of fees collected during the year of 1946. I made the check payable to Saline County for the benefit of the School Fund, under the old Section 13404.

"The County Clerk had asked the State Auditor what fund that would go to and he told him that it would go to some fund in the budget, but did not cite him any statute for that purpose. The Clerk put it in Class 4 of the budget.

"I believe that the Auditor should be put right on that proposition, as the old statute is very clear that it should be paid to the county for the benefit of the School Fund.

"The question on which I would like to have your opinion is the disposition of fees earned by the Probate Judge's office in 1946 but not collected until after the first of January, 1947. My judgment from reading S. B. 200 fixing the fees of Probate Judges and providing for the disposition of such fees would include

Honorable A. B. Hoy

fees earned in 1946 but not collected until 1947; of such fees I will probably collect \$500 or \$1000 during 1947."

Your question, in substance, is: What disposition should be made of the excess fees of probate judges which were earned prior to January 1, 1947, and collected after January 1, 1947?

Section 13404, R. S. Mo. 1939, which was repealed by Senate Committee Substitute for Senate Bill No. 200 of the 63rd General Assembly, contained the following provisions with respect to excess fees of probate judges:

"\* \* \* and whenever at any time after the expiration of the term of office of any probate judge the amount of fees collected by or for him, irrespective of the date of accrual, shall exceed the sum equal to the aforesaid annual compensation provided for a judge of the circuit court having jurisdiction in such county, it shall be the duty of such probate judge to pay such excess, and all fees thereafter collected by or for him on account of fees accrued to him as such probate judge less ten per cent thereof, within thirty days from the time of collection, into the county treasury for the benefit of the school fund. \* \* \*"

It will be noted that this statute provided that such fees be turned into the county treasury for the benefit of the county school fund. By S.C.S.S.B. No. 200, which was approved on July 6, 1946, and which became effective on January 1, 1947, said Section 13404, R. S. Mo. 1939, was repealed and re-enacted in a new section with the same number. Said Section 13404 of S.C.S.S.B. No. 200, in part, contains the following provisions with respect to the collection and disposition of fees by the probate judge:

"It shall be the duty of the judge and clerk of the probate court to charge upon behalf of the state or county as the case may be every fee that accrues for the services of such judge, clerk or court; except that in counties now or hereafter having more than 250,000 inhabitants the duty to charge such fees shall be imposed on the clerk of the probate court.

"In counties now or hereafter having 30,000 inhabitants or less, the judge shall, at the end

Honorable A. B. Hoy

of each month, pay over to the director of revenue to be deposited by him with the state treasurer in the 'magistrate fund', all moneys collected by him or his clerk as fees, taking two receipts therefor, one of which he shall immediately file with the state treasurer. Each judge shall, within thirty days after the expiration of each calendar year file with such director of revenue a written report, verified by his affidavit specifying the name and court number of each estate in which fees were paid in such calendar year, the amount of such fees paid in each such estate and the amount of fees unpaid and due in each estate at the end of such year. Such judge shall also, within such thirty day period after such calendar year make a written report to such director of revenue of all fees which have been due and unpaid for more than one year, the amounts thereof and the name of the estate in which the same are due, which report shall be verified by affidavit of the judge that he has been unable after the exercise of diligence, to collect the same; and it shall thereupon be the duty of the director of revenue to cause the same to be collected by law and turned over to the state treasurer.

"In all counties which now or may hereafter have more than 30,000 inhabitants such fees shall be charged on behalf of the county and paid over to the county treasurer, who shall issue two receipts therefor, one of which shall be filed with the clerk of the circuit court having jurisdiction in such county. The reports herein above required to be made to the director of revenue shall be made to the county treasurer."

It will be noted in the provisions of the new act that all the fees, which accrue to the office of probate judge in counties of 30,000 inhabitants or less, are paid over to the Director of Revenue, and in counties of more than 30,000 inhabitants, they are paid over to the county treasurer. Said S.C.S.S.B. No. 200 is silent as to the disposition of fees which were earned by a probate judge prior to January 1, 1947, and which were collected after that date. Before the enactment of said S.C.S.S.B. No. 200, these excess fees were paid into the county treasury for the benefit of the school fund of such county (Section 13404, R. S. Mo. 1939).

Honorable A. B. Hoy

In construing a statute, it should be given a prospective construction rather than a retrospective construction. This principle was announced in the case of *Cranor v. School District*, 151 Mo. 119.

This principle is based on the provisions of Section 13 of Article I of the Constitution of 1945, prohibiting the enactment of any law which is retrospective in its operation.

The fees of the probate judges which were earned prior to January 1, 1947, belonged either to the probate judge or to the county school fund. Under that law, the probate judge was authorized to retain out of the fees collected an amount equal to the salary of the circuit judge. In addition to the amount retained by the probate judge as his salary, he was allowed to expend from the fees collected amounts necessary for the payment of clerk hire. Then, whatever amount of fees there was in excess of the aforesaid expenditures was turned into the treasurer of the county for the benefit of the school fund of the county. At the time these fees were earned and accrued to the office of the probate judge, then such amounts of them that exceeded the probate judge's salary and clerk hire salaries belonged to the county school fund. At that time, the school fund had a vested interest in these fees.

We think the reason for these fees now going to the Director of Revenue in counties under 30,000 inhabitants and to the county treasurer in counties over 30,000 inhabitants is that the salaries of the probate judges are paid out of state funds and county funds respectively. There would be no such reason for applying the excess fees earned by probate judges prior to January 1, 1947, to the fund from which the salaries of probate judges is paid. Since the school funds have an apparent vested interest in these excess fees, we think a reasonable construction of these statutes would be that such fees should be turned into the county treasury for the benefit of the county school fund. This also would be in harmony with the constitutional provision against retrospective laws.

#### CONCLUSION

Therefore, it is the opinion of this department that fees earned by a probate judge prior to January 1, 1947, and which are in excess of his compensation and clerk hire, should be paid into the county treasury for the benefit of the county school fund.

Respectfully submitted,

TYRE W. BURTON  
Assistant Attorney General

APPROVED:

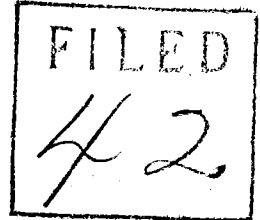
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J. E. TAYLOR  
Attorney General

SAVINGS & LOAN ASSOCIATIONS:

Savings & Loan Associations under Sections 2, 42 and 47 of House Bill #481 may enact and enforce a by-law to retain as a withdrawal fee a reasonable sum, perhaps to the extent of 50% of the dividends earned, where an account is withdrawn within one year after the investment thereof, and after the enactment of such by-law.

April 18, 1947



Honorable F. M. Horton  
Supervisor  
Division of Savings and Loan  
Supervision of Missouri  
Jefferson City, Missouri

Dear Mr. Horton:

This will acknowledge your request for the opinion of this Department on the validity of Section 25, as it is identified in the by-laws of the Excelsior Springs Savings and Loan Association of Excelsior Springs, Missouri.

Your letter requesting this opinion and containing a verbatim copy of said Section 25 of said by-laws, is as follows:

"Please let us have your opinion as to the legality of the following provision in a set of by-laws submitted to this office:

"WITHDRAWAL FEES. On accounts withdrawn within one year after date of investment thereof the Association may retain as a withdrawal fee a sum equal to fifty percent of the dividends declared thereon. The Board of Directors may eliminate withdrawal fees or reduce the amount of dividends to be retained upon withdrawal."

There is contained in your correspondence with the Secretary of said savings and loan association, the statement that the by-laws submitted by said association for the approval of your Department "appear acceptable", except that said Section 25 seems to you to be in conflict with Section 42 of the Savings and Loan Act, by which reference you mean of course, House Bill #481.

Inasmuch as a copy of said Section 25 is contained in your letter we will not recopy it here.

We think it proper here, for the purposes of comparison of said by-law 25 with the terms of said Section 42 of House Bill #481 to recite the text of said Section 42, which is as follows:

"Dividends shall be credited to accounts on the books of the association as of the first business day following the close of the semi-annual period for which the dividend was declared unless an account holder shall have requested and the board of directors shall have agreed to pay dividends upon all or any part of an account in cash. Except as otherwise provided in this Act, dividends shall be calculated on the participation value of each account at the beginning of the dividend period, plus payments made thereon during the dividend period (less amounts withdrawn and notice for withdrawal, which, for dividend purposes, shall be deducted from the latest previous payment thereon) computed at the dividend rate for the time invested; provided, that no association shall be required to compute, credit or pay any dividend on any amount withdrawn during the dividend period."

Section 42 of House Bill #481 states, as will be observed in the quotation in full of said Section hereinabove, in the last proviso thereof, "provided, that no association shall be required to compute, credit or pay any dividend on any amount withdrawn during the dividend period."

This proviso, we believe authorizes the exercise of the discretionary power of a savings and loan association to prescribe in its by-laws the method of computation of dividends where an account is withdrawn during the first year of its investment.

There are other sub-sections of said House Bill #481 which we think it necessary to refer to and quote as



determinative of the right of the Board of Directors of a Savings and Loan Association to pass and enforce a by-law such as said by-law 25 of the association referred to. One of such sections is Section 2 of House Bill #481, which defines the participation value of an account in a savings and loan association. It states, in part, as follows:

"\* \* \* 'Participation value' shall mean the aggregate of payments by a member on an account, plus dividends credited thereto, less redemptions and withdrawals, \* \* \*".

Section 47 of said House Bill #481 in fixing the terms of the value of an account upon withdrawal, and stating that the value may be determined by the Board, and referring back to the quoted part of said Section 2 defining "participation value" states, in part, as follows:

"\* \* \* Upon withdrawal, an association shall pay the value of an account, as determined by the board, but not in excess of the participation value thereof. \* \* \*".

There is text authority, and at least one opinion by one of the Appellate Courts of Missouri, supporting the right of savings and loan associations to enact a by-law in the terms and having the effect of said by-law 25 in the case being considered. 12 C.J.S., pages 446 and 447, under the title of "Building and Loan Associations" states the following general legal principal, to-wit:

"Whatever provisions exist in statutes, charters, or by-laws as to the amount payable on withdrawal are binding on the members; but a member is not bound by an irregularly adopted amendment to a by-law of this character. Also, vested rights as to the amount payable on withdrawal cannot be affected by a change in the statute, by-laws, or articles of incorporation, at least where the stock certificate in effect specifies that it is subject to the existing by-laws and articles of incorporation, unless the stockholder estops himself from questioning their validity.

"The withdrawal value of building and loan association stock is a price at which the association will redeem it before maturity; it is the amount actually paid, in addition to such proportion of the profits, or such rate of interest, as may be prescribed by statute or the by-laws. While prima facie it is the amount paid in by the stockholder with legal interest, and is sometimes considered to be the amount paid in together with the declared dividends in the absence of evidence of its actual value, it is not generally fixed on that basis, but is determined by considering the amount paid in together with the assets and liabilities of the association. \* \* \* ".

We find cases from other States cited in the foot-notes to the text above quoted in 12 C.J.S., pages 446 and 447, particularly the case of B. & L. of Newark vs. Weissberg, cited under note 52, page 447. This case, a New Jersey Equity case, is cited in 115 N.J.Eq. 487, 170 Atl. 662 and 98 A.L.R. 134, the used quotation here being 98 A.L.R. 134. That was a case involving the precise question raised here respecting the validity of said by-law 25, heretofore mentioned. In holding that a building and loan association -- by our statutes now named savings and loan associations -- have the discretionary right to establish a by-law fixing and limiting the withdrawal value of an account, otherwise called accrued profits or earned dividends, and that the right of a withdrawal does not exist at all except by a statute or by-law, and that when so existing it is but a privilege, the New Jersey Equity Court, l.c. 140, 141, said:

"The right of withdrawal does not exist, except as conferred by a by-law or statute, and when so conferred the right will be restricted to the terms of the by-laws or statute. Fitzgerald v. State Mutual Building & Loan Association, 76 N.J. Eq. 137, 141, 79 A. 454, 130 Am. St. Rep. 743.

And a defaulting member has no right to the inclusion of a portion of the profits in the ascertainment of the withdrawal value of his shares, unless it is conferred by statute or by-law. *Watkins v. Workmen's Building & Loan Ass'n*, 97 Pa. 514; Endlich on Building Associations, pp. 459, 460, 461. A borrower's claim to have all items, including profits, which go to swell the general fund of the association, taken into account, and to be given credit therefor, 'at any intermediate stage, has no foundation in law or equity.' He is, in the first place, a member, and only in the second place a borrower. In the former capacity he has no right to an account of profits except upon termination of the scheme, unless such right is expressly conferred by statute or the contract. *Mechanics' Building & Loan Association of New Brunswick v. Conover*, 14 N.J.Eq. 219, reversed, but not as to this point. *Herbert v. Mechanics' Building & Loan Ass'n of New Brunswick*, 17 N.J.Eq. 497, 90 Am. Dec. 601; Endlich on Building Associations, 461.

"The right to withdraw, without the forfeiture of the money paid in, is in its essence a privilege. In becoming a member of the association, the shareholder does so, ostensibly, at least, with the purpose of remaining in it to the end, bearing his part of all its burdens, and finally sharing all its profits in the same proportion. His failure to continue in the concern, therefore, is essentially in the nature of a breach of contract, upon which the loss of his previous contribution might, not unreasonably, be held to follow. But circumstances, unforeseen at the time of his assumption of membership, may, without any wrong on his part, make a severance of his connection with the

association desirable, if not imperative, Endlich on Building Associations, 82, 83.

"And therefore the statute confers the right of withdrawal, but only upon the terms therein prescribed. It recognizes and gives effect to the well-established principle that the withdrawing shareholder is not entitled to all the profits apportioned to his shares, but only to a reasonable part thereof. We find no warrant therein for appellants' claim to the profits apportioned to their shares at the annual meeting of the shareholders. There is evident a legislative purpose to give to a defaulting member who is a borrower on bond and mortgage the status of a withdrawing member, in respect of credit for the withdrawal value of his pledged shares. Section 55 of the act of 1925 provides that such member 'shall be allowed the withdrawal value of his pledged shares as a credit on such mortgage loan less any arrearages or charges in connection therewith.' Section 49, as amended, provides that after the first year 'a reasonable share of the profits, less unpaid fines, shall be included in the withdrawal value.' It should be observed that the statute does not direct the inclusion of a proportionate share of all profits, but a reasonable share of the profits only. And this is significant in view of the employment of the word 'proportionate' in the preceding clause relating to 'losses sustained.'

"The right of withdrawal springs from the statute, and not from contract. The shareholders could not, of course, by constitution or other agreement, override the statute. Campbell, Rec'r. v. Perth Amboy Loan Association, 67 N.J. Law, 71, 50 A. 444. There is not, in the instant case, any basis for the contention that the statute impairs the obligation of appellants' contract, nor is such claim made.

"The 'withdrawal value' should not be confused with the 'book value!' The 'withdrawal value' is the amount actually paid, in addition to such proportion of the profits, or such rate of interest, as may be prescribed by statute or the by-laws. The 'book value' is the proportionate amount of the net amount of the net assets, including profits or losses, of the association, applied to a share of its stock, taking into consideration the amount actually paid in, and the length of time the association has had the use of the money. A member is entitled to 'book value' only upon the maturity of his stock. Sundheim on Building and Loan Associations, Sec. 164.

"There is likewise a clearly manifested legislative purpose to vest in the board of directors a liberal discretion in determining the portion of profits to be included in ascertaining the withdrawal value. It is a discretion that must be reasonably, and not arbitrarily, exercised, to promote the financial integrity of the association. The act of 1925, by Section 7, as amended by P.L. 1929, p. 463 and P.L. 1930, p. 26 (Comp. St. Supp. Sec. 27--R(7)), provides that the business and affairs of every such association shall be managed and directed by a board of directors, and it clearly contemplates that the board shall determine the withdrawal value of the shares, subject to the limitations imposed by statute, and the provisions of its by-laws not inconsistent therewith, and that in such action, as in all others of a discretionary character, it shall be guided by the general purpose to effect and maintain the economic security of the association. The proper exercise of the power to determine what is a reasonable share of the profits to be

apportioned to the withdrawn shares, in settling their withdrawal value, is vitally essential, if the fundamental requirement of equal participation at all times is to be observed and the economic safety and stability of the association maintained. This is an authority that naturally and logically should reside in the body that is charged with the responsibility of the management and direction of the association's affairs and business, and neither the statute nor the Constitution places it elsewhere.

"Such discretion is consequently to be exercised in the light of existing conditions, and regard must of necessity be had to the absorption of future losses reasonably to be anticipated. Such discretion shall not, of course, be exercised capriciously, unreasonably, or oppressively. The shareholder is entitled, at the maturity of his shares, to receive the full amount of the profits apportioned thereto, but before maturity he can claim, in addition to the dues paid in, only a reasonable share of the profits earned thereon. \* \* \*".

Our St. Louis Court of Appeals had before it the case of Reitz vs. Hayward, 100 Mo. App. Rep. 216, on the question, among other features of fact and law considered, of the right to withdraw after an account has been established in a building and loan association, and before maturity, and the computation of the withdrawal value. The Court, l.c. 226, 227, on these questions, said:

"The withdrawal value of the shares must be computed, therefore, and the shareholder allowed a credit for what they are actually worth; for the underlying idea of building and loan associations is mutuality of losses and profits by all shareholders, who are, in a sense, partners, as has been many times decided. Hohenshell v. Ass'n, 140 Mo. 566;

Bertche v. Ass'n, 147 Mo. 343; Shell v. Ass'n, 150 Mo. 103. \* \* \*

\* \* \* \* \*

"\* \* \* The withdrawal of stock and payment of loans before the shares mature, are privileges not contemplated in the scheme of a building and loan association, but are departures from it tolerated for practical reasons. Members are permitted to withdraw their shares instead of being compelled to hold them until maturity, because the privilege has been found necessary to enable associations to secure a sufficient membership. So, borrowers are permitted to pay loans at their pleasure, instead of by installments until their stock matures and the loan is thereby discharged in the normal evolution of the association, because the exigencies of business have shown that privilege to be necessary. Both privileges are opposed to the central idea of the building and loan association scheme and can not fail to work injustice if an association becomes insolvent; for it may continue going, with its insolvency unknown for a long time except to the inner management; meanwhile withdrawals occur by which some members get back all they paid in, when, on account of losses, they are entitled only to part. The law, therefore, does not in theory permit withdrawals after an association is insolvent. But if the surrender of stock was perfected while it was still a going concern though, in fact, insolvent, it is an executed transaction and the proceeds may be retained, unless fraud can be imputed to the withdrawing stockholder. \* \* \*".

Giving due respect to the above cited and quoted authorities we believe that savings and loan associations, in the exercise of a reasonable discretion, since the right of withdrawal of an account is a privilege only, may enact a by-law such as by-law 25 of the Excelsior Springs Savings

and Loan Association, and enforce the same under said Sections 2, 42 and 47 of said House Bill #481.

Such a by-law, however, must be prospective and not retrospective. It must affect accounts only which are established after the passing of such by-law, and which accounts are withdrawn within one year after the establishment of such accounts.

An investor, with such a by-law as said by-law 25 being outstanding, would, by making his investment, waive any objection to the withholding of a percentage of his dividends which may have accrued if he withdrew his account within the first year of its investment. In other words, the doctrine of estoppel would apply.

Under said Sections 2, 42 and 47 of House Bill #481 a savings and loan association, we believe, would be entitled to withhold a percentage of the dividends due if an account were withdrawn within one year after its establishment, on the first six months period of that year, but would not be entitled to withhold such percentage of the dividends as a withdrawal fee for the last dividend period of six months of such year.

#### CONCLUSION.

It is, therefore, the opinion of this Department that Savings and Loan Associations have the discretionary power under said Sections 2, 42 and 47 of said House Bill #481, to adopt and enforce a by-law retaining a withdrawal fee in a reasonable sum, perhaps to the amount of 50% of the dividends due on accounts established with them and withdrawn within one year after the investment of such account. Such withdrawal fees should, and would, only affect accounts established with a Savings and Loan Association after the enactment of such a by-law.

Respectfully submitted,

APPROVED:

GEORGE W. CROWLEY  
Assistant Attorney General

J. E. TAYLOR  
Attorney General

GWC:ir



PUBLIC PRINTING AND BINDING: Definition of phrase "public printing and binding" as used in State Purchasing Agent Act.

FILED

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May 15, 1947

5/21

Mr. B. H. Howard, Comptroller  
Department of Revenue  
Jefferson City, Missouri

Dear Sir:

Reference is made to your inquiry of recent date wherein you request an official opinion of this office. Your request reads as follows:

"We would appreciate an opinion defining the term 'public printing and binding' and the nature of printed matter which would and would not come within the meaning of the definition."

We are further informed that your inquiry is prompted by the inclusion of this phrase in Section 76 of Senate Committee Substitute for Senate Bill No. 297 of the 63rd General Assembly, reading, in part, as follows:

"The state purchasing agent shall purchase all public printing and binding of the state, including that of all executive and administrative departments, bureaus, commissions, institutions and agencies, the general assembly and the supreme court.  
\* \* \* (Emphasis ours.)"

To aid in the construction of statutes of this state, the General Assembly has declared certain rules to be followed. We quote a portion of Section 655, R. S. Mo. 1939, reading as follows:

"The construction of all statutes of this state shall be by the following additional rules, unless such construction be plainly repugnant to the intent of the legislature,

or of the context of the same statute:  
First, words and phrases shall be taken  
in their plain or ordinary and usual  
sense, but technical words and phrases  
having a peculiar and appropriate mean-  
ing in law shall be understood accord-  
ing to their technical import; \* \* \*

The rule has been applied in *Donnelly Garment Co. v. Keitel*,  
193 S. W. (2d) 577, wherein the Supreme Court of Missouri said,  
1. c. 581:

" \* \* \* And a primary rule of construc-  
tion of a statute is to ascertain from  
the language used the intent of the law-  
makers if possible, and to put upon the  
language its plain and rational meaning  
in order to promote the object and pur-  
pose of the statute. *Haynes v. Unemploy-*  
*ment Compensation Commission*, supra, 183  
S. W. 2d loc. cit. 81, and cases there  
cited." (Emphasis ours.)

We have examined various law dictionaries and the permanent  
edition of *Words and Phrases* in an effort to determine whether  
or not the phrase "public printing and binding" had acquired a  
technical meaning which would necessarily have to be applied  
under the rule quoted from Section 655, R. S. Mo. 1939. We do  
not find that the phrase had acquired such a settled and fixed  
technical meaning at the time of its incorporation in the stat-  
ute under consideration, and therefore we are required, in con-  
struing the statute, to accord the phrase its plain or ordinary  
and usual sense.

Reference to Webster's New International Dictionary, Second  
Edition, discloses the following definitions of the words which  
have been incorporated in the statute:

"binding - The fastening of the sections  
of a book, esp. this fastening and the  
cover; also, a style or exemplar of book  
binding."

"printing - Act, art, or practice of im-  
pressing letters, characters, or figures  
on paper, cloth, or other material; the  
business of a printer, including type-  
setting and presswork, with their adjuncts;  
typography."

"public - Of or pertaining to the people; relating to, belonging to, or affecting, a nation, state, or community at large; -- opposed to private; as, the public treasury, credit, good; public opinion, etc. The term public is used in designating the legal character of various acts, rights, occupations, etc., that affect or belong to the collective body of a state, or community."

Applying these definitions to the words found in the phrase under consideration, we are led to the view that the General Assembly thereby referred to printed publications, books, documents, manuscripts, and items of a similar nature, designed primarily for public records and for the dissemination of information relative to the public affairs of the state to the inhabitants thereof. Examples of this type of printing and binding would be the statutes and legislative enactments and reports of all kinds, printed forms for various departmental public uses, such as income tax blanks, workmen's compensation forms, the numerous applications supplied the public to be used in dealing with state departments, the Missouri Supreme Court reports and Missouri Courts of Appeals reports, and the reports of various state departments which are required by law to be printed and made available to the public at large.

We recognize the fact that in addition to what we have described above as "public printing and binding," many of the state departments and agencies require other printed matter such as stationery and various blanks used within the department or agency itself and not by the general public. We think that items of this nature are properly to be considered "supplies" rather than "public printing and binding."

### CONCLUSION

In the premises, we are of the opinion that the phrase "public printing and binding," as used in Section 76 of Senate Committee Substitute for Senate Bill No. 297 of the 63rd General Assembly, refers to publications, documents, books, forms, and items similar in nature, which are more or less printed and distributed for the benefit of the public in general, or which are to be used by the public in dealing with the State of

Mr. B. H. Howard

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Missouri and its various departments and agencies, and that the phrase does not include such printed matter as is chiefly used and designed for the internal operation of the various state departments and agencies.

Respectfully submitted,

WILL F. BERRY, Jr.  
Assistant Attorney General

APPROVED:

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J. E. TAYLOR  
Attorney General

WFB:HR

SAVINGS AND LOAN ASSOCIATIONS: Three questions regarding rights of supervisor.

FILED

July 1, 1947

Honorable F. M. Horton, Supervisor  
Division of Savings and Loan Supervision  
Jefferson City, Missouri

Dear Sir:

We have your letter of recent date which reads as follows:

"We have a situation in the "A" building and loan association of the Directors acknowledging that, for some time prior to December 31, 1945, they had contemplated liquidation of the association. In February 1946 several of the Directors called at my office with a proposal to liquidate as of December 31, 1945, provided my approval was given with the expressed stipulation that borrowing members could not participate in distribution of the Reserves.

"Under the plan of operation when the shares in question were issued, each member was required to assume the same liability as a shareholder, whether the shares were pledged with a loan or not; and was privileged to participate in the profits on exactly the same basis as other installment shares. That all shares, both pledged and free, were treated as one and the same class of shares (prior to inception of the plan to liquidate) is shown by the records of maturities of these shares down to the present time. Without exception, in requesting departmental approval to retire maturing series, all shares in the series have been matured on the same basis, and never was the point raised that certain shares should be given preference over others.

"It was my position that it would be unfair to permit liquidation of a mutual savings and loan association under a plan providing that of two share accounts issued at the same time, (both assuming the same share liabilities and both having shared equally in the profits) one should participate in the extra profits incident to liquidation and the other should be denied that privilege.

"The members of the Board were quite outspoken in their insistence that liquidation be on that basis, and no other. They made it clear they intended to liquidate the association on their own terms, and would bide their time until they could work it out to their satisfaction. Their position being that they held and/or controlled a majority of the outstanding shares so that no action could be taken of which they did not approve, regardless of how much their position might react to the disadvantage of other members.

"Discrimination between shareholders in liquidation of a savings and loan association had never previously been proposed in any case coming to my attention, it having always been accepted that like shares should receive like treatment. Among the more recent liquidations of associations, operating as has the instant building and loan association, in which no discrimination was made or suggested are: Mexico Building and Loan Association, Steele Building and Loan Association, Dexter Building and Loan Association, Nickel Savings, Investment and Building Association of St. Louis, Mount Olive Building and Loan Association of St. Louis, Sikeston Building and Loan Association, Bethany Savings and Loan Association and Bolivar Building and Loan Association.

"Because of the fact the life of the building and loan association was continued through the year 1946 for the expressed purpose of eliminating certain members from participating in liquidation of their association, and that it is being continued at the present time for no other reason, it would appear it no longer serves the purposes for which it was organized and chartered by the

State of Missouri, and that steps should be taken to wind up the affairs of the association at the earliest possible date consistent with protecting the interests of all members.

"Pertinent facts and observations pertaining to the case, other than set out herein, are contained in the Examiner's Report of March 13, 1947, and a copy of this report is attached for your information.

"In view of the facts as contained herein and in the Examiner's Report, will you please advise as to the following:

- (1) As Supervisor of the Division of Savings and Loan Supervision do I have the power to insist that the association be liquidated?
- (2) Do I have the power to insist that in fairness to all members, liquidation be as of December 31, 1945?
- (3) Do I have the power to insist that all shareholders share equally (in proportion to their interest in the association) in the liquidation?

"I am particularly interested in your opinion on these questions as there appears to be a definite trend towards liquidation of these associations in the smaller towns, and of the smaller associations in the larger cities, due to lack of business in sufficient volume to permit of profitable operations. Also there is a noticeable tendency on the part of Directors and Officers to treat the winding up of the affairs of their association as the closing-out of their own private enterprise.

"With Reserves greater in proportion to the outstanding share liabilities than ever before and a ready market for good loans at par, or at a premium, the temptation is great to dissolve the corporation and distribute the reserves to the members. At this point is where we now encounter the trend to delay action until 'other' member's accounts have been closed out, or

greatly reduced. When this condition develops there appears to be no one willing, or in position, to protect the minority shareholders, other than this Department, and our right to take any action has been challenged in no uncertain manner.

"Not only will your opinion in this matter affect the instant association, but a parallel case has come to my attention in which it appears probable that minority shareholders have been even more ruthlessly treated, so it is imperative that the Department know the extent of its powers and how to proceed."

Your letter and the data contained in the Examiner's Report attached thereto show clearly that the holders of a majority of the stock for accounts of the building and loan association by virtue of their position as directors of said association, are manipulating the affairs of the association in such a manner as to gain an advantage for themselves over the other stockholders. Liquidation of the association has been agreed upon and the present acts of the directors are directed towards securing for themselves a preference for their interests over the interests of other shareholders in the distribution in liquidation.

The 1945 Legislature passed a new act governing such associations as the one under discussion. Said act is found in Laws 1945, page 1579. Section 32 of said act reads as follows:

"The members of an association shall not be responsible for any losses which its capital shall not be sufficient to satisfy, and the accounts of a member shall not be subject to assessment, nor shall a member holding an installment investment account be liable for any unpaid installments thereon. No preference between account holders shall be created with respect to the distribution of assets upon voluntary or involuntary liquidation, dissolution and winding up of an association."

Section 32 of said act provides for the voluntary liquidation of such an association. Said Section 32 reads as follows:



"Any association may, by a majority of two-thirds of the votes cast either in person or by proxy at a special meeting of the members, vote to liquidate, dissolve and terminate its existence. If such a resolution be so adopted, a certificate containing a true copy of such resolution, stating the number of votes cast for and against its adoption, and signed and acknowledged by the chairman of board, of directors, president and secretary of such association shall be filed in quadruplicate with the supervisor within ten days after the date of adoption of such resolution. The supervisor, upon receipt of such certificate, shall immediately examine such association. If he finds that such association is in sound condition, he shall make notation to such effect upon one of such quadruplicate certificates and return same to the association, with his approval of dissolution. Upon such approval, the association shall be dissolved and shall cease to transact any new business, but nevertheless shall continue as a corporate entity for the sole purpose of selling, collecting and conserving assets, paying, satisfying and discharging existing liabilities and obligations and making distribution to the members pro rata of the net proceeds of liquidation, and doing all other acts required to adjust, wind up and dissolve its business and affairs. The board of directors shall act as trustees for liquidation. They shall proceed as speedily as may be practicable to wind up the affairs of the association, and, to the extent necessary or expedient to that end, shall exercise all the powers of such dissolved association, and, without prejudice to the generality of such authority, may fill vacancies, elect officers, carry out the contracts, make new contracts, borrow money, mortgage or pledge the property, sell its assets at public or private sale, or compromise claims in favor of or against the association, apply assets to the discharge of liabilities, distribute assets either in cash or in kind among account holders according to their respective rights, after paying, or adequately providing for, the payment of liabilities, and do and perform all acts necessary or expedient to the winding up of

the association. All deeds or other instruments shall be in the name of the association, and shall be executed by the president or a vice president and the secretary or an assistant secretary. The association, during the liquidation of the assets of the association by the board of directors, shall continue to be subject to the supervision of the supervisor, and the board of directors shall report the progress of such liquidation to the supervisor from time to time as he may require. Upon completion of liquidation and distribution, the board of directors shall file with the supervisor a final report and accounting of such liquidation. If the supervisor approves such report and accounting, he shall issue to the Secretary of State in triplicate certification that such association has been liquidated and dissolved, its indebtedness paid, and the net proceeds derived from liquidation distributed to its members. The Secretary of State shall attach to one of such certifications, a certificate that such association has been dissolved and its corporate existence terminated and shall return same, together with copy thereof, to the supervisor, who shall cause such certificate to be filed for record in the office of the Recorder of Deeds in the county or city in which the principal office of such association is located."

It will be noticed that by the foregoing section the members of the association are entitled to their pro rata share of the net proceeds of liquidation. The mere fact that a member had his shares in the association pledged as security for a loan does not, destroy his relationship as a member. Even though his shares are pledged as security for a loan a member is still a member and entitled to his pro rata part of the liquidation.

What the directors in the case you mention are doing is bringing about a situation wherein they and their families and friends will be the principal ones to share in the division of the assets of the association. There is no question but what this procedure violates the spirit of Sections 32 and 82 of the 1945 act, but the question is whether the supervisor of savings and loan associations can do anything about the situation.

Section 5 of the 1945 act reads as follows:

"The supervisor shall have charge of the execution of laws relating to mutual savings fund, savings and loan associations. The supervisor shall have power to institute in the name of the state of Missouri, and to defend actions in the courts of the State of Missouri and of the United States, and shall have such further powers and perform such additional duties as may be provided by law."

By the foregoing section the supervisor is charged with the duty of seeing that the laws relating to savings and loan associations are carried out.

Section 82, supra, of the 1945 act gives the supervisor specific authority to supervise the voluntary liquidation of such an association. It provides as follows:

"The association, during the liquidation of the assets of the association by the board of directors, shall continue to be subject to the supervision of the supervisor, and the board of directors shall report the progress of such liquidation to the supervisor from time to time as he may require. Upon completion of liquidation and distribution, the board of directors shall file with the supervisor a final report and accounting of such liquidation. If the supervisor approves such report and accounting, he shall issue to the Secretary of State in triplicate certification that such association has been liquidated and dissolved, its indebtedness paid, and the net proceeds derived from liquidation distributed to its members. The Secretary of State shall attach to one of such certifications, a certificate that such association has been dissolved and its corporate existence terminated and shall return same, together with copy thereof, to the supervisor, who shall cause such certificate to be filed for record in the office of the Recorder of Deeds in the county or city in which the principal office of such association is located."

Therefore, the supervisor not only has power to supervise the acts of the directors during voluntary liquidation, but he must approve the final distribution of the assets to the members before the liquidation is complete and effective. The acts of the directors in liquidating the association would not be binding if not approved by the supervisor. Consequently, the supervisor is in position to compel the directors to give all members their pro rata share in the net assets of the association even though some of the members have their shares pledged as security for loans. Of course, it would only be those who were members at the time of liquidation who would be entitled to share in the proceeds. If members prior to that time had surrendered their accounts, they would not be entitled to share in the net assets. We do not believe that the law would authorize the supervisor to compel the distribution of the assets as of any other date than the date of liquidation. In other words, he could not compel a distribution of any part of the assets or profits to persons who were not members at the time of such distribution. Our answer to your second and third questions, therefore, is that the supervisor can compel the directors of a savings and loan association in charge of the voluntary liquidation of same to distribute the assets to those who are members at the time of such distribution in proportion to their interest in the association, regardless of whether or not some of the members have pledged their shares as security for loans, but that he cannot compel a distribution to persons who had been members in the past but who are not then members.

Your first question is somewhat more difficult to answer. There is no charge made that the association is insolvent. Neither is there any charge that the association should be re-organized in order to put it on a sound financial basis. Your question is whether or not you can compel a liquidation of the association because of the acts of the directors in manipulating the affairs so as to gain an advantage for themselves over other shareholders.

Section 97 of the 1945 act provides as follows:

"If it shall appear to the supervisor from any report of such association or from any examination made or caused to be made by him,

or from any knowledge or information obtained from any other source, that such association has committed a violation of its charter or is acting unlawfully, or is conducting its business in an unsafe or unauthorized manner, or that its assets are insufficient to justify the continuance of business by such association, or that it is unsafe or inexpedient for any such association to continue to transact business, the supervisor shall give written notice of such facts and circumstances by registered mail to the chairman of the board, president and secretary of such association. The association shall have sixty days within which to correct the matters of which complaint is made in such notice. If such objectional facts and circumstances are not corrected within such period of time, or if an association shall at any time refuse to permit the supervisor to examine its affairs, he may,--or if the board requests the supervisor to do so, he shall,--take charge and possession of such association and its assets."

Subsequent sections of the 1945 act provide what the supervisor shall do after he has taken charge of an association. Section 100 of said Act reads as follows:

"The supervisor upon taking charge of an association shall as soon as practical ascertain the financial condition thereof by an examination of its affairs and, in his discretion, an appraisal of its assets. If it shall appear therefrom that such association is in a condition to safely resume business without reorganization, he shall return the possession, assets and conduct of the business thereof to the directors and officers. If it shall appear that a reorganization will be necessary before such association can safely resume business and that a reorganization is feasible, he shall propose a plan and attempt to reorganize it. If a reorganization plan, when submitted to the members as herein-after provided, is not approved by the required majority, the supervisor shall liquidate and dissolve such association, and, after payment of all indebtedness, including

expenses of liquidation and dissolution, shall make distribution to the members of the net proceeds, pro rata to the participation value of their accounts."

If the supervisor should take charge of the association under discussion, he would be required by Section 100, supra, to return the association to the directors and officers because the financial condition is such that it is safe for the association to resume business.

Section 102 of the 1945 act reads as follows:

"The supervisor, at any time after taking charge of an association, may institute proceedings in a circuit court of the county or city in which such association has its principal office and have himself appointed temporary receiver until it is determined whether such association can safely resume business, or should be re-organized or should be liquidated. If it is determined that the association should be liquidated, the supervisor shall be appointed permanent receiver for liquidation."

We believe Sections 100 and 102 contemplate that an association shall not be liquidated unless its affairs are in such condition that it is not safe for the association to resume business or be re-organized. There is nothing in connection with the actions of the association under discussion which would indicate that persons who deal with the association would lose money by reason of the condition of the association. Legally the association could be required to meet its obligations. The fact that some of the members are misled into surrendering their interests does not affect the solvency of the association. Members who stay in the association will eventually be paid their pro rata part of the assets. If the directors by wrongful representations induce members to surrender their stock, such members could bring an action upon discovery of the fraud on them and secure the benefits they lost by surrendering their stock. We realize that members will not likely resort to legal action to protect their rights, and we realize too that the directors owe a duty to protect all members of the association, which latter duty

they are apparently not performing, but we do not believe the law gives you the right to liquidate an association because of the acts you mentioned in your letter.

Conclusion

It is, therefore, the opinion of this office (1) that the supervisor of savings and loan associations cannot compel the liquidation of an association because the directors are delaying voluntary liquidation in order that minority shareholders will surrender their shares and drop out of the association before liquidation, with the result that the majority members will divide the assets of the corporation; (2) that the supervisor of savings and loan associations cannot compel an association to liquidate as of any certain date in the past; and (3) that the supervisor can compel the directors upon voluntary liquidation of savings and loan associations to pay all members their pro rata part of the assets even though some members have their interests pledged as security for loans.

Yours very truly,

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Harry H. Kay  
Assistant Attorney General

APPROVED:

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J. E. Taylor  
Attorney General

TOWNSHIP BOARDS: When a special road district is formed under Art. 18,  
ROADS AND BRIDGES: Chap. 46, R.S.A., twp. bd. of trustees must deliver to  
commrs. of spec. rd. dist. all tools and machinery to  
which dist. is entitled. Commrs. of spec. rd. dist.  
and twp. bd. of trustees cannot contract for redelivery  
of road tools and machinery. Commrs. of spec. rd. dist.  
and twp. bd. cannot make contract providing twp. will  
do road work in spec. rd. dist. for consideration of  
taxes due spec. rd. dist. under township levy.

July 11, 1947

FILED

42

Honorable Marvin C. Hopper  
Prosecuting Attorney  
Linn County  
Brookfield, Missouri

Dear Sir:

This is in reply to your letter of recent date, requesting  
an official opinion of this department, and reading as follows:

"I request an official opinion from your De-  
partment on the following matters.

"In May, 1947 there was incorporated the  
Purdin Special Road District comprising some-  
what less than one-half of the total area of  
approximately the south one-half of Benton  
Township, Linn County, Missouri. The purpose  
of incorporating the special road district was  
to insure the voting of bonds for the purpose  
of gravelling certain roads in the special  
road district area.

"The Special Road District Commissioners de-  
sire to enter into a contract with the Town-  
ship Board of Trustees to the effect that  
there shall be no division of road tools and  
machinery as contemplated by Section 8840,  
Revised Statutes of Missouri, 1939, because  
of the impracticability thereof; that all or  
any of such equipment may be used by the Town-  
ship and as the Township Board of Trustees see  
fit; that the Township will continue to levy  
and collect taxes for road and bridge purposes  
as before the date of incorporation of the spe-  
cial road district; that the Township will con-  
tinue to expend funds so collected in both the  
township area and in the special road district  
area.



"My specific questions are these--

"(1) Under Section 8840 is it mandatory that the Township Board of Trustees deliver to the Commissioners of the Special Road District all road tools and machinery to which the special road district may be entitled?

"(2) If the answer to Question No. 1 is Yes, under a contract between the Commissioners of the Special Road District and the Township Board of Trustees providing for the maintenance of roads and bridges on stipulated terms, could the Commissioners of the special road district re-deliver road tools and machinery allotted to it under Section 8840 to the Township Board of Trustees?

"(3) Can the Commissioners of a special road district contract with the Township Board of Trustees, the special road district formerly having been a part of said township, the contract providing that the special road district shall not demand any funds collected by virtue of township tax levies for road and bridge purposes and to which it is entitled, but that the same shall be retained by the township in consideration of the promise of the township to continue to expend as formerly a proportionate share of such funds for road and bridge purposes in the special road district?

"No road and bridge work is now being done in Benton Township pending receipt of answers to the above questions, and because of the emergency condition occasioned by recent flood waters, it is imperative that these questions be answered by your Department at the earliest possible time."

Section 8840, R. S. Mo. 1939, provides as follows:

"The township board of trustees shall, upon the organization of such commissioners, cause all tools and machinery used for working roads belonging to the districts and parts of districts formerly existing and composed of territory embraced within the incorporated district to be delivered to said commissioners, for which such

commissioners shall give receipt, and such commissioners shall keep and use such tools and machinery for constructing and improving public roads and bridges. The township boards shall also cause the township treasurer to pay over to the treasurer of the special road district all moneys in his hands belonging to the district or districts that have been merged into the special road district whenever the board of commissioners of such special road district shall make demand therefor. Said commissioners shall have sole, exclusive and entire control and jurisdiction over all public highways, bridges and culverts, within the district to construct, improve and repair such highways, bridges and culverts, and shall have all the power, rights and authority conferred by law upon road overseers, and shall at all times keep such roads, bridges and culverts in as good condition as the means at their command will permit, and for such purpose may employ hands and teams at such compensation as they shall agree upon; rent, lease or buy teams, implements, tools and machinery; all kinds of motor power, and all things needed to carry on such work: Provided, that said commissioners may have such road work, or bridge or culvert work, or any part thereof, done by contract, under such regulations as said commissioners may prescribe."

In the case of State ex rel. v. Wurdeman, 246 S. W. 189, 1.c. 194, the Supreme Court of Missouri, in Banc, said:

" \* \* \* Usually the use of the word 'shall' indicates a mandate, and unless there are other things in a statute it indicates a mandatory statute. \* \* \*"

From the holding of the Supreme Court in this case, it is our opinion that the provision of Section 8840, R. S. Mo. 1939, providing that the township board of trustees shall cause all tools and machinery used for working roads belonging to the districts and parts of districts formerly existing and composed of territory embraced within the incorporated district to be delivered to said commissioners, is mandatory. It is clear that if the township board of trustees refused to deliver such tools

Honorable Marvin C. Hopper -4-

and machinery to the commissioners of the special road district, mandamus would lie to compel such delivery, unless the delivery would be physically impossible.

Since your second question inquires as to a contract that might be made if the tools and machinery were delivered, we have assumed, in answering your first question, that it is physically possible to make the delivery of such tools and machinery.

The answer to your second and third questions depends on whether or not the township board can contract with the special road district for maintenance of the roads in the special road district by the township.

In the case of *Jensen v. Wilson Township of Gentry County*, 145 S. W. (2d) 372, the Supreme Court of Missouri said at l. c. 374:

" \* \* \* A township board functions not as a court of broad jurisdiction but as the agent of the township with limited authority. Consequently, it is even more essential that its authority be exercised in strict compliance with the powers granted to it. Such a board comes under the same rule as a county court. A county court is only the agent of the county with no powers except those granted and limited by law, and like all other agents, it must pursue its authority and act within the scope of its powers. *State ex rel. Quincy, etc., Ry. Co. v. Harris*, 96 Mo. 29, 8 S. W. 794. \* \* \* "

Section 13933, R. S. Mo. 1939, provides as follows:

"Each township, as a body corporate, shall have power and capacity: First, to sue and be sued, in the manner provided by the laws of this state; second, to purchase and hold real estate within its own limits for the use of its inhabitants, subject to the power of

the general assembly; third, to make such contracts, purchase and hold personal property, and so much thereof as may be necessary to the exercise of its corporate or administrative powers; fourth, to make such orders for the disposition, regulation or use of its corporate property as may be conducive to the interest of the inhabitants thereof; fifth, to purchase at any public sale, for the use of said township, any real estate which may be necessary to secure any debt to said township, or the inhabitants thereof, in their corporate capacity, and to dispose of the same."

Section 13934, R. S. No. 1939, provides as follows:

"No township shall possess any corporate powers, except such as are enumerated or granted by this chapter, or shall be specially given by law, or shall be necessary to the exercise of the powers so enumerated or granted."

It is to be noted that it is provided in Section 13933 that the township has the power only "to make such contracts \* \* \* as may be necessary to the exercise of its corporate or administrative powers." The duty of the township board with relation to roads in the township is set out in Article 17 of Chapter 46, R. S. A., and neither in Article 17 of Chapter 46 nor any other provision of the statutes of this state are we able to find any provision which places within the corporate or administrative powers of a township the maintaining of roads in a special road district organized under the provisions of Article 18 of Chapter 46, R. S. A. A special road district organized under the provisions of Article 18 of Chapter 46 is a distinct and separate entity from a township, and such special road district is given sole, exclusive and entire control and jurisdiction over all public highways, bridges and culverts within the district to construct, improve and repair such highways, bridges and culverts. Therefore, we are unable to see any reason why the making of a contract by which the township board is to maintain the roads in a special road district is a contract necessary to the exercise of the corporate or administrative powers of a township.

CONCLUSION

It is the opinion of this department that:

(1) Section 8840, R. S. No. 1939, providing that the township board of trustees shall, upon the organization of a special road district under the provisions of Article 18 of Chapter 46, R. S. A., cause all tools and machinery used for working roads formerly belonging to the territory embraced within such special road district to be delivered to the commissioners of such district, is mandatory.

(2) The commissioners of a special road district and the township board cannot enter into a contract providing for re-delivery of such tools and machinery to the township board.

(3) The township board cannot contract with the commissioners of a special road district, the contract providing that the township shall maintain the roads in the special road district in consideration of the road district's payment to the township of all tax moneys that the road district would be entitled to under a township levy.

Respectfully submitted,

C. B. BURNS, Jr.  
Assistant Attorney General

APPROVED:

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J. E. TAYLOR  
Attorney General

CBB:HR

INCREASING SALARIES OF PUBLIC OFFICERS: Salaries of public officers may be increased under the Constitution during the terms of such officers where additional duties are added to their regular duties.

July 23, 1947

FILED

42

Honorable B. H. Howard  
Comptroller  
Department of Revenue  
Jefferson City, Missouri

8/1

Dear Mr. Howard:

This will acknowledge your recent request for an opinion from this Department respecting the increase in compensation of the members and General Counsel of the Public Service Commission.

Your letter is as follows:

"Senate Bill No. 78, 64th. General Assembly, provides additional duties and compensation for the members and the general counsel of the Public Service Commission.

"We will appreciate an opinion in regard to the date the additional compensation becomes effective with respect to the present holders of the offices."

Senate Bill #78 of the 64th General Assembly repeals Section 5595, Article 1, Chapter 35, R.S. Mo. 1939, and enacts in lieu thereof three new sections to be known as Sections 5595, 5595a and 5595b. Senate Bill #78 was passed February 26, 1947, and approved July 7, 1947.

Section 5595, Article 1, Chapter 35, R.S. Mo. 1939, repealed by said Senate Bill #78, was as follows:

"The commission shall furnish its secretary all of its findings, orders and decisions and the secretary shall compile the same for the purpose of publication in a series of volumes to be designated 'Reports of the public service commission of the state of Missouri,' which shall

be published in such form and manner as may be best adapted for public information and use, and such authorized publications shall be competent evidence of the findings, orders and decisions of the commission therein contained without any further proof or authentication thereof."

Said repealed Section 5595, supra, required the Public Service Commission to furnish to its secretary its orders, findings and decisions to be compiled by the secretary for the purpose of publication, and to have published, the findings, orders and decisions of the Commission. Said Senate Bill #78 shifts such work from the secretary and requires such duties to be performed by the Commission itself and counsel for the Commission by providing in the new Section 5595 that the Commission together with the General Counsel shall be a Publications Commission to select and designate what findings, orders and decisions of the Public Service Commission shall be published and to supervise and cause to be prepared the syllabi for said findings, orders and decisions, and to select and designate such other works, papers or studies of the Public Service Commission relating to the field of public utilities regulation that may be of interest to the public and to cause same to be published in pamphlet or book form. There are thereby added new, different and increased duties to the Commission and the General Counsel thereof not required in the repealed Section 5595.

The law is well settled, both in text and decision, that the addition of new duties to an office imposed upon the officer holding the office will authorize and justify an increase in his compensation during the term of the person holding the office.

46 Corpus Juris, page 1026, upholds this rule by saying:

"\* \* \* but such a provision does not prevent the legislature or its delegate from providing that a change in the duties of an incumbent of an office shall be accompanied by an increase \* \* \*".

Our Supreme Court has spoken definitely upon this question. The case of State vs. Sheehan, 269 Mo. 421, was before the Court on the question submitted here that new duties were added to the functions of an office after the officer had been inducted into office, and whether because of such added duties an increase of compensation was constitutional. The Court in that case, l.c. 429, said the following:

"Another contention made is that since the appellant was an officer at the time of the passage of the act, it is inapplicable to him because the Constitution prohibits any increase in the pay of an officer during his term of office. We think this contention unsound because the act in question enjoins upon such officers as appellant new and additional duties and provides merely a compensation therefor. While in some jurisdictions a constitutional provision such as ours has been held to inhibit even this, in this and many other states the contrary doctrine has been accepted and acted upon. \* \* \*".

The Supreme Court of Missouri again held in the case of Drainage District vs. Lassater, 325 Mo. 493, that added duties to an office for the incumbent thereof to perform justified an increase of compensation to the officer during his incumbency in office. The Court in that case, l.c. 502, said:

"Appellant contends that Section 4575 authorizes an increase in the compensation of township collectors during their terms of office and, hence, violates Section 8, of Article XIV, of the Missouri Constitution, which provides that 'the compensation or fees of no state, county or municipal officer shall be increased during his term of office; . . . .' As neither county collectors nor township collectors, in respect to their services,



in collecting the taxes of drainage districts, perform any of the duties of state, county or municipal officers, it would seem that the fixing of their compensation for rendering such services to drainage districts is not controlled by Section 8, Article XIV, of the Constitution.

"The constitutional inhibition only applies to compensation or fees of officers for performing duties incident to their offices and has no application to additional duties imposed upon such officers not ordinarily incident to their offices. (State ex rel. McGrath v. Walker, 97 Mo. 162, 10 S.W. 473; State ex rel. Hickory County v. Dent, 121 Mo. 162, 25 S.W. 924; State ex rel. Linn County v. Adams, 172 Mo. 1, 72 S.W. 655; State ex rel. Harvey v. Sheehan, 269 Mo. 421, 190 S.W. 864; State ex rel. Zevly v. Hackmann, 300 Mo. 59, 254 S.W. 53; State ex rel. Barrett v. Boeckler Lumber Company, 302 Mo. 187, 257 S.W. 453.)

"The collection of drainage district taxes is no part of the duties ordinarily incident to the office of county and township collectors. Such duties are additional duties dependent upon the existence of a drainage district having lands, taxable for district purposes, lying within the territorial jurisdiction of such officers. In collecting such taxes, county and township collectors are officers and agents of the particular drainage district. They are required to give separate bonds to such district. (Sec. 4396, R.S. 1919.) The provisions of Section 8, Article XIV, of the Constitution, are not violated by Section 4575."

Thus, it will be seen that our Supreme Court has placed its approval in the above quoted parts of its decision, upon the constitutionality of a legislative act increasing salaries of officers during their terms where new duties are added to such offices after such officers are inducted into office.

Senate Bill #78, as stated above, was passed by the Legislature on February 26, 1947. It was approved by the Governor of Missouri on July 7, 1947.

There was no emergency clause contained in said Senate Bill #78.

The Legislature on May 23, 1947, passed the following Joint Resolution, found in the Senate Journal at page 1121, to-wit:

"HOUSE JOINT RESOLUTION NO. 2.

"WHEREAS, Section 29, Article III of the Constitution of 1945 provides that if the General Assembly recesses for thirty days or more it may prescribe by Joint Resolution that laws previously passed and not effective shall take effect ninety days from the beginning of such recess; and

"WHEREAS, the 64th General Assembly has resolved to recess for a period beginning Thursday, June 12, 1947, and ending Monday, July 14, 1947; now therefore

"BE IT RESOLVED, by the House of Representatives and Senate, jointly that all laws passed by the 64th General Assembly on or before the 12th day of June, 1947, and not effective, shall take effect ninety days from the beginning of said recess, to-wit: on the 10th day of September, 1947."

It would, therefore, be apparent that said Senate Bill #78 would take effect on September 10, 1947, which would be ninety days after June 12, 1947, the first day of said recess.

Honorable B. H. Howard

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CONCLUSION.

It is, therefore, the opinion of this Department that under Senate Bill #78 which is supported by the above cited text and the decisions of our Supreme Court because of the addition of new duties to the Public Service Commission and the General Counsel thereto, the compensation for the members of the Commission and the General Counsel may be increased as provided for in said Senate Bill #78 under the Constitution of this State, and that said enactment becomes effective ninety days from June 12, 1947, to-wit: September 10, 1947.

Respectfully submitted,

GEORGE W. CROWLEY  
Assistant Attorney General

APPROVED:

J. E. TAYLOR  
Attorney General

GWC:ir

APPROPRIATIONS: Availability of current appropriation to pay claims for refunds of motor vehicle fuel tax accruing during previous fiscal year.

July 24, 1947

FILED

42

Mr. B. H. Howard, Comptroller  
Department of Revenue  
State Capitol Building  
Jefferson City, Missouri

Dear Sir:

Reference is made to your inquiry of recent date for an official opinion of this department, reading as follows:

"Section 3.060 of House Bill 172, 64th. General Assembly, reads as follows:

There is hereby appropriated out of the State Treasury, chargeable to the State Highway Department Fund, One Million Fifty Thousand Dollars (\$1,050,000.00) for the purpose of refunding of gasoline taxes, as provided by law, for the period beginning July 1, 1947, and ending June 30, 1948.

"The appropriation of the 63rd. General Assembly provided the following:

To pay claims for refund of taxes paid on motor vehicle fuels as provided by law for the period beginning July 1, 1946 and ending June 30, 1947  
.....\$1,000,000.00.

"As of June 2, 1947, the appropriation by the 63rd. General Assembly was exhausted and since that time we have received deficiency claims amounting to \$221,550.02 and it appears that we will receive further claims dated prior to July 1, 1947, which may increase the total to \$250,000.00 or more.

"Before approving these claims for payment, we would appreciate an opinion from you as to whether or not a claim for refund

received during the fiscal year ended June 30, 1947, can be paid from the appropriation for the period beginning July 1, 1947 and ending June 30, 1948.

"A reply at your earliest convenience will be appreciated."

The refunds referred to in the two appropriation acts arise under the provisions of Sections 8411.15, 8411.16 and 8411.17, Mo. R. S. Ann. In substance, these statutes provide for presentation of claims based upon loss or destruction of motor vehicle fuel, non-use of motor vehicle fuel in motor vehicles used upon the public highways and errors made in the determination of the tax due to the administrator of the Motor Vehicle Fuel Tax Act. Upon determination by that official that such refunds are proper, the administrator is required to requisition the amount of refund due the claimant from the state treasury. It is such approved claims as these that have now been forwarded to the office of the comptroller for payment.

The determination of the question which you have proposed hinges upon the availability of the current appropriation for the payment of such of these claims as have been established and approved during the prior fiscal year.

A very similar situation arose and was decided in the case of State ex rel. vs. Thompson, 45 S. W. (2d) 1078. The facts involved in that case were briefly these: The relatrix had in 1923 been found eligible to receive a Missouri pension for the deserving blind. Her application had been duly approved and certified to the State Auditor at that time. She remained on the roll until April 1, 1926, at which time the commission administering the blind pension act unwarrantedly removed her name therefrom. She was restored to the roll on September 12, 1928, and thereafter received her pension. As a result of subsequent proceedings, she was restored on the roll on May 8, 1931, retroactive to April 1, 1926, the date of her removal therefrom. The respondent in the case, the State Auditor, refused payment for the period from April 1, 1926, to September 12, 1928, on the ground that the then current appropriation for the biennial period beginning the first day of January, 1931, and ending on the 31st day of December, 1932, was not available for that purpose.

The court, in disposing of this contention, said at l.c. 1078:

"The only question here is whether the payment which relatrix seeks to have made out of the state treasury is within the 'object' to which the appropriation under the act just set out is to be applied. If it is a 'pension to the deserving blind as provided for in chapter 51, Revised Statutes, 1929,' it is. The language in the title of the Appropriation Act, 'for the biennial period beginning on the first day of January, 1931, and ending on the thirty-first day of December, 1932,' if read into the act itself, merely limits the period within which the appropriation made shall be available, in conformity with said section 19 of the Constitution; it has no reference to the time when the right to the pensions for the payment of which the appropriation is made should accrue or had accrued, nor to the period for which such pensions are payable.

"Section 8893 (Revision of 1929) provides that an adult blind person having the qualifications therein prescribed 'shall be entitled to receive, when enrolled under the provision of this article, an annual pension,' etc. One is 'enrolled under the provision of this article' when his name is placed on the blind pension roll by the state auditor. Section 8900. When enrolled the pensioner is entitled to a pension from the date of the filing of his application with the probate court. An applicant's name is placed on the blind pension roll upon certification by the commission for the blind; it is stricken from the roll upon a like certification when the commission, after notice and hearing, determines that the pensioner is no longer qualified to receive a pension. Section 8896."

It is our thought that in view of the similarity existing between the administrative procedure involved in certifying persons as eligible for blind pension benefits and for determining that refunds of motor vehicle fuel tax are properly due from the state that similar decision would be reached.

CONCLUSION

In the premises, we are of the opinion that the appropriation made by the 64th General Assembly for the purpose of refunding motor vehicle fuel taxes, found at Section 3.060 of House Bill No. 172, is available for the payment of claims for such refunds as have been found by the administrator of the Motor Vehicle Fuel Tax Act to be proper, even though such accrued claims were so found to be proper during the prior fiscal year.

Respectfully submitted,

WILL F. BERRY, Jr.  
Assistant Attorney General

APPROVED:

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J. E. TAYLOR  
Attorney General

WFB:VLM

LAWS:)  
CONSTITUTIONAL LAW:)

Senate Bill 159 effective  
September 10, 1947; Said  
bill and Senate Bill 176  
are constitutional.

July 28, 1947

FILED

42

Honorable B. H. Howard  
Comptroller  
Jefferson City, Missouri

Dear Sir:

We have your letter of recent date which reads  
as follows:

"Senate Bill No. 159, 64th. General Assembly,  
increases the salaries of the Judges of the  
Supreme Court and the Judges of the Courts  
of Appeals.

We will appreciate an opinion in regard  
to the effective date of the changes with  
respect to the present members of the courts."

Senate Bill No. 159 reads as follows:

"Section 1. From and after the effective  
date of this act each Judge of the Supreme  
Court of Missouri shall receive an annual  
salary of \$12,000.00 and each Judge of  
the several Courts of Appeals shall receive  
an annual salary of \$10,500.00, and, in  
addition thereto, each of said Judges when  
temporarily serving, transferred or assigned  
as a Judge of another court than the one  
to which appointed or elected, said court  
to which temporarily assigned or transferred  
being held in a county other than the county  
in which the court to which said Judge is  
appointed or elected is held, shall receive  
for his expenses mileage at five cents a  
mile for each mile traveled in going to  
and returning from the place where court is  
held. The said salaries and expenses shall  
be paid out of the State Treasury, said  
salaries to be paid in monthly installments  
on the first day of each month. Said  
salaries and expenses shall constitute the  
total compensation for all duties performed  
by, and all expenses of, said Judges, and



there shall be no further payment made to or accepted by said Judges for the performance of any duties required to be performed by them under the law.

Section 2. All laws, insofar as they conflict with the provisions hereof, pertaining to the salaries, expenses or compensation of the Judges mentioned in Section 1, are hereby repealed."

Section 29 of Article III of the Constitution of 1945 reads as follows:

"No law passed by the general assembly shall take effect until ninety days after the adjournment of the session at which it was enacted, except an appropriation act or in case of an emergency which must be expressed in the preamble or in the body of the act, the general assembly shall otherwise direct by a two-thirds vote of the members elected to each house, taken by yeas and nays; provided, if the general assembly recesses for thirty days or more it may prescribe by joint resolution that laws previously passed and not effective shall take effect ninety days from the beginning of such recess."

Senate Bill No. 159 was not an appropriation act, and it did not contain any emergency clause. It would, therefore, be effective ninety days after the adjournment of the 64th General Assembly unless it is governed by the proviso contained in Section 29 of Article III of the Constitution, supra.

Said bill was approved by the Governor on June 5, 1947. The General Assembly recessed on June 12, 1947, for more than thirty days, to-wit, for a period ending July 14, 1947. On May 23, 1947, the General Assembly passed a joint resolution known as House Joint Resolution No. 2. (See Senate Journal p. 1121). Said joint resolution read as follows:

"HOUSE JOINT RESOLUTION NO. 2.

WHEREAS, Section 29, Article III of the Constitution of 1945 provides that if the General Assembly recesses for thirty days or more it may prescribe by Joint Resolution that laws previously passed and not effective shall take effect ninety days from the beginning of such recess; and

WHEREAS, the 64th General Assembly has resolved to recess for a period beginning Thursday, June 12, 1947, and ending Monday, July 14, 1947; now therefore

BE IT RESOLVED, by the House of Representatives and Senate, jointly that all laws passed by the 64th General Assembly on or before the 12th day of June, 1947, and not effective, shall take effect ninety days from the beginning of said recess, to-wit: on the 10th day of September, 1947."

It will be seen, therefore, that the General Assembly has, under authority of Section 29 of Article III of the Constitution, provided that Senate Bill No. 159 shall go into effect September 10, 1947, that date being ninety days after the recess of June 12, 1947, of the General Assembly.

At first blush, it might seem that Senate Bill No. 159 violates Section 13 of Article VII of the Constitution, and that suggestion may as well be considered now as in the future. That section of the Constitution reads as follows:

"The compensation of state, county and municipal officers shall not be increased during the term of office; nor shall the term of any officer be extended."

However, we find another section of the constitution which deals specifically with the compensation of Judges of Courts. That section is Section 24 of Article V, and it reads in part as follows:

"All judges shall receive as salary the total amount of their present compensation until otherwise provided by law, but no judge's salary shall be diminished during his term of office."

The question naturally arises as to which of these constitutional provisions controls when applied to Senate Bill No. 159. We must consider certain rules of construction which have been adopted and applied to similar situations in order to determine this question.

In construing a constitution we should consider all provisions bearing on the same subject. In the case of *State v. Adkins*, 284 Mo. 680, l.c. 693, the court said:

"\* \* \* It is a fundamental rule of construction of all writings, whether they be laws, wills, deeds, contracts or constitutions, that they must be construed as a whole, and not in detached fragments; that they must be construed to effectuate and not to destroy their plain intent and purpose, and that in determining what is that intent and purpose all provisions relating either generally or specially to a particular topic are to be scrutinized and so interpreted, if possible, as to effectuate the intention of the makers. This rule does not need (though it does not lack) authority to give it vitality. It is inherent in the very nature of things, and springs from reason as Minerva sprang from the brain of Jove, full-grown and ready for battle."

When applying the above principle we must go even further and resolve seemingly overlapping provisions of the Constitution by harmonizing them. We should avoid a construction which renders any section meaningless or inoperative, and should lean to a construction that would render both sections operative, rather than one which may make a section idle and nugatory. *State ex rel. Crutcher v. Koeln*, 61 S. W. 2d 750, and *State on Inf. McKittrick, Attorney General, v. Williams, Sheriff*, 144 S. W. 2d 98.

A second principle of constitutional construction that we believe applicable in this case is that specific provisions should prevail over the general provisions when they affect the same subject matter. Citing the case of *State ex. rel. Gordon v. Becker, Secretary of State*, 49 S. W. 2d 146, this general rule, as set out in 16 C. J. S., Section 25, p. 65, reads as follows:

"When general and special provisions of a constitution are in conflict, the special provisions should be given effect to the extent of their scope, leaving the general provisions to control in cases where the special provisions do not apply."

Where there is a conflicting specific and general provision, or a particular intent which is incompatible with a general intent, the specific provision or particular intent will be treated as an exception, and should receive a strict, but reasonable construction.  
\* \* \* "

It can readily be seen that Section 13 of Article VII is a general provision applying to all state, county and municipal officers, while Section 24 of Article V applies only to Judges. Therefore, by applying the two preceding rules of statutory construction, we must conclude that Section 24 of Article V, being a specific section dealing with the compensation of Judges only, prevails over Section 13 of Article VII, which is a general section dealing with compensation of all state, county and municipal officers. Both sections deal with the same subject matter, and under the rules of construction above mentioned, the specific section is considered as an exception to the general section. The only limitation on the power of the General Assembly in Section 24 of Article V is the prohibition against diminishing a Judge's compensation during his term of office. There being no other prohibition on the General Assembly, they would have the power to increase the compensation of Judges whenever they deemed it necessary, since a state constitution is not a grant of power to a Legislature but is a limitation thereon and the Legislature may pass laws on any subject not forbidden by the State or Federal Constitutions. (State ex rel. McDonald v. Lollis 33 S.W. 2d 98, 326 Mo. 644; State ex rel. Gains v. Canada 113 S. W. 2d 783, 342 Mo. 121).

After determining that Section 24 of Article V is controlling in regard to our problems, it will be necessary to examine this section more closely. When interpreting a section of a constitution the intent and purpose of the lawmakers is of primary importance in determining its true meaning and scope. State ex rel. Harry L. Hussmann Refrigerator & Supply Co. v. St. Louis, 5 S. W. 2d 1080, 319 Mo. 497; Graves v. Purcell, 85 S. W. 2d 543, 337 Mo. 574. Further, authority may be found in State ex Inf. Norman v. Ellis, 28 S. W. 2d 363, 325 Mo. 154, where the court stated, 1.c. S. W. 367:

"\* \* \* There is another rule superior to that, which is that the intention of the lawmakers and Constitution makers must be gathered when interpreting an act or constitutional provision. \* \* \* "

In ascertaining this intent we believe it proper to examine the debates of the Constitutional Convention so that we may determine what was in the minds of the framers of our organic law when they adopted this particular section. We further realize that there is a limit to the reliance that may be placed on these debates, as was pointed out in State ex rel. Donnell v. Osburn, 147 S. W. 2d 1065, wherein the Court said, l.c. 1068:

"In the debates before the Constitutional Convention of 1875 which proposed section 3, it seems to have been agreed that upon aggregating the votes from the face of the returns the candidate with the highest vote would prima facie be entitled to the office and to enter upon his duties. Any attack upon the returns would have to be made thereafter by a contest before the general assembly. See Debates of the Missouri Constitutional Convention of 1875 by Loeb and Shoemaker, Vol. IV, p. 428, et seq. We refer to the debates with knowledge of the rule which limits the reliance which may be placed in them. State ex rel. Heimberger v. Board of Curators. 268 Mo. 598, 188 S. W. 128."

After a thorough reading of this case it will be noticed that, regardless of their stated rule of limited reliance, the court did in fact actually use the record of the proceedings to ascertain the true intent of the lawmakers. As declaratory of the rule that the records of the Constitutional debates may be examined to determine the true meaning of a section of the Constitution, we direct your attention to Ex parte Oppenstein, 233 S. W. 440, wherein the Supreme Court said, l.c. 444:

" This substitute was rejected by a vote of 42 to 23. Three members were absent. The power to inspect and examine the ballots in 'judicial proceedings' would have been given by this amendment. The convention rejected it.

It is clear from this that the constitutional convention had before it, in the proposed substitute section, the very question which counsel discuss. This substitute would have expressly given the authority now sought to be exerted. When the convention defeated it, it passed upon the question in this case. Its intent could hardly have been more clearly exhibited than by the vote upon the substitute section."

In a very recent case before the Supreme Court en banc, they again relied on the Constitutional debates to determine the true intent and meaning of a section of the Constitution. We quote from *State ex rel. Montgomery et al., County Judges, v. Nordberg, Clerk of County Court, et al.*, 193 S. W. 2d 10, 1.c. 12:

"An examination of the Journal of the Constitutional Convention discloses that the main purpose prompting the adoption of Sec. 23 was to facilitate state bookkeeping, so to speak. Thus it was stated by Dr. McCluer, on the 145th day, Friday, May 19, 1944, p. 2417: 'The principal change is in the date of the fiscal year from the calendar year to the dates as indicated, a change which is desirable to bring the fiscal business of the state in line with that of the nation and for other reasons that were set forth by representatives of the State Auditor's Office.'

Again, Mr. Hemphill, apparently reading from a memorandum prepared by the State Auditor, said:

'The efficiency of every department of the state government would be materially benefitted and the lost motion which occurs during the first six months period following the meeting of the Legislature will be done away with.'

\* \* \* \* \*

If this change is made, the only confusion which would result is the confusion which would still exist in cities and counties where the fiscal year and the calendar year coincide. However, this could easily be

corrected by the Legislature when it next meets, by creating a statute fixing the fiscal year of the county and the city the same as the fiscal year of the state!"

In examining the Constitutional debates on Section 24, Article V, we note that an amendment was offered which is found on pages 2739 and 2740 of Part 6 of the Stenotype Transcript of the Debates, and reads as follows:

"PRESIDENT: Are there any amendments?

"MR. TEE: I have an amendment, please.

"(Amendment submitted and read as follows:)

AMENDMENT NO. 1 FOR SUBSTITUTE NO. 1 FOR SECTION 24. Amend Mr. Righter's substitute for Section 24 by inserting the words 'increased or' between the words 'be and diminished' in line 6 of said substitute as the same appears on page 16 of the Journal of May 25, 1944.

"PRESIDENT: Do you move the adoption of the amendment?

"MR. TEE: I do.

"(Motion was seconded.)

"MR. TEE: Now, Mr. President, I have called attention to the sentence in Section 24 of the Committee's report reading as follows and found in lines 2, 3, 4 of the section. 'No judge's salary shall be increased or diminished during his term of office.' Now, the Committee gave that part of the section a great deal of attention. Those words were not placed in there without consideration. Those words are also found in the present constitution and I believe they should continue to be a part of the Constitution with reference to this subject matter. Now, I ...

"MR. BRADSHAW (Interrupting): Mr. President, may I interrogate Mr. Tee?

"PRESIDENT: Does the gentleman yield?

"MR. TEE: I do.

"MR. BRADSHAW: Mr. Tee, is not the same purpose served by Section 6 of File No. 7? I am reading here from the Phraseology report which provides the compensation of state, county and municipal officers shall not be increased during the term of office nor shall the term of any officer be extended?

"MR. TEE: That was the very action that I was about to refer to.

"MR. BRADSHAW: Is there any reason for your amendment?

"MR. TEE: I think so because I am of the belief from remarks here made that this section, as amended, 24, as amended, would be considered an exception to their language in File no. 7 which you just read.

\* \* \* \* \*

"MR. TEE: Well, it all means the same thing. Now, there is no reason why that this salary or this compensation should not be fixed and it should not be susceptible to be juggled around and juggled around like it has been or like this amendment would permit it to be in one direction only. Judges, those men who are competent to be judges, I think are competent to decide, that is to understand the terms upon which the office to which they aspire and which is offered and I think it not an unjust thing to expect them to continue throughout the term of that office upon the terms upon which it is offered. We are not taking any undue advantage of those people by making the limitation on both ends of this matter. I think it should be retained."

After a long discussion (found in the Debates on pages 2738 to 2751) on the merits of allowing the General Assembly to increase the salaries of judges during their terms of office, the amendment was defeated, clearly showing the intention of the framers of the Constitution to leave this problem to the wisdom of the General Assembly.



By applying well established rules of construction, therefore, we must conclude that the framers of the present Constitution of Missouri intended to place no limitations upon the General Assembly with respect to fixing the compensation of Judges of Courts except that such compensation should not be diminished during their term of office. It follows that Senate Bill 159 does not violate the Constitution.

In this connection, attention should be given to Senate Bill No. 176 which was passed by the 64th General Assembly, and approved by the Governor on April 4, 1947. Said latter act provided for the appointment of Supreme Court Commissioners, prescribed their duties and provided for their compensation. Section 1 of said act reads as follows:

"Section 1. The Supreme Court is hereby authorized and directed to appoint by order made and entered of record within thirty days after this act shall take effect, six (6) persons to be known as supreme court commissioners, each of whom shall possess the same qualifications and take and subscribe a like oath as judges of the supreme court. Such appointment shall be for a term of four years from the expiration of the terms of the present commissioners who are acting under the law creating the similar commission passed by the general assembly in the year 1943. Such commissioners shall receive the same compensation now or hereafter to be received by the judges of the supreme court and payable in the same manner. If any such commissioner shall resign or become in any manner disabled or disqualified to discharge his duties, a successor shall be appointed by the supreme court to serve for the remainder of his term in the manner provided for the appointment of original commissioners; provided that not more than three of said commissioners shall at any time belong to the same political party."

It will be seen that the compensation of the Supreme Court Commissioners is to be the same as that of the Judges of the Supreme Court. When, therefore, the compensation of the judges changes, the compensation of the commissioners likewise changes. Senate Bill 176 contained an emergency clause, and, therefore, went into effect April 4, 1947. Therefore, on September

10, 1947, when the compensation of the Judges of the Supreme Court is increased, the compensation of the commissioners will also be increased so as to be the same as that of the judges. It might be suggested that the Commissioners of the Supreme Court are not judges, and that, therefore, Senate Bill 176 violates Section 13, Article VII of the Constitution, *supra*. Said latter constitutional provision prevents an increase in compensation of "state, county and municipal officers" during their terms of office. Such a question requires that it be determined whether Supreme Court Commissioners are state officers,

In the recent case of *State ex rel. v. Meriwether*, 200 S. W. 2d, 340, our Supreme Court had before it the question of determining whether a court reporter was a public officer or was merely an employee of the court. The court was considering in that case whether an act of the Legislature increasing the compensation of court reporters during their terms violated Section 13 of Article VII of the Constitution. In discussing the question the Court said, *l.c.* 341:

" 'It is not possible to define the words 'public office or public officer.' The cases are determined from the particular facts, including a consideration of the intention and subject-matter of the enactment of the statute or the adoption of the constitutional provision.' *State ex inf. McKittrick, Attorney General, v. Bode*, 342 Mo. 162, 113 S. W. 2d 806, *loc. cit.* 806.

'It was to prevent persons while possessed of the prestige and influence of official power from using that power for their own advantage that the framers of our organic law ordained that salaries of public officers should not be increased during the terms of the persons holding such offices.' *Folk v. City of St. Louis*, 250 Mo. 116, *loc. cit.* 135, 157 S. W. 71, 74.

'Numerous criteria, such as (1) the giving of a bond for faithful performance of the service required, (2) definite duties imposed by law involving the exercise of some portion of the sovereign power, (3) continuing and permanent nature of the duties enjoined, and (4) right of successor to the powers, duties, and emoluments, have been resorted to in determining whether a person is an

officer, although no single one is in every case conclusive \* \* \* Illustrative of what is meant by 'sovereignty of the state,' in the same opinion (State ex rel. Landis v. Board of Commissioners (of Butler County), 95 Ohio St. 157, 115 N. E. 919, 920) it is said: 'If specific statutory and independent duties are imposed upon an appointee in relation to the exercise of the police powers of the state, if the appointee is invested with independent power in the disposition of public property or with power to incur financial obligations upon the part of the county or state, if he is empowered to act in those multitudinous cases involving business or political dealings between individuals and the public, wherein the latter must necessarily act through an official agency, then such functions are a part of the sovereignty of the state.' State ex rel. Pickett v. Truman, Judge, 333 Mo. 1018, 64 S. W. 2d 105, loc. cit. 106."

After the foregoing discussion the Court turned to the statutes relating to court reporters to see whether they in fact constituted the court reporter a public officer, and concluded that the reporter was not a public officer but was merely an employee, the decision in that regard being bottomed primarily upon the proposition that the statutes relating to court reporters do not delegate to them a portion of the sovereign power of government to be exercised for the benefit of the public.

We must, therefore, look to the provisions of Senate Bill 176 to see whether the Supreme Court Commissioners are public officers or are merely employees of the court.

Section 1 of said bill quoted above provides for the appointment of commissioners by order of the Supreme Court. Said section requires the commissioners to have the same qualifications and to take the same oath of office as Judges of the Supreme Court. It also provides that they shall be appointed for a term of four years. Sections 3 and 4 of said act read as follows;

"Section 3. The supreme court en banc may from time to time refer to such commissioners any case or cases for the preparation by said commissioners of a statement of the facts and an opinion upon the legal questions involved or arising in such cases, and shall by order provide for oral arguments before them and the submission of briefs to the said commissioners in cases referred to them. Such commissioners may under the direction of the supreme court prepare and publish dockets from time to time of cases referred to them, and hear oral arguments. The supreme court en banc may order said commissioners or any of them to sit with the court en banc, or with either division of the court in the hearing of arguments and may assign cases so heard by the supreme court or either division thereof and said commissioners sitting with the court, to one of said commissioners for the preparation by said commissioner of a statement of the facts and his opinion upon the legal questions involved or arising therein.

Section 4. All statements of the facts and opinions of said commissioners or any one of them shall be promptly reported to the supreme court en banc, or to such division thereof as the supreme court en banc may order. Such report shall be in writing and signed by the commissioner who prepared the same, and shall show which of the other commissioners concurred therein; and any commissioner or commissioners failing to concur in a report shall prepare a separate report and shall deliver the same to the supreme court en banc or to the division thereof to which the original report was made. Every report shall contain a concise statement of the facts in the case together with an opinion upon the legal questions involved or arising therein. The supreme court en banc, or either division of the supreme court to which such report shall be made, may approve, modify or reject the same and whenever it shall approve a report as submitted or modified the same as approved shall be promulgated as the opinion of the supreme court or such division thereof, and

shall be filed and judgment shall be entered in the same manner and with like effect and subject to the same orders and motions as in the case of other opinions and judgments of the court en banc, or the division thereof, by which the same shall be approved or promulgated, and shall show which of the commissioners and which of the judges concurred in such opinion; Provided, if such report shall have been made to either division of the supreme court, and shall have received a majority vote of the members of such division, if any of the judges of such division dissent from the opinion of the commissioners, such case may be transferred from such division to the court en banc, in the same manner and with like effect as cases now or may hereafter be transferred when the opinion is written by one of the judges of such division. The commissioners shall be subject to the rules and orders of the supreme court and shall in fact perform such service as the court may require and the court shall by rule provide for carrying into effect the provisions and purposes of this act in order to expedite the business of the court." (emphasis ours.)

While Senate Bill 176 requires the commissioners to take an oath of office and prescribes a term of office, yet it does not invest them with any part of the sovereign power of government. They are given no authority to do anything in and of themselves, but they can only do what is assigned to them by the judges of the court, and what they do then has no legal or binding effect unless it is approved and adopted by the court. Section 4 of the act, supra, provides that "The supreme court en banc, or either division of the supreme court to which such report shall be made, may approve, modify or reject the same and whenever it shall approve a report as submitted or modified the same as approved shall be promulgated as the opinion of the supreme court or such division thereof, \* \* \*". The last sentence of Section 4 of the act reads as follows:

"The commissioners shall be subject to the rules and orders of the supreme court and shall in fact perform such service as the court may require and the court shall by rule provide for carrying into effect the provisions and purposes of this act in order to expedite the business of the court."

It thus appears clear that the commissioners are employees appointed by the court to assist the court in its work and to expedite the business of the court. Not being state, county or municipal officers, their compensation can be increased during their terms, and if Senate Bill 176 has the effect of increasing their compensation during their terms, it does not violate Section 13 of Article VII of the Constitution. There is no prohibition in the constitution against increasing the compensation of employees.

There is another reason why we think Senate Bill 176 does not violate Section 13 of Article VII of the Constitution, and that is that it does not actually provide for an increase in compensation of the commissioners. What it does is to provide a method by which the compensation of the commissioners is to be determined. It does not state the compensation at any given figures. It provides that the compensation shall be the same as that of the Judges of the Supreme Court, be that great or small. The compensation of the judges is the yardstick by which the compensation of the commissioners is to be measured. The increase in the compensation of the judges does not increase the compensation of the commissioners as set by Senate Bill 176, but it merely produces a different amount for the compensation of the commissioners in accordance with the formula for determining the compensation as set forth in said act.

An increase in the compensation of Judges of the Supreme Court produces as to the compensation of the commissioners a result similar to that produced upon the compensation of a county officer when the population of his county increases during his term, and thereby puts him into a different salary bracket. In *State ex rel. v. Hamilton*, 303 Mo. 302, 260 S. W. 466, a circuit clerk had sued to recover increased salary to which he contended he was entitled by reason of the change in the population of his county which put his county in a higher salary bracket. His claim was opposed on the ground that his salary could not be increased during his term under the constitution. In ruling the case the Court said, 260 S. W. 1.c. 469:

"This act of 1915 was in effect when relator was elected. Under it, relator's salary was fixed for his whole term, but was not in named dollars and cents for the whole term. The effect of this act of 1915 was to say to relator, 'Your salary shall be determined

upon the presidential vote of 1916, until there is another presidential election, at which time your county may be in a lower or a higher class, according to the population indicated by the presidential vote.' The salary, in amount, was fixed by law as to relator's office in any event. If his county was not subjected to a change of class, his salary was not changed. If his county (by a decreased population) dropped to a lower class, his salary was fixed, and was fixed before his election, although the change of class might give him a different amount. So too, if his county increased in population and thereby passed to a higher class, the existing law (that in force at the time of his election) fixed for him a salary. True it was higher, but it was definitely fixed at the date of his election. If the act of 1915 had said that the circuit clerk of Crawford county, elected in 1916, shall receive \$1,600 per year for the first two years, and \$1,950 per year for the last two years of the term there would be no question. Section 8 of article 14 of the Constitution could not be invoked, because the salary would not be either increased or decreased during the term. To my mind the act of 1915 as it now stands is no nearer a violation of section 8 of article 14 of the Constitution, than the supposed law. The lawmakers knew the presidential election years, and with this knowledge classified the counties as to salaries, and provided that such salaries should be determined by the last previous presidential vote. The salary of each class was fixed, and as said no subsequent law has changed the fixed salaries. The mere fact that a county passed from one class to the other does not deprive the holder of the office of the salary fixed by law, and fixed too, at a time long prior to relator's election. In our judgment section 8 of article 14 of the Constitution does not preclude a recovery by relator. This because his salary was fixed by law before his election, and no law since enacted has changed it, except as we may hereafter note."

To the same effect is the case of State ex rel. v. Linville 318 Mo. 698, 300 S. W. 1066. Senate Bill 176, which was in effect when the commissioners were appointed, provided that they should receive the same amount of compensation as the Judges of the Supreme Court, whether that amount was \$10,000, \$12,000 or some other amount which the Legislature might prescribe for the judges. In effect said bill definitely fixed the compensation of the commissioners, and the mere fact that other circumstances provided for in the act came into play which made their compensation more than it was when they were appointed did not amount to an increase in their compensation any more than did a change in population of counties during the terms of county officers, thereby putting such officers in a higher salary bracket, amount to an increase in such salaries in the Hamilton and Linville cases, supra.

Conclusion

It is, therefore, the opinion of this office that Senate Bill No. 159 will become effective September 10, 1947, and that said bill and Senate Bill No. 176 are constitutional.

Yours very truly,

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Harry H. Kay  
Assistant Attorney General

APPROVED:

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J. E. Taylor  
Attorney General.

HHK/vlv



INCREASING SALARIES OF PUBLIC : Salaries of public officials who  
APPOINTIVE OFFICERS. : are appointed and who have no  
: fixed terms of office may be in-  
: creased during their official  
: periods of appointment.

August 2, 1947

FILED

42

8/5

Honorable B. H. Howard  
Comptroller  
Department of Revenue  
Jefferson City, Missouri

Dear Mr. Howard:

This will acknowledge your request of recent date for an opinion from this Department, respecting the changes in the salaries of the Commissioner of Finance, Deputy Commissioner of Finance, Examiners, Assistant Examiners and other assistants, and the effective date of such changes respecting those holding such offices at the present time, all relating to the terms and provisions of Senate Bill #181 enacted by the 64th General Assembly of this State.

Your request for such opinion, is as follows:

"Senate Bill No. 181, 64th. General Assembly, provides for changes in the salaries of the Commissioner of Finance, Deputy Commissioner of Finance, examiners, assistant examiners and other assistants.

"We will appreciate an opinion in regard to the effective date of these changes with respect to those holding the offices at the present time."

Section 7877, Article 1, Chapter 39, R.S. Mo. 1939, respecting the appointment, and the tenure of his office, is as follows:

"The commissioner of finance shall be appointed by the governor, by and with the advice and consent of the senate, and shall hold his office at the pleasure of the governor."

Senate Bill #181 repeals outright, Section 7881 of Article 1, Chapter 39, R.S. Mo. 1939, and Section 7883 of an Act of the 62nd General Assembly, Laws of Missouri, 1943, page 1003, both repealed sections relating to compensation of the Commissioner of Finance of this State and his subordinates, and enacting new sections in lieu thereof, to be known as Sections 7881 and 7883. The two new sections enacted by Senate Bill #181 change the compensation of the Commissioner of Finance, the Deputy Commissioner of Finance and each examiner appointed, by providing for an increase in the compensation of such officers during the time of their appointment.

The new Sections, 7881 and 7883, contained in said Senate Bill #181, provide for the appointment by the Commissioner of Finance, with the approval of the Governor, of a Deputy Commissioner of Finance, and such examiners, not to exceed twenty in number, assistant examiners, and other assistants as, subject to the approval of the Governor, he shall deem necessary to discharge the duties of the Department of Finance. The above named subordinates of the Commissioner of Finance, as it is said in said new Section 7881, "shall hold their offices during and at the pleasure of the Commissioner of Finance."

Thus, we observe that under said Section 7887, Article 1, Chapter 39, R.S. Mo. 1939, the tenure of office of the Commissioner of Finance himself is at the pleasure of the Governor. He, therefore, has no term of office.

Said Section 7881 of Senate Bill #181 provides that the subordinates of the office of the Commissioner of Finance shall hold their offices during and at the pleasure of the Commissioner of Finance. Neither do they, nor any of such subordinates, have any term of office.

We think this question is well considered in the case of State ex rel. vs. Gordon, 238 Mo. 168. That was a case in which an appointive officer's salary was increased during his holding of the office. Our Supreme Court in said case held that where an office is filled by appointment and a definite term of office is not fixed by the Constitution or the statutes, but such office is held at the pleasure of the appointing power, and the incumbent may be removed at any time, such officer is not one of the class which the Constitution prohibits from having an increase in the compensation of such officer during a term of office.

The Supreme Court in said case, l.c. 179, 180, on the point, and holding that the compensation of such an appointive officer may be changed and increased during his holding of the office, said:

"\* \* \* In State ex rel. v. Johnson, 123 Mo. 43, relator Kane, chief of the fire-department of St. Joseph, had his salary increased. He held office during the pleasure of the city council. In holding that the constitutional inhibition did not apply, we said (p. 49): 'It will be observed that this section of the Constitution only embraces within its provisions officers who are elected or appointed for some specific or definite time, and that it has no application whatever to the case in hand, when the relator's term of office is not fixed by any law or ordinance and he simply holds at the pleasure of the appointing power. This is manifest from the fact, that it also provides that the term of office shall not be extended for a longer period than that for which such officer was elected or appointed. The relator was not elected, nor was he appointed for any definite time. There does not seem to be room for argument in regard to the proper meaning of this section, so plain is it in its construction.'

"The gist of the holding is put by our reporter in the first paragraph of the head-notes, viz.: 'A city officer appointed by the council and subject to removal by it at pleasure is not an officer within the meaning of the Constitution, article 14, section 8, prohibiting the increase of the salary of an officer during his term of office.'

"Indeed in every decided case coming under my eye, in which we held the constitutional provision did apply, the officer had a fixed and definite term of office, and if subject to removal at all it was only for cause shown, on a hearing in which he was entitled to due process of law in the form of a notice and charges preferred."

Senate Bill #181 was passed on May 20, 1947. It was approved by the Governor on June 6, 1947. The Bill had no emergency clause.

The Legislature on May 23, 1947, passed the following Joint Resolution, found in the Senate Journal, at page 1121, to-wit:

"HOUSE JOINT RESOLUTION NO. 2

"WHEREAS, Section 29, Article III of the Constitution of 1945 provides that if the General Assembly recesses for thirty days or more it may prescribe by Joint Resolution that laws previously passed and not effective shall take effect ninety days from the beginning of such recess; and

"WHEREAS, the 64th General Assembly has resolved to recess for a period beginning Thursday, June 12, 1947, and ending Monday, July 14, 1947; now therefore

"BE IT RESOLVED, by the House of Representatives and Senate, jointly that all laws passed by the 64th General Assembly on or before the 12th day of June, 1947, and not effective, shall take effect ninety days from the beginning of said recess, to-wit: on the 10th day of September, 1947."

It would, therefore, be apparent that said Senate Bill #181 would take effect on September 10, 1947, which would be ninety days after June 12, 1947, the first day of said recess.

CONCLUSION.

It is, therefore, the opinion of this Department that said Senate Bill #181, passed by the 64th General Assembly, in changing the salaries of the Commissioner of Finance, Deputy Commissioner of Finance, examiners, assistant examiners and other assistants, by increasing the compensation of such officials, is constitutional and valid, because said officials being appointive officers do not have

Honorable B. H. Howard      -5-

a definite term of office, and that said Senate Bill #181 will take effect ninety days from June 12, 1947, to-wit: September 10, 1947.

Respectfully submitted,

GEORGE W. CROWLEY  
Assistant Attorney General

APPROVED:

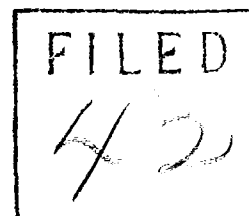
J. E. TAYLOR  
Attorney General

GWC:ir

STATE GEOLOGISTS: Compensation of state geologist cannot be increased during present term of office.  
PUBLIC OFFICERS: That of his chief assistant may be increased not to exceed \$5,000.00.

August 14, 1947

8/28



Department of Revenue  
State of Missouri  
Jefferson City, Missouri

Attention: Mr. B. H. Howard, Comptroller

Gentlemen:

This will acknowledge receipt of your request for an opinion which reads:

"Section 14887 provides that the Governor shall fix the salary of the State Geologist, not to exceed \$7,000.00 per annum, and for his chief assistant, not to exceed \$5,000.00 per annum.

"We will appreciate an opinion as to the effective date that these salaries may be fixed with respect to the present holders of the offices."

The sole question to be determined is whether the present persons holding office referred to in your request are public officers or merely employees. If they come within the classification of officers, then their compensation cannot be increased during their term of office; otherwise, the Governor may increase said compensation not to exceed \$7,000.00 per annum for the state geologist and \$5,000.00 per annum for the chief assistant to the state geologist.

Section 14875, R. S. Mo. 1939, authorizes the Governor to appoint by and with the consent of the Senate a state geologist who shall serve for a term of four years unless sooner removed for cause. Said section reads:

"The governor is hereby authorized to appoint, by and with the consent of the senate, one state geologist, who shall be a person of competent scientific and practical knowledge of the sciences of geology and mineralogy, and whose headquarters shall be located at the state school of mines at Rolla, who shall be the director of the survey, and said state geologist may appoint such assistants and subordinate

assistants and laborers as may be deemed necessary in order to make a thorough scientific, geological and mineralogical survey of the state. The state geologist shall serve for a term of four years unless sooner removed for cause by the governor. The bureau of geology and mines and the board of managers thereof, as heretofore constituted are hereby abolished, and all the rights, duties and powers heretofore vested by law in said bureau of geology and mines, and the board of managers thereof, are hereby transferred to and vested in the governor. Where any law refers in any way to or imposes any right, duty or power upon the bureau of geology and mines, or upon the board of managers thereof, such law shall be construed as referring to and imposing such rights, duties and powers upon the governor. The words 'board,' 'board of managers,' 'bureau' and 'bureau of geology and mines' as used in this chapter shall be construed to mean the governor."

Prior to the enactment of Senate Bill No. 136, supra, the maximum salary allowed the state geologist was \$5,000.00 and his chief assistant, \$4,000.00, under Section 14887, R. S. Mo. 1939. Senate Bill No. 136, supra, repealed that provision and enacted a new Section 14887, which provides that the Governor shall fix the salary of the state geologist, not to exceed \$7,000.00 per annum and of his chief assistant, not to exceed \$5,000.00 per annum, and reads:

"The Governor shall fix the salary of the state geologist, not to exceed seven thousand dollars (\$7,000) per annum, and for his chief assistant, not to exceed five thousand dollars (\$5,000) per annum. The state geologist shall fix the compensation of other assistants, clerks, stenographers, and laborers, commensurate with the qualifications and responsibilities of the individual. Such compensation of any clerk, stenographer, or laborer shall not exceed that of similar clerks, stenographers, and laborers of other departments of the state performing similar duties. All salaries shall be paid in equal monthly installments.

The state geologist shall certify to the State Comptroller the sums of money required to pay the salaries of the state geologist and his assistants, clerks, stenographers, and laborers, and other expenses of the division."

Likewise under Section 14894, R. S. Mo. 1939, it provides the state geologist and his principal assistant should take the usual oath of office to faithfully perform all services required of them before entering upon the discharge of their duties. However, that provision was repealed by Senate Bill No. 136, supra, and a new statute enacted in lieu thereof, known as Section 14894, which only requires the state geologist to take the usual oath of office prior to entering upon the duties of his office. This section reads:

"Before entering upon the duties of his office the state geologist shall take the usual oath to faithfully demean himself in office and perform all the duties required of him by law. The state geologist and all employees of the division shall abstain from all private or personal consulting activities for themselves or others within the state while employed in the division of Geological Survey and Water Resources."

While the principal assistant to the state geologist under Senate Bill No. 136, supra, is not required any longer to take an oath, the mere fact that he did take the oath when appointed and is now acting under said oath does not of itself make him a public officer. See State ex rel. vs. Meriwether, 200 S.W. (2d) 340, wherein the circuit court reporter required to be a sworn officer of the court was held by the court to not be a public officer but an employee.

We shall briefly refer to some of the statutory duties placed upon the state geologist. Under Section 14877, R. S. Mo. 1939, he is required to make a thorough geological survey of the state, discover and examine all beds or deposits of mineral contents and fossils, to discover the various positions, formations, arrangements, composition, and utilization of the many different ores, clays, rocks, coals, mineral oils, natural gas, surface and waters, and other mineral substances as may be useful or valuable. Also he shall assemble and cause to be published annual statistics of mineral production in this state and prepare topographic relief maps of various areas.



Under Section 14888, R. S. Mo. 1939, the state geologist with the approval of the Governor shall negotiate for such technical work as may be necessary beyond the facilities of the division. He shall also purchase equipment, apparatus and supplies with funds appropriated therefor.

Under Section 14882, R. S. Mo. 1939, he is authorized to furnish the press and radio with new discoveries.

Under Section 14887, R. S. Mo. 1939, he shall fix the compensation of other assistants, clerks, stenographers and laborers employed by him.

In State vs. Truman, 64 S.W. (2d) 105, 1.c. 106, the court laid down the general principal for determining what constitutes public officers and employees, and said:

"Numerous criteria, such as (1) the giving of a bond for faithful performance of the service required, (2) definite duties imposed by law involving the exercise of some portion of the sovereign power, (3) continuing and permanent nature of the duties enjoined, and (4) right of successor to the powers, duties, and emoluments, have been resorted to in determining whether a person is an officer, although no single one is in every case conclusive. 46 C. J. p. 928, Section 19, n. 1; 53 A. L. R. p. 595. It is the duty of his office and the nature of the duty that makes one an officer and not the extent of the authority (Mechem on Public Officers, p. 7, Section 9; Throop on Public Officers, pp. 2, 3, Section 2), although designation by law has some significance. 46 C. J. p. 931, Section 24; State ex rel. v. Gray, 91 Mo. App. 438, 445; State ex rel. Cannon v. May, 106 Mo. 488, 505, 17 S.W. 660; State ex rel. v. Shannon, 133 Mo. 139, 164, 33 S.W. 1137; Gracey v. St. Louis, 213 Mo. 384, 393, 394, 111 S.W. 1159.

"In Mechem on Public Officers, pp. 1 and 2, Section 1, it is said: 'A public office is the right, authority and duty, created and conferred by law, by which for a given period, either fixed by law or enduring at

the pleasure of the creating power, an individual is invested with some portion of the sovereign functions of the government, to be exercised by him for the benefit of the public. The individual so invested is a public officer.' We have approved this definition in *State ex rel. Walker v. Bus*, 135 Mo. 325, 331, 332, 36 S.W. 636, 33 L. R. A. 616, *State ex rel. vs. Hackmann*, 300 Mo. 59, 254 S.W. 53, 55, and *Hasting v. Jasper County*, 314 Mo. 144, 282 S.W. 700, 701; and it appears to be in harmony with the great weight of authority. *State ex rel. Key v. Bond*, 94 W. Va. 255, 118 S.W. 276, 278, 279; *State ex rel. Landis v. Board of Commissioners*, 95 Ohio St. 157, 115 N.E. 919, 920; *Bunn et al. v. People ex rel.*, 45 Ill. 397, 409. The Ohio decision states that it is no longer an open question in that state that to constitute a public office 'it is essential that certain independent public duties, a part of the sovereignty of the state, should be appointed to it by law.' Illustrative of what is meant by 'sovereignty of the state,' in the same opinion it is said: 'If specific statutory and independent duties are imposed upon an appointee in relation to the exercise of the police powers of the state, if the appointee is invested with independent power in the disposition of public property or with power to incur financial obligations upon the part of the county or state, if he is empowered to act in those multitudinous cases involving business or political dealings between individuals and the public, wherein the latter must necessarily act through an official agency, then such functions are a part of the sovereignty of the state.'"

See also *State vs. Bode*, 113 S.W. (2d) 805, 1.c. 806, 807.

Section 13, Article VII of the Constitution of Missouri 1945, provides that the compensation of state, county and municipal officers shall not be increased during the term of office for which they were appointed or elected. Said section reads:

"The compensation of state, county and municipal officers shall not be increased during the term of office; nor shall the term of any officer be extended."

In view of the foregoing statutory provisions relating to appointment, duties and compensation of the state geologist and his chief assistant and the decisions laying down the general rule for determining who are public officers and employees, it cannot be denied that the state geologist, being appointed for a term of four years, also requiring him to take an oath of office and perform many functions of sovereignty placed upon him by the Legislature, is a public officer and as such, his compensation cannot be increased during his present term of office. His chief assistant is not appointed for any specific term of office. At the time he was appointed, the law required him to take an oath of office; however, Senate Bill No. 136 repealed that provision and he is no longer required to take said oath. Furthermore, he is not in charge of any department and has very few, if any, functions of sovereignty to perform but acts under the directions of the state geologist.

#### CONCLUSION

Therefore, it is the opinion of this department that the present state geologist, appointed to that office for a term of four years prior to Senate Bill No. 136, passed by the 64th General Assembly, becoming effective, is not entitled to receive an increase in his compensation during said term of office for the reason he is a public officer and as such, there is a constitutional inhibition against increasing compensation of public officers during their term of office for which they are elected or appointed. This is not true with respect to the chief assistant to the state geologist. He is not a public officer but merely an employee, and there being no such inhibition against increasing the compensation of employees, the Governor, under Section 14887 of Senate Bill No. 136, passed by the 64th General Assembly, may fix his compensation in an amount not to exceed \$5,000.00 per annum.

Respectfully submitted,

APPROVED:

AUBREY R. HAMMETT, Jr.  
Assistant Attorney General

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J. E. TAYLOR  
Attorney General

ARH:VLM

COMMISSIONER OF  
AGRICULTURE:

Under provisions of Senate Bill No. 10 of the 64th General Assembly, after September 10, 1947, Commissioner of Agriculture will have no "term of office" and salary provided for in Senate Bill No. 10 will be paid to Commissioner of Agriculture.

August 16, 1947

FILED

42

8/19

Mr. B. H. Howard, Comptroller  
Department of Revenue  
Jefferson City, Missouri

Dear Sir:

This is in reply to your letter of recent date, reading as follows:

"Senate Bill No. 10, 64th. General Assembly, fixes the salary of the Commissioner of Agriculture at \$6,500.00 per annum.

"We will appreciate an opinion in regard to the effective date of that rate with respect to the present commissioner."

Senate Bill No. 10 of the 64th General Assembly, effective September 10, 1947, repeals and reenacts, with modifications, Section 14025, R. S. Mo. 1939. Section 14025 of such bill makes only three changes in reenacting Section 14025, R. S. Mo. 1939. The changes are:

(1) Section 14025, R. S. Mo. 1939, provides, "who shall hold his office for a period of four years," and Section 14025 of the bill provides, "who shall hold his office for a term concurrent with that of the governor and until his successor is appointed and qualified."

(2) Section 14025, R. S. Mo. 1939, provides that the compensation of the Commissioner shall be \$3,000.00 per year, and Section 14025 of the bill provides that this compensation shall be \$6,500.00 per year.

(3) Section 14025, R. S. Mo. 1939, provides, "and shall be subject to removal from office for cause by the governor at his pleasure," and Section 14025 of the bill provides, "and shall be subject to removal from office by the governor at his pleasure."

Section 13, Article VII, of the Constitution of Missouri provides as follows:

"The compensation of state, county and municipal officers shall not be increased during the term of office; nor shall the term of any officer be extended."

In view of this constitutional provision, the first question to be determined is whether, under the provisions of Section 14025 of the bill, the Commissioner of Agriculture will have a "term of office" after September 10, 1947.

In the case of State ex rel. v. Gordon, 238 Mo. 168, the Supreme Court had before it the question of whether or not the Adjutant General of the State of Missouri was entitled to an increase of salary from \$2,000.00 to \$2,500.00 per year, provided for in an act of the Legislature found in Laws of 1909, page 674, Section 3, and decided that the Adjutant General was entitled to such increase on the ground that such an officer did not have a "term of office" within the meaning of the constitutional prohibition against increasing the compensation of state, county or municipal officers during their terms of office. The court said, 1. c. 180-181:

"Recognizing the precision of definition judicially indulged in the exposition of the constitutional provision now up, as already indicated, we now come to a closer view of the case and to the application of the doctrines announced to the facts in judgment. The final question is: Considering the terms of the law of 1905 under which relator was appointed, does he have a 'term of office' in a constitutional sense? Clearly no. The statute provides that the Adjutant-General shall be appointed by the Governor, that he shall be military secretary to the Governor and that he 'shall hold office during the term of the Governor and may be removed by him at his pleasure.' If the statute had said he should hold office 'during the term of the Governor' and had broken off at that point we would have a different case to deal with. In such case his term would have the same boundaries as the Governor's term. By referring to this certainty, the term of the Adjutant-General would be made certain and the maxim, id certum est, would control the situation.

But the law does not break off there and neither should we in the exposition of it. It goes on to say in the same breath that the Governor may remove him at 'his pleasure.' The Governor's breath, under the law, made him, and the Governor's breath is left to unmake him. The appointing power has left to it the disappointing power unchecked, free of limit in time, place or circumstance. No man who holds office at the pleasure of another can be said to have a certain fixed term of office. The two ideas are radically antagonistic and in right reason they cannot both apply at the same time to the same thing. The Governor's 'pleasure' has no fixed bounds discernible to the judicial eye." (Emphasis ours.)

The fact that Section 14025 of the bill refers to a "term" of the Commissioner of Agriculture is surplusage, since such section further provides for removal of the Commissioner of Agriculture at the pleasure of the Governor, and the court held in the Gordon case that "no man who holds office at the pleasure of another can be said to have a certain fixed term of office."

That part of the opinion in the Gordon case holding, l. c. 182:

"Our learned Attorney-General makes an ingenious argument against such construction. As we grasp it his contention is that relator's term of office has a fixed and definite tenure, to-wit, that of the Governor, and that the removal part of the statute brings into view a new and independent matter, viz., the power of removal which may be exercised at pleasure. But we do not think a fair construction of the law allows it to be taken apart and then joined together so as to make of it two independent provisions. The clause in hand is inseperable, relates to the same subject-matter and what the Legislature hath joined together we ought not put asunder."

is authority, we believe, for holding that, since Section 14025 of the bill contains the provision that the Commissioner may be removed at the pleasure of the Governor, such provision shows conclusively that the Commissioner does not hold a "term of office."

It has been held by the Supreme Court of this state that a legislative office may be controlled, modified or repealed by the body creating it. The Supreme Court said in *State ex rel. v. Davis*, 44 Mo. 129, 1. c. 131:

" \* \* \* A mere legislative office is always subject to be controlled, modified, or repealed by the body creating it. In England, offices are considered incorporeal hereditaments, grantable by the crown, and a subject of vested or private interests. Not so in the American States; they are not held by grant or contract, nor has any person a private property or vested interest in them, and they are therefore liable to such modifications and changes as the law-making power may deem it advisable to enact. \* \* \*"

Therefore, the Legislature had the power to repeal Section 14025, R. S. Mo. 1939, and reenact, with modifications, such section in Senate Bill No. 10.

A general rule of statutory construction is that when a statute is simultaneously repealed and reenacted, the repealed statute is continued in effect as modified by the reenactment of such statute. In the case of *State v. Bradford*, 314 Mo. 684, 1. c. 697, the court said:

"While the Act of 1921, Laws 1921, page 206, purports to repeal Section 3973 of Revised Statutes 1919, yet as the same law was reenacted with a modification, it is simply an amendment of the law of 1919, and is a continuation of the latter as amended. \* \* \*"

Therefore, no new appointment will be necessary to the position of Commissioner of Agriculture after the effective date of Senate Bill No. 10, as the effect of Section 14025, R. S. Mo. 1939, as reenacted, with modifications, in Senate Bill No. 10, was only to change the office of Commissioner of Agriculture from an office having a fixed term to an office having no term, in the sense of Section 13, Article VII, of the Constitution.

#### CONCLUSION

It is the opinion of this department that after September 10, 1947, the effective date of Senate Bill No. 10 of the 64th General Assembly, the Commissioner of Agriculture will have no

Mr. B. H. Howard

-5-

"term of office," and that after September 10, 1947, such Commissioner will be entitled to the compensation provided for such office in Section 14025 of Senate Bill No. 10 of the 64th General Assembly, and that such officer will, after such date, hold his office at the pleasure of the Governor.

Respectfully submitted,

C. B. BURNS, Jr.  
Assistant Attorney General

APPROVED:

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J. E. TAYLOR  
Attorney General

CBB:HR



PENITENTIARY:  
INTERMEDIATE REFORMATORY:

Transactions between the Penitentiary and the Intermediate Reformatory may be handled on a system of debits and credits.

November 26, 1947



12/4

Honorable B. H. Howard  
Comptroller  
Department of Revenue  
Jefferson City, Missouri

Dear Sir:

We have your letter requesting an opinion of this office, which said letter reads as follows:

"We refer to an opinion dated July 18, 1947 furnished to Hon. Thomas E. Whitecotton, Director of the Department of Corrections, stating that, 'Transactions between various industries under the control of the Department of Corrections, and between the Penitentiary and said industries may be handled by a system of debits and credits'.

The Department of Corrections now proposes to extend this system of debits and credits to transactions between the Penitentiary and the Intermediate Reformatory. For instance, the Penitentiary will sell clothing to the Intermediate Reformatory in the amount of \$1,000.00, and the Intermediate Reformatory during the same period of time will sell produce to the Penitentiary in the amount of \$900.00. Under the present system, each institution would pay the other the full amount due. Under the proposed system, settlement would be made periodically on a net basis, and in the instance cited above, the only payment made would be \$100.00 by the Intermediate Reformatory to the Penitentiary.

We will appreciate an opinion as to whether or not settlement of such transactions between the Penitentiary and the Intermediate Reformatory on a net basis is proper."

You refer to an opinion of this office in which we held that transactions between various industries under the control of the Department of Corrections and between the penitentiary and said industries may be handled by a system of debits and credits. The reasoning in that opinion was to the effect that since the industries in the penitentiary were all under the control of the Department of Corrections, exchanges of materials or manufactured articles between the various industries and between the penitentiary and said industries did not amount to sales and hence did not require payment of cash with each transaction, but that said transactions could be handled by a system of debits and credits. If the legal relationship between the penitentiary and the Intermediate Reformatory is similar or comparable to that existing between the penitentiary and the industries operated by it, then it would follow that transactions between the penitentiary and the Intermediate Reformatory could be handled on a similar system of debits and credits. We must, therefore, consider the various statutes which relate to the penitentiary and the Intermediate Reformatory in order to determine what the relationship between those two institutions is.

Section 1, page 724, Laws 1945, reads as follows:

"There is hereby created and established as a department of state government a department of corrections, which may hereafter be referred to as the department. The scope and purpose of the department shall be to supervise and manage the penal, correctional and reformatory institutions of the state, together with certain duties in relation to the training schools and the board of probation and parole, hereafter set out. The department of corrections shall be composed of three divisions, namely:

- (1) the division of penal institutions,
- (2) the division of educational institutions,
- and (3) the board of probation and parole.

The board of penal commissioners, as established by Article I, Chapter 48, Revised Statutes of Missouri, 1939, with amendments thereto, is hereby abolished and discontinued and all powers and duties over activities and institutions pertaining to,

controlled by and administered through the board of penal commissioners, shall henceforth be vested in and administered through the department of corrections, together with any additional powers and duties which may herein or hereafter be assigned to the department."

By the foregoing section the supervision and management of "penal, correctional and reformatory institutions of the state" are vested in the Department of Corrections. Thus the penitentiary and the Intermediate Reformatory are both under the supervision and management of the same department.

Sections 10 and 11, page 726-727, Laws 1945, provide as follows:

"There is hereby created and established within the department of corrections a division of penal institutions. The division of penal institutions shall be the successor to and shall possess and exercise all the powers and duties of the commission of penal institutions with respect to institutions and activities pertaining to intermediate and adult offenders, including all such powers and duties not specifically repealed by this act, in addition to possessing other powers and duties established by this act."

"In all laws of Missouri or parts thereof, the words 'department of corrections' shall be substituted for the words 'commission of penal institutions' with respect to institutions and activities pertaining to intermediate and adult offenders. Said department shall hold and exercise control and jurisdiction over all intermediate and adult correctional and penal institutions and activities in this state, except such powers and duties as may be assigned to the board of probation and parole, supported in whole or in part by the direct appropriation of money out of the state treasury, including the state penitentiary, the women's branch of the state penitentiary, the intermediate reformatory for young men at Algoa,

and over any other correctional institution for intermediate and adult offenders as may hereafter be established; and over all the branches of such institutions, and over all the real estate, building, equipment, machinery, facilities and products properly belonging to or used by or in connection with said institutions and branches thereof, and over the activities of these institutions and branches; and the department shall make and enforce such orders and findings as it may from time to time deem necessary and proper in the management of all institutions and persons committed to its control and shall be vested with and possessed with all other powers and duties necessary and proper to enable it to carry out fully and effectively all the purposes of this act."

By Sections 10 and 11, supra, all the powers and duties formerly exercised by the Commission of Penal Institutions with respect to the Intermediate Reformatory are now vested in the Division of Penal Institutions of the Department of Corrections, and we turn now to see what those powers were.

Section 9109, R. S. 1939, reads as follows:

"The intermediate reformatory for young men shall be under the management of the department of penal institutions, but it shall be established separate and apart from the Missouri penitentiary and also the Missouri training school for boys now located at Boonville."

Section 9119 provides for the establishment of industries in the Intermediate Reformatory, and reads as follows:

"It shall be the duty of the department of penal institutions to provide for teaching the inmates in the common branches of an English education; also in profitable and useful trades and to offer such employment in industries, agriculture and such other vocations as will enable them, upon their release, to more surely earn their own support and make self-reliant and self-supporting citizens, and as will contribute materially to the support of the institution."

By the two preceeding sections it is provided that industries shall be established to furnish employment for the inmates of the Intermediate Reformatory.

Sections 9124, 9125 and 9146, R. S. 1939, deal with the financial affairs of the Intermediate Reformatory, and they read as follows:

Section 9124:

"The commission shall attend to the financial concerns of the intermediate reformatory for young men and shall pay into the state treasury all moneys received by them on account of the institution, and shall keep in suitable books regular and complete accounts of all moneys received, and from what source, and shall have vouchers for all money disbursed. The books shall exhibit the profits or losses of each branch of manufacturers."

Section 9125:

"The commission shall, on or before the tenth day of each month, deposit with the state treasurer all moneys which have been received by it from any contractor or other person, or for any article manufactured or sold for the state, or any money received from any other source belonging to the state, same having been divided as provided in Section 9098, taking his receipt therefor, which receipt shall be filed with the monthly statement of the commission, as herein provided, and the state treasurer shall take charge of same and pay it out only for the use and support of said prison, upon the warrant of the state auditor, which shall be drawn on the requisition of the commission. And said commission shall, on or before the tenth day of each month, make and enter in proper books a full and accurate account of all moneys received and expended, on what account received or expended, and shall accompany said statement with proper vouchers therefor, and pay out said funds as directed in Sections 9099, 9100 and 9101."

Section 9146:

"All moneys derived from the sales of any articles manufactured in any of said industries in this article referred to, shall be collected by said board and paid into the treasury of the state to the credit of the following funds: Said board shall ascertain and determine on the first of each month from the books, records and accounts kept showing the business operations of the intermediate reformatory, the amount of money received each month due to the purchase of raw material for use and manufacture, and said sum when so determined shall be deposited in the 'revolving fund', and said board shall further determine what part of said receipts are due to labor and other profits in the operation of said intermediate reformatory, and said amount shall be deposited in the 'earning fund;' and it is hereby made the duty of the treasurer of the state to carry on the books of his office as separate accounts the said 'revolving fund' and said 'earning fund,' Said 'revolving fund' shall not be used in whole or in part for any purpose or purposes other than those named in sections 9095, 9096 and 9097. The money deposited in the 'earning fund' shall be used by the prison board for the use of, support and maintenance of said prison, and such expenses as come under section 9052, and the treasurer shall pay same upon the warrant of the state auditor which shall be drawn on the requisition of the board."

Sections 9124, 9125 and 9146, supra, provide arrangements for handling the funds of the Intermediate Reformatory which are the same as those provided for handling the funds of the Penitentiary as set forth in Sections 9097 and 9098. When a sale is made of articles manufactured by either institution, the proceeds are to be divided as set forth in Section 9098 and then deposited to the respective funds mentioned in Section 9098. Section 9125 provides that the proceeds from the sale of articles manufactured by the Intermediate Reformatory shall be divided as provided by Section 9098 and then deposited in "the 'revolving fund'" and "the 'earning fund'". The only revolving

fund provided for by law is that provided for in Sections 9097 and 9098, and the only earning fund is that provided for by Section 9098. Therefore, the money realized from the sales of articles manufactured by either industries connected with the Penitentiary or those connected with the Intermediate Reformatory are deposited in the same funds and by the same agency. How much any one industry deposits to said fund or withdraws from said fund is a matter of bookkeeping. Whether a sale be made on behalf of the Penitentiary or the Intermediate Reformatory, the Department of Corrections makes the sale, divides the proceeds and deposits the money in the same fund. When a transfer of products between the Penitentiary and the Intermediate Reformatory occurs, no sale is in fact made. If a warrant were to be issued for such a transfer, it would be issued by the Department of Corrections, payable to the order of the Department of Corrections and deposited by the Department of Corrections in the funds which are used by the Department of Corrections for the operation of both the Penitentiary and the Intermediate Reformatory. No purpose would be served in going through such a procedure. Proper debits and credits would show which industry produced and which received the products transferred, and the revolving and earning funds would be the same as if warrants were issued against and thereafter deposited to the same funds. The amount of said funds would not be changed by either method of handling such transfers. At such stated intervals as the Department of Corrections may think proper, it can settle the accounts between the two institutions in order that a clear picture of the operations of the two institutions can be more readily seen.

#### Conclusion

It is, therefore, the opinion of this office that transactions between the Penitentiary and the Intermediate Reformatory may be handled by a system of debits and credits with settlements periodically on a net basis and that it is not necessary to issue warrants in payment of articles transferred from one of said institutions to the other.

Yours very truly,

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HARRY H. KAY

Assistant Attorney General

APPROVED:

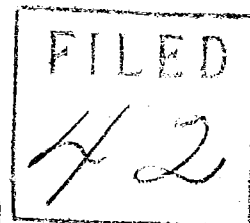
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J. E. TAYLOR, Attorney General

HHK/vlv

*See letter to  
S.S. Kresge Co. Howard  
2.11.47*

December 11, 1947



Mr. B. H. Howard, Comptroller  
Department of Revenue  
Jefferson City, Missouri

Dear Sir:

Reference is made to your request for an official opinion of this office with respect to the validity of the appropriation found in Section 9.061 of House Bill No. 445 of the 64th General Assembly.

The appropriation in question reads as follows:

"Section 9.061. There is hereby appropriated out of the State Treasury, chargeable to the General Revenue Fund, the sum of One Thousand Seven Hundred Ten Dollars (\$1,710.00) for the period beginning January 8, 1947, and ending June 30, 1947, for the relief of the S. S. Kresge Company because of the over-payment of foreign corporation qualification taxes."

It is our thought that the above appropriation is violative of Section 23 of Article III, subsection 7 of Section 40 of Article III, and Section 22 of Article IV of the Constitution of Missouri.

Further, assuming that the payment was voluntarily made by the corporation referred to in the appropriation act, we think the case falls within the rule declared by the Supreme Court in *Couch v. Kansas City*, 127 Mo. 436, holding that voluntary payment of taxes may not be recovered where such payment is made as a result of a mistake of law.

For the reasons mentioned, it is our opinion that Section 9.061 of House Bill No. 445 of the 64th General Assembly is void.

Very truly yours,

APPROVED:

WILL F. BERRY, Jr.  
Assistant Attorney General

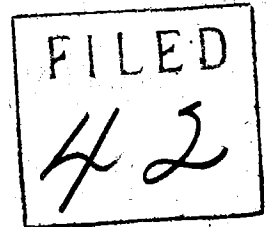
J. E. TAYLOR  
Attorney General

WFB:HR



ESCHEATS: Section 9.100 of H.B. 445 is ineffective.  
Court order necessary to obtain money in  
Escheats Fund.

December 15, 1947



Honorable B. H. Howard  
Comptroller  
Department of Revenue  
Jefferson City, Missouri

Dear Sir:

We have your letter of recent date which reads as follows:

"Section 9.100, House Bill 445, provides for payments totaling \$370.91 chargeable to the Escheats Fund. We will appreciate an opinion as to whether or not these payments can be made without receiving a Court Order."

It is presumed that all of the above monies in the escheat fund have been ordered placed in said fund by court order.

H.B. 445 is an appropriation act. Section 9.100 reads as follows:

"There is hereby appropriated out of the State Treasury, chargeable to the Escheats Fund, the sum of Three Hundred Seventy Dollars and Ninety-one Cents (\$370.91), for the purpose of paying the following rightful owners the following amounts:  
Mrs. Stella M. Reid, Aurora,  
Mo.; Due from the Bank of Aurora,  
Aurora, Mo. . . . . \$32.18 "  
(Here follow other names and amounts similar to the foregoing.)

The foregoing section undertakes to appropriate money from the Escheats Fund. That fund is provided for by Sections 620 and 621, R. S. 1939. Said sections read as follows:

Section 620:

"If any person die intestate, seized of any real or personal property, leaving no heirs or representatives capable of inheriting the same; or, if upon final settlement of an executor or administrator, there is a balance in his hands belonging to some legatee or distributee who is a non-resident or who is not in a situation to receive the same and give a discharge thereof or who does not appear by himself or agent to claim and receive the same; or, if upon final settlement of an assignee for the benefit of creditors, there shall remain in his possession any unclaimed dividends; or, if upon final report of any sheriff to the court, it is shown that the interests in the proceeds of the sale of land in partition of certain parties, who are absent from the state, who are non-residents, who are not known or named in the proceedings, or who, from any cause, are not in a situation to receive the same, are in his hands unpaid and unclaimed; or, if, upon final settlement of the receiver of any company or corporation which has been doing business in this state, there is money in his hands unpaid and unclaimed, in each and every such instance such real and personal estate shall escheat and vest in the state, subject to and in accordance with the provisions of this chapter."

Section 621:

"Within one year after the final settlement of any executor or administrator, assignee, sheriff or receiver, all moneys in his hands unpaid or unclaimed, as provided in section 620, shall, upon the order of the court in which such settlement is made, be paid into the state treasury. And the state treasurer shall issue to him a duplicate receipt therefor, one of which shall be filed with the state auditor, who shall credit him with the amount thereof and charge the state treasurer therewith. All such moneys so received into the state treasury shall be credited into a fund, to be known and designated as 'escheats.'"

Apparently the receivers of various banks have turned over to the State Treasury unclaimed funds in their hands at the close of the liquidation of said banks. Sections 623 and 624 provide how money paid into the State Treasury as provided by Sections 620 and 621 may be recovered by those claiming same. Sections 623 and 624 read as follows:

"Within twenty-one years after any money has been paid into the state treasury by an executor or administrator, assignee, sheriff or receiver, any person who appears and claims the same may file his petition in the court in which the final settlement of the executor or administrator, assignee, sheriff or receiver was had, stating the nature of his claim and praying that such money be paid to him, a copy of which petition shall be served upon the prosecuting attorney, who shall file an answer to the same."

"The Court shall examine the said claim, and the allegations and proofs, and if it find that such person is entitled to any money so paid into the state treasury it shall order the state auditor to issue his warrant on the state treasurer for the amount of said claim, but without interest or costs; a copy of which order, under seal of the court, shall be a sufficient voucher for issuing such warrant."

We find no other manner provided by law for the recovery of such funds by those claiming same. The court which had jurisdiction of the funds originally must make a finding and order in favor of a claimant before such funds can be withdrawn from the State Treasury.

Section 642 R. S. 1939 provides as follows:

"All moneys paid into the state treasury under the provisions of this chapter, after remaining therein unclaimed for twenty-one years, shall escheat and vest absolutely in the state and be, on the order of the board of fund commissioners, transferred to the public school fund."

It will be seen by Sections 620 and 642, supra, that the funds do not become state funds until twenty-one years after being paid into the State Treasury. Section 620 provides that said funds shall escheat and vest in the state subject to and in accordance with the provisions of this chapter. Section 642 is a part of that chapter, and it provides that the funds shall escheat and vest in the state after they have remained in the treasury unclaimed for twenty-one years. The funds sought to be appropriated by H. B. 445 have evidently not been in the treasury twenty-one years. However, if said funds have been in the State Treasury twenty-one years they are not subject to appropriation by the Legislature. Section 5, Art. IX of the Constitution of 1945 definitely earmarks such funds as a public school fund. Said section reads as follows:

"The proceeds of all certificates of indebtedness due the state school fund, and all moneys, bonds, lands, and other property belonging to or donated to any state fund for public school purposes, and the net proceeds of all sales of lands and other property and effects that may accrue to the state by escheat, shall be paid into the state treasury, and securely invested under the supervision of the state board of education, and sacredly preserved as a public school fund the annual income of which shall be faithfully appropriated for establishing and maintaining free public schools, and for no other uses or purposes whatsoever."

Under the foregoing constitutional provision, the Legislature cannot appropriate the public school fund, but can only appropriate the annual income from it, and that income can be appropriated for establishing and maintaining free public schools and for no other purpose.

#### Conclusion

It is, therefore, the opinion of this office that Section 9.100 of H. B. 445 of the Sixty-Fourth General Assembly is ineffective and that before persons

named as beneficiaries in said bill can be paid they must secure an order of the court which originally had jurisdiction of the funds they claim.

Yours very truly,

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HARRY H. KAY  
Assistant Attorney General

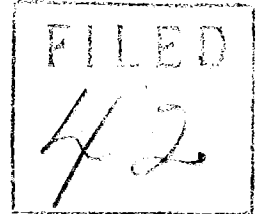
APPROVED:

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J. E. TAYLOR  
Attorney General

HHK/vlv

APPROPRIATIONS: Appropriation available for six months after expiration of period for which made to pay obligations lawfully incurred during said period.



December 17, 1947

12/31

Honorable B. H. Howard  
State Comptroller  
Department of Revenue  
Jefferson City, Missouri

Dear Sir:

We have your letter of recent date which reads as follows:

"Please furnish us an opinion as to whether or not we should honor a request for the payment of an obligation incurred by the issuance of a purchase order in the previous appropriation period. In other words, if the order was issued during the 1946-47 fiscal period and delivery of the goods is not made before the appropriation expires on December 31, 1947, can payment be made and charged to the appropriation for the 1947-48 fiscal period?

This question has been raised by various departments throught the state, and we will appreciate a reply at your earliest convenience."

The Constitution of 1945 made marked changes in the handling of state finances. Therefore appropriations had been made for biennial periods, that is, for periods of two calendar years. The Constitution of 1945 prescribed a fiscal year for the state which runs from July 1 of one year to June 30 of the following year. Section 23 of Article IV of said Constitution reads as follows:

"The fiscal year of the state and all its agencies shall be the twelve months beginning on the first day of July in each year. The general assembly shall make appropriations for one or two fiscal years, and the 63rd General Assembly shall also make appropriations for the six months ending June 30, 1945 \* \* #

By the foregoing provision, the fiscal year of the state does not correspond to a calendar year, but it runs from July 1st of one year to June 30th of the succeeding year. The General Assembly is required to appropriate money for either one or two fiscal years. Section 28 of Article IV of said Constitution provides as follows:

"No money shall be withdrawn from the state treasury except by warrant drawn in accordance with an appropriation made by law, nor shall any obligation for the payment of money be incurred unless the comptroller certifies it for payment and the state auditor certifies that the expenditure is within the purpose of the appropriation and that there is in the appropriation an unencumbered balance sufficient to pay it. At the time of issuance each such certification shall be entered on the general accounting books as an encumbrance on the appropriation. No appropriation shall confer authority to incur an obligation after the termination of the fiscal period to which it relates, and every appropriation shall expire six months after the end of the period for which made."

Before an obligation can be lawfully incurred, therefore, there must be a certification that there is an appropriation to cover said obligation and that there is an unencumbered balance in said appropriation to pay the obligation. An encumbrance against said appropriation is entered upon the books at the time the obligation is made so that it will be certain that the obligation will be paid. The last sentence in the last quoted constitutional provision provides that "No appropriation shall confer authority to incur an obligation after the termination of the fiscal period to which it relates." That is to say, that at any time during the fiscal period or periods for which an appropriation is made, obligations can be incurred against said appropriation, but such obligations cannot be incurred after the expiration of said fiscal period or periods. The appropriation itself does not expire until six months after the end of the fiscal period or periods for which it was made. That means that the appropriation is available for six months beyond said fiscal period or periods for the payment of obligations

which were legally incurred during such period or periods. In other words, obligations incurred on behalf of the state must be paid out of appropriations made for the period or periods in which said obligations are incurred, and if such obligations are legally incurred, they can be paid at any time during said period or periods and six months thereafter.

Conclusion

It is, therefore, the opinion of this office that obligations lawfully incurred on behalf of the state must be paid out of appropriations made for the fiscal period or periods in which said obligations are incurred, but that payment of such obligations can be made at any time within six months after the expiration of the period or periods for which the proper appropriation was made.

Yours very truly,

HARRY H. KAY  
Assistant Attorney General

APPROVED:

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J. E. TAYLOR  
Attorney General.

HHK/vlv



COMPENSATION OF COUNTY COLLECTORS  
IN COUNTIES OF THE SECOND CLASS:

County collector may not retain  
any compensation for his services  
other than the annual salary of  
\$5,000.00.

FILED

43

March 24, 1947

3/27

Mr. Clifton Hurst  
County Collector  
Buchanan County  
St. Joseph, Missouri

Dear Sir:

We are in receipt of your recent request for an  
opinion, based on the following state of facts:

"I would appreciate your interpretation  
of House Bill No. 892 in regard to the  
Collector's salary.

"Sec. 2 refers to all fees, commissions  
etc. We have two Drainage Districts in  
this County which we have been charging,  
as allowed by law, one per cent on cur-  
rent and two per cent on delinquent and  
as I understand the new law we will not  
be allowed to retain this fee in the  
future.

"Also in the past we have checked lists  
for the Banks and Insurance Companies  
for which we made no charge, however we  
have accepted their checks as donations  
or gifts which I believe is covered  
under Section 4."

Your attention is called to Sections 2, 3 and 4 of  
House Bill No. 892, which are as follows:

"Section 2. The county collector, in  
all counties of the second class, shall  
receive as compensation for his services,  
an annual salary of \$5000.00, to be paid  
by the county, in twelve equal monthly  
installments out of the county treasury.

Such salary shall be in lieu of all fees, commissions, penalties, charges, and other compensation now charged, received or allowed by virtue of any statute, to any such collector as compensation for his services.

"Section 3. The county collector, in all counties of the second class, shall be entitled to have and to appoint such deputies and assistants as the county collector, with the approval of the county court, shall deem necessary for the prompt and proper discharge of the office, and such deputies and assistants, so appointed, shall receive such salaries as may be fixed by the county collector, with the approval of the county court. The salaries of all such deputies and assistants shall be paid by the county in the same manner as the salary of the county collector is paid.

"Section 4. No compensation shall be allowed or paid any such collector, his deputies or assistants, except that and to those herein expressly provided for, and no amount shall be charged to the county or drawn out of the treasury for the services of any deputy or assistant that shall not be the exact amount due said deputy or assistant. The county collector and all his employees are hereby forbidden, under penalty of forfeiture of office, to collect, charge or retain, directly or indirectly, any compensation other than that herein allowed."

These sections definitely prohibit the collector or his deputies in counties of the second class from charging or retaining, directly or indirectly, any compensation for their services other than the salaries provided therein.

Mr. Clifton Hurst

-3-

Conclusion.

It is, therefore, the opinion of this department that collectors or their deputies in counties of the second class may not charge or retain, directly or indirectly, any fee or compensation for their services other than the annual salary of \$5,000.00 for the collector and the salary for the deputy as fixed by the collector. The penalty for retaining any other fee or compensation is forfeiture of office.

Respectfully submitted,

W. BRADY DUNCAN  
Assistant Attorney General

APPROVED:

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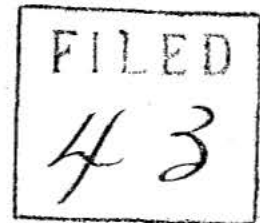
J. E. TAYLOR  
Attorney General

WED:ml

CONSERVATION COMMISSION:  
CRIMINAL LAW:  
MISDEMEANOR:

A misdemeanor cannot be prosecuted in a magistrate court prior to the filing of an information by the prosecuting attorney.

April 16, 1947



Honorable W. R. J. Hughes  
Prosecuting Attorney  
Iron County  
Ironton, Missouri

Dear Sir:

This will acknowledge receipt of your request for an official opinion, which reads:

"C.S.S.B. 366, Section 6, provides as follows: 'Any such agent may arrest, without warrant, any person caught by him or in his view violating or who has good reason to believe is violating or has violated this Act or any such rules and regulations, and take such person forthwith before a magistrate or any court having jurisdiction, who shall proceed without delay to hear, try and determine the matter as in other criminal cases.'"

"The part I have underscored is misleading to me and I shall be pleased to receive your interpretation. Evidently, an attempt is here made to expedite the handling of game violations, and it seems to indicate that the magistrate himself can proceed to try the matter without waiting for the filing of an information by the Prosecuting Attorney. In this regard it is in conflict with the general law which requires the filing of the information before any hearing of any sort in a misdemeanor case.

"What I should like to know, for the convenience of the agents who operate in this territory, is this: Is the magistrate compelled, under this act, to proceed immediately and before information is filed, or must he await the filing of the information before assuming jurisdiction?"

The particular provision of the law that you wish construed is Section 6 of Senate Committee Substitute for Senate Bill No. 366, passed by the 63rd General Assembly, which reads:

"Every authorized agent of the Commission shall have the same power to serve criminal process as sheriffs and marshals, only in such cases as are violations of this Act and rules and regulations of the Commission, and have the same right as sheriffs and marshals to require aid in the execution of such process. Any such agent may arrest, without warrant, any person caught by him or in his view violating or who he has good reason to believe is violating, or has violated this Act or any such rules and regulations, and take such person forthwith before a magistrate or any court having jurisdiction, who shall proceed without delay to hear, try and determine the matter as in other criminal cases." (Underscoring ours.)

The question to be determined is as follows: Is the magistrate, under the foregoing provision, required to hear, try and render judgment in a misdemeanor before an information is filed by the prosecuting attorney with the magistrate?

At first blush it appears that the General Assembly did intend for the magistrate to hear the case and render judgment prior to the filing of an information, but in construing the law, we must not only examine and construe the one provision, but all other law relative to the same subject matter should be construed together, and, if possible, harmonized and give effect to all provisions. In *Whalen v. Buchanan County*, 342 Mo. 33, 111 S.W. (2d) 177, 1.c. 180, the court said:

"\* \* \* Statutes relating to the same subject are to be construed together and, if possible, harmonized and effect given to all provisions.  
\* \* \* \* \*

See also *State v. State Tax Commission*, 153 S.W. (2d) 43, 1.c. 45 (4).

Section 6, S.C.S.S.B. No. 366, relates to the enforcement of rules and regulations adopted by the Conservation Commission of the State of Missouri. Senate Bill No. 193, passed by the

63rd General Assembly, the same body that passed S.C.S.S.B. No. 366, provides, under Section 2 thereof, that prosecutions before a magistrate for misdemeanor shall be by information. Section 3 of said act requires all such information shall be made by the prosecuting attorney and filed with the magistrate as soon as practicable and before the party or parties accused shall be put upon trial. Section 5 of said act requires the magistrate, before whom complaints are filed, to forthwith forward such complaints to the prosecuting attorney, and said provision requires the prosecuting attorney, if, upon investigation of facts and hearing the complainant, determines that the offense was committed and that a case against the accused can be made, shall immediately file his information before the magistrate. Section 7 of the same act further provides in certain cases that the accused shall not be put upon trial for any offense until he shall be charged therewith by information.

We are of the opinion that Section 6 of S.C.S.S.B. No. 366 and Senate Bill No. 193, supra, can be construed harmoniously and reasonable construction given each and every provision thereof.

S.C.S.S.B. No. 366 deals specifically with the enforcement of fish and game laws and rules and regulations of the Conservation Commission. Section 6 of said act in part provides that the agent shall bring forth the violator before a magistrate or any court having jurisdiction, who shall proceed without delay to hear, try and determine the matter as in other criminal cases. You will notice the underscoring refers to "as in other criminal cases." Senate Bill No. 193, supra, prescribes the procedure in magistrate courts in case of misdemeanors and at this time is the law to be followed in proceeding against a misdemeanant for violating rules and regulations of said Commission. There is also a well established rule of statutory construction that the Legislature, in enacting laws is presumed to know the law in effect at the time of passing same and take such laws into consideration; also, they are presumed to know any judicial construction placed on said laws by the courts. (See Reed v. Goldneck, 86 S.W. 1104, 112 Mo. App. 310. Also, Graves v. Little Tarkio Drainage District, 345 Mo. 557, 134 S.W. (2d) 70.) This being true, the Legislature must have had in mind Section 17, Article I of the Constitution of Missouri 1945, which prohibits the prosecution of any misdemeanant other than by indictment or information, and reads:

"That no person shall be prosecuted criminally for felony or misdemeanor otherwise than by indictment or information, which shall be concurrent remedies, but this shall not be applied

to cases arising in the land or naval forces or in the militia when in actual service in time of war or public danger, nor to prevent arrests and preliminary examination in any criminal case."

The foregoing constitutional provision makes an exception to the filing of an indictment or information, prior to prosecution, when to do so it will prevent arrest and is not necessary before hearing preliminary examination in any criminal case. However, that exception does not apply to one charged with having committed a misdemeanor, for the person so charged in such case is not provided with a preliminary examination. Such preliminary examinations only apply in case of a felony. So, for sake of argument only, if the foregoing act should be construed as to hold that a magistrate may proceed to hear, try and determine the matter prior to the filing of an information by the prosecuting attorney, then under the foregoing constitutional provision such acts would be held in direct violation thereof, and at least that part of said acts in conflict with the foregoing constitutional provision would be held unconstitutional and of no effect. However, we believe there is no conflict, and that Section 6 of S.C.S.S.B. No. 366 means that the magistrate shall hear the matter without delay and as provided in other criminal cases, refers to the procedure under Senate Bill No. 193, supra.

#### CONCLUSION

Therefore, it is the opinion of this department that a magistrate cannot try a person charged with a misdemeanor in his court until the prosecuting attorney has filed an information in such case with the magistrate as provided in Senate Bill No. 193, supra.

Respectfully submitted,

AUBREY R. HAMMETT, Jr.  
Assistant Attorney General

APPROVED: /

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J. E. TAYLOR  
Attorney General

ARR:LR

SHERIFFS IN THIRD CLASS COUNTIES:

Sheriff may not retain an arrest fee or mileage for apprehending a person in Missouri who is charged with a felony in another state.

*Copy to  
Mr. Smith*

May 27, 1947

FILED

44

6/3

Mr. David E. Impey  
Prosecuting Attorney  
Texas County  
Houston, Missouri

Dear Sir:

This department is in receipt of your request for an opinion, based upon the following facts:

"I should like your opinion as to whether a Missouri Sheriff who is paid an arrest fee and mileage for apprehending a defendant on a felony charge in another state and turning him over to the foreign officer is entitled to retain such fee and mileage or is required to account for it as other criminal costs."

Your attention is called to House Bill No. 899, Section 3, Laws of Missouri 1945, page 1562, applying to sheriffs in third class counties. Said Section 3 is as follows:

"It shall be the duty of the sheriff in counties of the third class to charge and collect in all instances every fee, both civil and criminal, including mileage, accruing to his office by law, except such criminal fees as are chargeable to the county, and such sheriff shall, at the end of each month, file with the county court a report of all fees charged and collected during said month, stating for what act said fees were charged and collected, together with the names of the persons paying or who are liable for same, which report shall be verified by the oath or affirmation of such sheriff. It



shall be the duty of such sheriff upon the filing of said report to forthwith pay over to the county treasurer all fees arising in connection with the investigation, arrest, prosecution, custody, care, commitment and transportation of persons accused of or convicted of a criminal offense during the month and required to be shown in said monthly report, taking a duplicate receipt therefor, one of which shall be filed in his office and one in the office of the clerk of the county court and every such sheriff shall be liable on his official bond for all such criminal fees collected and not accounted for by him and paid into the county treasury; provided that he shall retain all fees collected by him in civil matters."

The provisions of this section require that all fees accruing to the sheriff's office in connection with his criminal duties shall be accounted for and turned in to the county treasurer. It makes no distinction between cases arising in Missouri and those outside of this state.

Conclusion.

It is, therefore, the opinion of this department that a sheriff in counties of the third class may not retain arrest fees or mileage for apprehending a defendant in his county on a felony charge for another state, but that he must account for this fee and remit same to the county treasurer in his monthly report.

Respectfully submitted,

APPROVED:

W. BRADY DUNCAN  
Assistant Attorney General

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J. E. TAYLOR  
Attorney General

WBD:ml

COUNTY BOARD OF EQUALIZATION: County judges, county clerk,  
COUNTY JUDGES: county surveyor and sheriff  
COUNTY CLERK: in third class counties may  
COUNTY SURVEYOR: receive compensation as members  
COUNTY SHERIFF: of County Board of Equalization.

August 14, 1947



Honorable David E. Impey  
Prosecuting Attorney  
Texas County  
Houston, Missouri

Dear Mr. Impey:

This is in reply to your letter of August 9, 1947,  
requesting an official opinion from this department, which  
reads as follows:

"I request an opinion as to the compensation, if any, to be paid in this county to the County Judges, the County Surveyor, the Sheriff and County Clerk for their services as members of the County Board of Equalization.

In this county the Judges of the County Court, the County Clerk and Sheriff are, of course, on salaries. Section 11008, Revised Statutes as amended by House Bill 467, 63rd General Assembly, approved December 6, 1945 (Laws 1945, L.C. 1778), appears to be controlling, but I am puzzled by the fact that Shepard's Missouri Citations, June Issue, 1947, Volume XXXVII, No. 2, under Section 11008, cites 'Art. 3A Section 11008.3, 11008.4, etc., to 11008.34,' and indicates an amendment in 1947 by Senate Bill No. 143. I have requested and have been unable to secure any such act or any information concerning it. Hence, this request for your opinion."

This will advise you that Section 11008, Mo. R.S.A., is controlling in this matter. The reference made in Shepard's Missouri Citations, June Issue, 1947, Volume XXXVII, No. 2, under Section 11008, is to Senate Bill No. 143 of the 64th General Assembly, which amends, in part,

the act setting up the State Department of Revenue, as found in Sections 11008.1 through 11008.18. Said act was apparently placed at this particular place in the Missouri Revised Statutes Annotated merely for the purpose of classification, and has no bearing on, or reference to, the subject matter of Section 11008, which reads as follows:

"The judges of the county court, the county surveyor, the county assessor, the sheriff, the county clerk, and those sitting as members as may otherwise be provided, shall receive five dollars per day for each day they shall be present and act in the performance of their duties as members of the county board of equalization. Provided, that the above county officers who are now or may hereafter be compensated by salary shall not be entitled to the compensation provided in this section."

Your attention is directed to an opinion rendered by this department to Mr. W. V. Mayse, Prosecuting Attorney of Harrison County, dated July 16, 1946, holding that members of the county court in third class counties, and the sheriffs of third class counties, are entitled to the compensation provided in Section 11008, Mo. R.S.A., when present and acting in the performance of their duties as members of the county board of equalization. We are enclosing herewith a copy of said opinion.

Section 2494.4, Mo. R.S.A., also expressly provides that members of the county court are entitled to said compensation, and reads as follows:

"In addition to the compensation provided in Section 1 of this act, the judges of the county court in counties of the third class shall receive five dollars per day for each day they shall act as members of the county board of equalization."

County surveyors in counties of the third class are compensated on a fee basis, as provided in Section 13425.1, Mo. R.S.A., and, therefore, the prohibition in Section 11008 against those officers compensated by salary is not applicable. It will also be noted that Section 13425.1 expressly authorizes a county surveyor to receive \$5.00 per day for each day actually engaged in serving as a member of the county board of equalization. It is quite clear then that said county surveyor is entitled to receive said compensation as a member of the county board of equalization.

The remaining question concerns the clerk of the county court in counties of the third class. Said clerk is compensated by salary and, at first blush, it would seem that he is prohibited by Section 11008 from receiving said compensation as a member of the county board of equalization. However, Section 13441.18, Mo. R.S.A., relating to the collection of fees by the clerk of a county court in counties of the third class, expressly allows said clerk to receive and retain his per diem as Secretary of the county board of equalization. Said section provides, in part, as follows:

"It shall be the duty of the clerk of the county court in counties of the third class to charge and collect in all cases every fee accruing to his office by law, except such fees as are chargeable to the county including his per diem as secretary of the board of equalization. \* \* \*"

Section 13441.18, supra, is a special statute and was enacted and made effective at a later date than Section 11008 (Section 13441.18 effective July 1, 1946; Section 11008 effective December 6, 1945), and is clearly controlling over that section. Therefore, said clerk of the county court is entitled to receive \$5.00 per day for each day that he is present and acts in the performance of his duties as secretary of the county board of equalization.

Conclusion.

It is the opinion of this department that the members of the county court, the clerk of the county court, the county surveyor and the sheriff of Texas County, a county of the third class, are entitled to receive \$5.00 per day for each day that they are present and act in the performance of their duties as members of the county board of equalization.

Respectfully submitted,

DAVID DONNELLY  
Assistant Attorney General

APPROVED:

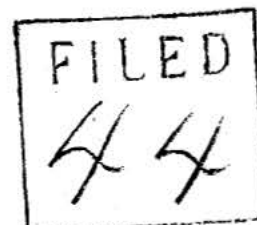
J. E. TAYLOR  
Attorney General

DD:ml/jy  
Enc.

EMPLOYMENT BUREAU: The Baby Sitters Service, an organization furnishing sitters for its members, is subject to the provisions of Section 10161, R.S. Mo. 1939.

September 11, 1947

9/12



Mr. Lon N. Irwin, Director  
Division of Industrial Inspection  
Department of Labor and Industrial Relations  
Jefferson City, Missouri

Dear Sir:

This is in reply to your letter of August 11, 1947, wherein you requested an opinion of this department relative to the liability of a Baby Sitters Service to pay the license fee required by Section 10161, R.S. Mo. 1939. Said letter reads as follows:

"We have contacted the Baby Sitters Service, 3109 North Taylor, St. Louis, Missouri, which is owned and operated by Dorothy West, who refers baby sitters to people to watch their children.

"We have issued a license for this same thing in the City of St. Louis for which we have received a fee of \$50.00 under Section 10161, Employment offices or agencies to obtain licenses--license fees.

"This firm has obtained a ruling from James Singer of Lewis, Rice, Tucker and Chubb, 208 North Broadway, St. Louis, Missouri, who states this service is not subject to the \$50.00 license fee. This Division feels that we are entitled to it.

"I wish you would give us an opinion on this as we are about to take it to court to find out why this Baby Sitters Service is operating in what we believe a violation of the employment bureau and employment agency law in the State of Missouri.

"I would appreciate very much an opinion from your office as to whether or not we are entitled to this fee under this subscribers plan."

Section 10161, R.S. Mo. 1939, reads as follows:

"No person, firm or corporation in this state shall open, operate or maintain an employment office or agency for hire, or where a fee is charged to either applicants for employment or for help, without first obtaining a license for the same from the state commissioner of labor and industrial inspection. Such license fee in cities of fifty thousand population and over shall be fifty dollars per annum, and in all cities containing less than fifty thousand population, a uniform fee of twenty-five dollars per annum. Every license shall contain a designation of the city, street and number of the building in which the licensed party conducts said employment agency. The license, together with a copy of sections 10161 to 10164, inclusive, shall be posted in a conspicuous place in each and every employment agency. The commissioner of labor and industrial inspection shall require with each application for a license a bond in the penal sum of five hundred dollars, with one or more sureties, to be approved by said commissioner and conditioned that the obligors will not violate any of the duties, terms, conditions, provisions or requirements of said sections. The said commissioner is authorized to commence action or actions on said bond or bonds in the name of the state of Missouri for any violation of any of its conditions, and he may also revoke, upon a full hearing, any license, whenever, in his judgment, the party licensed shall have violated any of the provisions of said sections. It shall be the duty of every licensed agency to keep a register in which shall be entered the names and addresses of every person who shall make application for help or servants, and the names and nature of such employment for which such help shall be wanted. Such register shall, at all reasonable hours, be open to the inspection and examination of the commissioner of labor and industrial inspection and his agent, or agents, deputies or

assistants. Where a registration fee is charged for receiving or filing applications for employment or help, a receipt shall be given, in which shall be stated the name of the applicant, the amount of the fee, the date and the name or nature of the work to be done or the situation to be procured. In case the said applicant shall not obtain a situation or employment through such licensed agency within one month, after registration, as aforesaid, then said licensed agency shall forthwith repay and return to said applicant, upon demand being made therefor, the full amount of the fee paid or delivered by said applicant to said licensed agency. Any licensed agency shall not publish or cause to be published any false or fraudulent notice or advertisement, or give any false information or make any false promise concerning or relating to work or employment to any one who shall apply for employment, and no licensed agency shall make any false entries in the register to be kept as herein provided. No person, firm or corporation shall conduct the business of any employment office or agency in, or in connection with, any place where intoxicating liquors are sold."

As is stated in 56 A.L.R. 1340, there would seem to be no dispute that those carrying on the business of an employment agency are subject to regulation and may be compelled to pay a license fee for the privilege of conducting such a business. At page 1341 of 56 A.L.R. it is stated:

"And in *People ex rel. Armstrong v. Warden* (N.Y.) supra, the court in holding that requiring the procurement of a license to conduct an employment agency was within the police power, and constituted no deprivation of a constitutional right to carry on business, said: 'A statute to promote the public health, the public safety, or to secure public order,



or for the prevention or suppression of fraud, is a valid law, although it may in some respects interfere with individual freedom. All business and occupations are conducted subject to the exercise of the police power. Individual freedom must yield to regulations for the public good. It may be laid down as a general principle that legislation is valid which has for its object the promotion of the public health, safety, morals, convenience, and general welfare, or the prevention of fraud or immorality.\* \* \*

In line with this above quoted reasoning, the Legislature of this state has seen fit to so regulate employment agencies, and have required that a license be obtained from the State Commissioner of Labor and Industrial Inspection. Section 10161, R.S. Mo. 1939, supra. The authority of the Legislature to enact such a provision, we feel, cannot now be seriously questioned.

Attached to this opinion request is a copy of the application which the subscribers to this Baby Sitters Service sign, and which, in effect, sets out the purposes and plans of the organization. From this we herewith quote the pertinent paragraphs:

"Baby Sitters Service is an organization composed of its subscribers and formed for the purpose of finding persons for sitting with children and babies.

"It acts as a central office in obtaining for its members those who have been recommended to us as qualified sitters.

"The members pay Baby Sitters Service \$2.50 for registration and \$1.50 for six sitters in advance (which is 25¢ a sitter). The sitter pays no fee to the service.

"The sitter is not an employee of Baby Sitters Service but is the employee of the member and is paid directly by the member at the rate of 40¢ an hour and carfare. With a minimum wage of \$1.00 a visit.

"I wish to become a member of Baby Sitters Service for:



Registration Fee           \$2.50  
Six Sitters in Advance   \$1.50

"Payment by check or cash, accompanies  
this signed application.

---

Name"

It thus appears that the persons who desire sitters are the ones who make up the membership. The registration fee is paid by these members. The central office, on request from one or more members, finds desirable sitters for those members, who pay the sitter's wage to the sitter. Is the above such a transaction as was intended to, and does, come within Section 10161, R.S. Mo. 1939, supra? Such legislation as Section 10161 has been held valid and regulatory of employment agencies when it served the purpose of promoting the public health and safety, or of serving public order, or for the suppression of fraud. Such is the case, even though in some respects it may interfere with individual freedom. It is felt that the public good is better served in so regulating, and that individual freedoms may have to yield to the public good. We cannot help but feel that such is true in the case at hand; and especially so, since the wording of the statute would indicate the legislative intent as including such an organization as the one in question. Section 10161, supra, says:

"No person, firm or corporation in this state shall open, operate or maintain an employment office or agency for hire, or where a fee is charged to either applicants for employment or for help, without first obtaining a license for the same from the state commissioner of labor and industrial inspection.\* \* \*" (Underscoring ours.)

From the facts in this case, it appears to us that this Baby Sitters Service is a "person, firm or corporation" which is maintaining "an employment office or agency where a fee is charged to either applicants for employment or for help." Our case being the latter; viz., the applicants (members) are seeking help (baby sitters), and the Baby Sitters Service is supplying same.

Mr. Lon N. Irwin

-6-

CONCLUSION

It is, therefore, the opinion of this department that the Baby Sitters Service in question is subject to the provisions of Section 10161, R.S. Mo. 1939; and must, therefore, obtain a license from the State Commissioner of Labor and Industrial Inspection.

Respectfully submitted,

Wm. C. COCKRILL  
Assistant Attorney General

APPROVED:

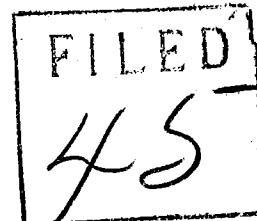
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J. E. TAYLOR  
Attorney General

WCC:LR

SALES T : )  
DIRECTOR OF REVENUE: )

Director of Revenue authorized to use the records of one unit in order to compute a tax under another unit.



January 9, 1947

1/15

Honorable W. O. Jackson  
Supervisor of Sales Tax Unit  
Department of Revenue  
Jefferson City, Missouri

Dear Mr. Jackson:

We are in receipt of your letter of December 9, 1946, requesting an opinion from this office. Your letter reads as follows:

"A question has arisen as to the interpretation of Sections 15 of Senate Bill 297 enacted by the 63rd General Assembly, Section 11375 of the new Income Tax Law and Section 11415 of House Bill 652 enacted by the 63rd General Assembly.

"The question that has arisen is whether or not the Director of Revenue, or his authorized agents, in determining the amount of sales tax which may be due from a retail dealer is authorized to examine the income tax returns of the dealer and to use in arriving at the proper amount of sales tax due, information which may be found in the State Income Tax Return of the merchant. Would you please furnish the writer an opinion upon that question."

Some of the background of these new laws must be considered if they are to be properly construed.

Section 11375, R. S. Mo. 1939, concerning the Income Tax Law, provided a penalty for divulging information found in income tax returns but made an exception in the case of the

State Auditor or his agents in the discharge of their duties in the administration of the income tax laws.

Section 11440, R. S. Mo. 1939, the Sales Tax Law, also makes it unlawful to divulge information concerning sales tax returns and sets out a similar exception in regard to the State Auditor and his agents when they are required to give evidence in court or in any proceeding brought to collect any tax due or to punish persons for making false or fraudulent returns.

During the existence of these provisions no situation arose involving the question of whether or not the State Auditor was entitled to look to the returns and records of one of these divisions in order to compute the tax under the other. This was true even though Section 11415, R. S. Mo. 1939, of the Sales Tax Law, is a general provision allowing the State Auditor to obtain information from other agencies. It is as follows:

"For the purpose of carrying out the provisions of this article, the State Auditor is hereby authorized and empowered to demand of any agency or department of the State Government, or of any officer of any political subdivision of the State, any and all information necessary to properly administer any and all provisions of this article."

When the Missouri Constitution of 1945 made provision for the reorganization of the Executive Department, Senate Bill 297 establishing the Department of Revenue, containing a provision similar to Section 11415 of House Bill 652, was enacted. The provision, Section 15 of Senate Bill 297, is as follows:

"The state collector of revenue or his agent shall have access to all records and property used in the assessment or collection of any license, tax or fee payable to the state in any department, institution or agency in which such records may be."

The income tax and sales tax laws were reenacted to comply with this reorganization. The Sales Tax Act was left substantially the same. In the sections we are interested in here, 11415 and 11440 of House Bill 652, the only change made was to substitute the words "director of revenue" for "state auditor." However, when Section 11375, the Income Tax Law, was reenacted by the 63rd General Assembly in House Bill 676, several changes were made including several additional exceptions, one in particular that we are interested in here is as follows:

"Provided, further, that this section shall not prohibit the Director of Revenue nor any agent, clerk or inspector employed by his office from comparing any such return as provided for in this article with other returns required by law to be filed by the Director of Revenue, \* \* \*"

Judging from the wording of this clause it seems clear that the intention of the General Assembly was to harmonize Section 11375 of House Bill 676, the Income Tax Law, with the previously enacted provisions of Section 15 of Senate Bill 297 and Section 11415 of House Bill 652, the Sales Tax Law, which give the Director of Revenue, the Collector of Revenue, or the Supervisor of the Sales Tax Unit access to, and require this official to demand any information or records used in the assessment or collection of any tax in any department or agency in which such information or records may be found. This view is supported by the rule of construction in the case of *State v. Ball*, 171 S. W. (2d) 787, p. 792, as follows:

"The general rule as to statutory construction has been stated as follows:  
'The intent is the vital part, the essence of the law, and the primary rule of construction is to ascertain and give effect to that intent, \* \* \* Intent is the spirit which gives life to a legislative enactment. In construing statutes the proper course is to start out and follow the true intent of the Legislature and to adopt that sense which harmonizes best with the context and promotes in the fullest

manner the apparent policy and objects of the Legislature.' Sutherland on Statutory Construction, 2d Ed., Vol. 2, Sec. 363."

And also in the case of Pugh v. St. Louis Police Relief Ass'n., et al., 179 S. W. (2d) 927, at pp. 934-935:

"In construing said statutes the court must be guided by the primary rule of statutory construction, which is to ascertain and give effect to the intention of the lawmakers from the words used in the statutes and to adopt that sense which harmonizes best with the context thereof and promotes in the fullest measure the apparent policy and objects of the Legislature. State ex rel. Lentine v. State Board of Health, 334 Mo. 220, 65 S. W. 2d 943. See also, Sutherland on Statutory Construction, 2d Ed., Vol. 2, Section 363."

The harmonization of these provisions will make possible more efficient administration of the units within the Division of Collection of the Revenue Department.

#### Conclusion

Therefore, it is the opinion of this department that the Director of Revenue or his authorized agents, in determining the amount of sales tax which may be due from a retail dealer, is authorized to examine the income tax returns of the dealer and to use in arriving at the proper amount of sales tax due, information which may be found in the state income tax return of the dealer.

Respectfully submitted,

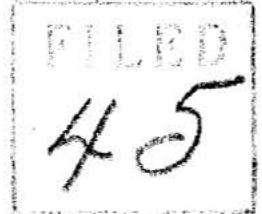
APPROVED:

DAVID DONNELLY  
Assistant Attorney General

J. E. TAYLOR  
Attorney General

DD:EG

January 23, 1947



1/23

Honorable Owen S. Jackson  
Commissioner of Insurance  
of the State of Missouri  
Jefferson City, Missouri

Attention: Honorable Ralph C. Lashly.

Dear Commissioner Jackson:

This will acknowledge transmission to this Department of certified copies of the proceedings of the Kansas City Fire & Marine Insurance Company, of the meeting of the Board of Directors of said company on March 5, 1946, and the proceedings of the annual shareholders' meeting of said company on March 12, 1946, respecting the amendment of the Articles of Association of said Company as proposed, set forth and accomplished in the proceedings of the Board of Directors and the stockholders of said company, as aforesaid, with your request for another opinion subsequent to the opinion rendered by this Department on January 15, 1947. There is furnished to this Department additional and satisfactory proof of the procedure in both of said meetings of said company, which proof was lacking when the former opinion herein was written on January 15, 1947, in disapproval of such proceedings.

Upon examination and inspection of the additional copies of the records of such proceedings of said company in both its Directors' meeting and Stockholders' meeting in relation to amending its Articles of Incorporation, and the additional proof submitted of the publication of the notices required by law of the meeting of the stockholders of said company on March 12, 1946, and the additional proof that such proceedings to so amend its Articles of Incorporation were actually had and done by said company at its said annual stockholders' meeting on March 12, 1946, it is the opinion of this Department that such proceedings in both the Directors' meeting and the Stockholders'

Honorable Owen G. Jackson -2-

meeting aforesaid, on the dates aforesaid, comply with the laws of the State of Missouri, and that they are not inconsistent with the Constitution of the State of Missouri, or the Constitution of the United States.

Respectfully submitted,

*George W. Crowley*  
GEORGE W. CROWLEY  
Assistant Attorney General

GWC:ir



FOREIGN INSURANCE CORPORATIONS-- : Neither foreign insurance corporations  
INVESTING FUNDS IN REAL ESTATE. : nor domestic insurance corporations  
under Sec. 5, Art. XI of our Consti-  
tution are authorized or empowered to  
invest their capital or funds, of any  
description, in real estate in this  
State, as an investment, but may only  
hold real estate for such purposes

March 11, 1947

and for such time as are pro-  
vided in said Sec. 5, Art.  
XI of the present Constitution  
of this State.

Honorable Owen G. Jackson  
Superintendent  
Division of Insurance  
Jefferson City, Missouri

Attention: Honorable Ralph C. Lashly

Dear Superintendent Jackson:

This will acknowledge your letter requesting the opinion of this Department upon the question of what the authority is, if any, for a foreign insurance company operating in Missouri to make investments of its funds in real estate in Missouri, particularly as to what bearing Senate Bill #323 has upon the question.

Your letter is as follows:

"Enactment of Senate Bill 323 has prompted an inquiry on the part of a foreign insurance company operating in Missouri, respecting its right to make investments in real estate in Missouri.

"The General Assembly of Connecticut passed a law in 1945 permitting a domestic life insurance company to invest not over 5% of its assets in investments not otherwise authorized. It now develops that Connecticut life insurance companies are seeking investments in income producing real estate. The specific inquiry involves a purchase of a fee interest in such income producing property, the buildings on which would be under long term leases to highly responsible lessees. The Company making inquiry has power under an amendment to its charter of 1887 in addition to the general law applicable to all Connecticut companies, to invest not exceeding 5%



of its assets in productive real estate outside of Connecticut.

"Senate Bill 323 (Section 6032-A, Revised Statutes of Missouri, 1939), effective July 1, 1946, empowers a foreign company to invest its capital reserve and surplus funds as permitted by the charter and domiciliary laws of such company. This bill in itself would seem to indicate a clear right on the part of a Connecticut company to purchase real estate in Missouri for income producing purposes. However, Article XI, Section 5, of the Constitution of the State of Missouri entitled 'Corporation' provides that 'No corporation shall engage in business other than that expressly authorized in its charter by law, nor shall it hold any real estate except such as is necessary and proper for carrying on its legitimate business; provided, that any corporation may hold for ten years and for such longer period as may be provided by general law, real estate acquired in payment of a debt, by foreclosure or otherwise, and real estate exchanged therefor.' Further, Section 97 of 'The General Business Corporation Act of Missouri' passed in 1943, provides that a foreign corporation which shall have received a certificate of authority under this Act shall, enjoy the same, but no greater, rights and privileges as a domestic corporation organized for the purposes set forth in the application pursuant to which such certificate of authority was issued; nor shall it hold any real estate for a period longer than six years except such as may be necessary and proper for carrying on its legitimate business; and, except as in this Act otherwise provided shall be subject to the same duties, restrictions,

penalties and liabilities now or hereafter imposed upon a corporation or like character organized under or subject to this Act. Section 6029, Revised Statutes of Missouri, 1939, restricts real estate purchases by domestic companies to certain specified purposes and conditions. Thus, a question is raised as to what construction is to be placed upon Senate Bill 323 in view of the above current constitutional provision and statutory laws.

"Very truly yours,

"/s/ RALPH C. LASHLY  
Ralph C. Lashly  
Counsel."

Senate Bill #323 reads as follows:

"Section 1. That Article 10, Chapter 37, Revised Statutes of Missouri, 1939, relating to insurance, be and the same is hereby amended by adding immediately after Section 6032 a new section relating to the investment of funds of life insurance companies organized under the laws of another state, to be known as Section 6032-A, and to read as follows:

"Section 6032-A. Any life insurance company organized under the laws of another state, and admitted to do business in the State of Missouri, shall have power to invest its capital reserve and surplus funds in the same manner, to the same extent and in the same investments as are permitted to domestic life insurance companies organized under the laws of this state; provided, that nothing herein contained shall be so construed as to prohibit any such foreign company from investing its capital, reserve and surplus funds as permitted by its charter and the laws of its domiciliary state."

Senate Bill #323 is an amendment of Article 10, Chapter 37, R.S. Mo. 1939, by adding Section 6032-A in said Senate Bill #323 immediately after Section 6032 in Article 10, Chapter 37, R.S. Mo. 1939.

For the proper solution of this question we believe it necessary to quote at this time, and keep in mind throughout the preparation of this opinion, Section 5 of Article XI of the Constitution of this State, 1945. Said Section 5 reads as follows:

"No corporation shall engage in business other than that expressly authorized in its charter or by law, nor shall it hold any real estate except such as is necessary and proper for carrying on its legitimate business; provided, that any corporation may hold, for ten years and for such longer period as may be provided by general law, real estate acquired in payment of a debt, by foreclosure or otherwise, and real estate exchanged therefor."

There are certain sections of the statutes of this State which refer to the right of corporations, some of such statutes including insurance corporations, following very closely the language and effect of said Section 5, Article XI of our present Constitution, except the period of time they may hold real estate.

Section 5 of said Article XI of the Constitution of this State was framed and passed by the last Constitutional Convention to take the place of Section 7, Article XII, Constitution of 1875, which said Section 7, reads as follows:

"Sec. 7. Corporation business limited by charter--power to hold real estate--.  
No corporation shall engage in business other than that expressly authorized in its charter or the law under which it may have been or hereafter may be organized, nor shall it hold any real estate for any period longer than six years, except such as may be necessary and proper for carrying on its legitimate business."

Section 6029, R.S. Mo. 1939, is one of the sections in our statutes referred to as following the constitutional

prohibition against corporations holding real estate in this State, except for the purposes pointed out in said Section 5 of Article XI of the Constitution, and the several statutes of this State following said constitutional prohibition.

Section 6029 refers to domestic insurance corporations.

Section 6029 is, in part, as follows:

"Sec. 6029. Not to deal in real estate, except, etc.--No insurance company formed under the laws of this state shall be permitted to purchase, hold or convey real estate, except for the purpose and in the manner herein set forth, to-wit: First, such as shall be necessary for its accommodation in the transaction of its business; \* \* \*".

Section 97, Laws of Missouri, 1943, page 462, reads, in part, as follows:

"Section 97. No foreign corporation shall transact business forbidden to corporations organized under laws of this state.--No foreign corporation shall transact in this State any business which a corporation organized under the laws of this State is not permitted to transact. \* \* \*".

It appears that in passing Senate Bill #323 the Legislature overlooked the repeal, Laws of Missouri, 1943, page 608, of Section 6032, R.S. Mo. 1939, and re-enacted a new Section in lieu thereof, also denominated Section 6032, Laws of Missouri, 1943, pages 608, 609.

This new Section does not differ materially from the Section -- 6032, R.S. Mo. 1939 -- repealed. It does, however, in one of the provisos, l.c. 609, state the following:

"\* \* \* and provided further, that such capital, reserve and surplus funds may

be invested in real estate consistent with the provisions of Section 6029 and Section 6030, Revised Statutes of Missouri, 1939, as the same now is or as the same may be subsequently amended.  
\* \* \* "

Since there is reference made in said quotation to said Sections 6029 and 6030, they are again referred to here. Section 6029, with respect to its pertinence and applicability to the matter here being considered, has, in part, been hereinabove cited and quoted. Said quotation of said Section 6029 as will be observed by reading it, limits an insurance company in the owning or holding of real estate to the purposes therein named, none of which permit the purchase, owning or holding of real estate for speculative purposes.

Section 6030, as referred to in said Section 6032, Laws of Missouri, 1943, l.c. 609, in said proviso, which, for the sake of brevity will not be quoted here, provides that, where a life insurance company, benefit societies, or other associations doing business in this State shall have acquired, by foreclosure or in the payment of a debt previously contracted, real estate or personal property in this State or elsewhere, such real estate may be exchanged for stocks and bonds or for other real estate. And the period of six years in which such real estate may be held, by law, may, for good cause shown, be extended by the Superintendent of Insurance for a period of six years in addition to the period now provided by law in which real estate may be held by an insurance company. However, the text of Section 6032, Laws of Missouri, 1943, pages 608, 609, is not out of harmony with that section of the Constitution and the sections of our statutes hereinabove quoted to the effect that real estate may only be held by an insurance corporation, either domestic or foreign, as an aid to the transaction of its business, or where acquired by foreclosure under a loan, or as an exchange for real estate so acquired, and then to be held only for six years, (Section 5, Article XI of the new Constitution says 10 years instead of 6 years), unless such extension be given as is provided for in said proviso of Section 6032, Laws of Missouri, 1943, l.c. 609.

It will readily be seen that legislation must be enacted to change the six year period in Section 6029 and other statutes, as the period real estate may be held by

corporations, to ten years to comply with said Section 5, Article XI of the present Constitution.

Foreign insurance corporations, we assert, such as are identified in the request for this opinion, have no sanction of exception from the terms of said Section 5, Article XI of the Constitution of this State on the ground that the State or States of their domicile, or their charters, or both, permit them to invest their funds in real estate, or because said Senate Bill #323 permits them to do so because, even if any or all of said grounds may exist, said Senate Bill #323, in the proviso thereof, which, in word and effect, states that the capital or surplus funds of any foreign insurance Company may be invested in real estate in this State, if and as permitted by its charter and the laws of its domiciliary State, is in conflict, in that behalf, with our said Section 5 of Article XI of the Constitution of this State, and is therefor void and ineffective.

The Constitution of 1875, Article XII, Section 7, provided for six years as the period in which corporations could hold real estate, except where held in the proper administration of their corporate business. Section 6029, R.S. Mo. 1939, and other sections of our statutes germane to such provision were in harmony with the Constitution of 1875, and must still be held to be in harmony with said Section 5 of Article XI of our new Constitution, except in fixing the same limit of time for corporations to hold real estate at six years, unless such holdings come within the terms of the statutes, or be extended for an additional period farther than said six years under our statutes, or until changed by "general" law, that is, by legislative act, instead of ten years as is provided in said Section 5 of Article XI of the present Constitution. But in any event, real estate under said Section 5, Article XI of our Constitution may not be purchased, nor may any insurance corporation, foreign or domestic, invest its capital funds, or its reserved funds in real estate as an investment.

The case of McWilliams vs. Central States Life Insurance Company, 137 S.W. (2d) 641, was before our St. Louis Court of Appeals in 1940. The case was one where the facts and the law applied to a transaction alleged to be in

violation of Section 5918, R.S. Mo. 1929, which is our present Section 6029, referred to and quoted in part hereinabove, which section prohibited purchasing, holding or conveying realty by insurance companies, except for certain designated purposes.

The facts were that the Lewis-Marr Realty Company, a corporation of the City of St. Louis, Missouri, grantor, on February 10, 1930, executed and delivered its warranty deed to the American National Assurance Company, a corporation of the City of St. Louis, Missouri, grantee.

On March 1, 1932, the American National Assurance Company conveyed the title to said real estate by warranty deed to Edward A. Byrne, who, in turn, on the same day, by warranty deed conveyed title to said real estate to the Lindell Tower Investment Company, a Missouri corporation, with which neither the American National Assurance Company nor the Central States Life Insurance Company had any connection, according to the statement of facts in the opinion. Title to said real estate remained in the Lindell Tower Investment Company until a foreclosure of said property on December 13, 1934.

In June 1933, the Central States Life Insurance Company and the American National Assurance Company were consolidated. Under the agreement and articles of consolidation the consolidated company under the name of Central States Life Insurance Company agreed to assume the outstanding obligations of the American National Assurance Company.

There was some controversy as to the question of fact of what obligations and in what measure of said obligations as to amount the consolidated company agreed to assume. The opinion stating the contents of the warranty deed from the Lewis-Marr Realty Company to the American National Assurance Company, so the opinion states, contained the following paragraphs:

L.C. 644:

"Subject to a first deed of trust securing a first mortgage bond issue in the total sum of \$650,000.00, now of record.

"Subject to a second deed of trust securing a second mortgage bond issue in the total



sum of \$25,000.00, now of record, both of which the purchaser assumes and agrees to pay."

The case was tried and submitted on an agreed statement of facts on November 30, 1937. On the next day a motion was filed to set aside the submission and praying the Court to reopen the case for the purpose of the introduction of evidence to show that the grantee, American National Assurance Company, was obligated to assume both bond issues, and that the deed of February 10, 1930 was executed and delivered pursuant to and in accordance with such intention on the part of both parties. The Court later sustained the motion and set aside the submission for the purpose of the reception of evidence set out in said motion.

The theory and application of the facts upon which the case was tried was that upon the consolidation of the Central States Life Insurance Company and the American National Assurance Company that the Central States Life Insurance Company, the defendant in the case reported and here being considered, became liable for the obligations of the American National Assurance Company. It was asserted and proven in evidence that there was an exchange of real estate between the Lewis-Marr Realty Company and the American National Assurance Company, upon the consolidation of which last named company with the Central States Life Insurance Company the latter assumed and became obligated for the payment of the obligations of the Assurance Company involving such real estate. The statement of facts and the application of the law thereto, in the case cited is, we believe, a precedent to be applied to the question being considered and determined in this opinion. The facts in that case are somewhat disconnected in position, and we think a proper understanding of the case will be best had to quote, even though it may be rather extensive, much of the opinion itself. We believe the matter will be clarified and the application of the opinion to the question here made appropriate by quoting the following, beginning l.c. 646 to the end of said opinion where the text of the opinion applies. That part of the test of which opinion so applying is as follows:

"The transaction with which we are concerned here is not only ultra vires in the strict sense, but is also expressly prohibited by statute. It is both ultra

vires and malum prohibitum.

"Section 5918, R.S. 1929, Mo. St. Ann. Sec. 5918, p. 4511, provides as follows: 'No insurance company formed under the laws of this state shall be permitted to purchase, hold or convey real estate, excepting for the purpose and in the manner herein set forth, to-wit: First, such as shall be necessary for its accommodation in the transaction of its business; or, second, such as shall have been mortgaged in good faith by way of security for loans previously contracted, or for moneys due; or, third, such as shall have been conveyed to it in satisfaction of debts previously contracted in the course of its dealings; or fourth, such as shall have been purchased at sales upon the judgments, decrees or mortgages obtained or made for such debts. And it shall not be lawful for any company incorporated as aforesaid to purchase, hold or convey real estate in any other case or for any other purpose; and all such real estate as may be acquired as aforesaid, and which shall not be necessary for the accommodation of such company in the convenient transaction of its business, shall be sold and disposed of within six years after such company shall have acquired absolute title to the same.'

"The section, for the sake of clarity, may be read as follows: No insurance company formed under the laws of this state shall be permitted to purchase, hold, or convey, real estate, excepting for the purpose and in the manner hereinafter set forth, and it shall not be lawful for any company incorporated as aforesaid to purchase, hold, or convey, real estate in any other case or for any other purpose.

"It is thus seen that the prohibition is twice expressed in the most positive and unyielding language.

"Transactions in violation of the prohibition are illegal, and are not legalized or rendered enforceable by estoppel. This view is not out of accord with cases relied on by plaintiff, but is supported by them. Hall v. Farmers' & Merchants' Bank, 145 Mo. 418, loc. cit. 425, 46 S.W. 1000; Joseph Schlitz Brewing Co. v. Missouri Poultry & Game Co., 287 Mo. 400, 229 S.W. 813, loc. cit. 816; Title Guaranty Trust Co. v. Sessinghaus, 325 Mo. 420, 28 S.W. 2d 1001, loc. cit. 1006; Cass County v. Mercantile Town Mutual Ins. Co., 188 Mo. 1, loc. cit. 14, 86 S.W. 237.

"It should be observed in this connection that insurance companies are not regarded as mere private business corporations. On the contrary, they are regarded as quasi-public corporations. The business of insurance is affected with a public interest, so much so that it is subject to the regulatory power of the state. It has very definite characteristics, with a reach of influence and consequence beyond and different from that of the ordinary business of the commercial world. Contracts of insurance are said to be interdependent. They cannot be regarded singly, or isolatedly, and the effect of their relation is to create a fund of insurance or a credit, the companies being the depositaries of the moneys of the insureds, possessing great power thereby, and charged with a great responsibility. The solvency of such companies manifestly is a matter of grave public concern. State ex rel. Missouri State Life Ins. Co. v. Hall, 330 Mo. 1107, 1116, 52 S.W. 2d 174, loc. cit. 177."

\* \* \* \* \*

"But plaintiff contends that inasmuch as the assurance company had a right to purchase and sell the farms purchased by it

at foreclosure sales, it had the right to exchange such farms for other real estate. We doubt that this is so. But it seems certain that the assurance company was not authorized to exchange these farms, worth \$100,000, for other real estate valued at \$950,000, and account for the difference, by the payment of \$175,000 in cash, and the assumption of mortgage bonds aggregating \$675,000, more than three times the capital of the company and more than twice its combined capital and surplus.

"It is pertinent to observe that the assurance company did not purchase or take over this real estate for the purpose of obtaining payment of a debt owing it by the real estate company. The transaction was purely a speculative venture."

\* \* \* \* \*

"In view of the conclusion we have arrived at, other questions raised need not be considered.

"The Commissioner recommends that the judgment of the circuit court be affirmed."

One of our Appellate Courts having placed its disapproval upon the purchase or exchange of real property for purposes other than those permitted by the Constitution and the statutes of this State, and having rendered its opinion exactly contrary to the terms and purposes of Senate Bill #323, we may come to only one conclusion in this matter, and that is that said Senate Bill #323 would, if held valid, place the investment of the funds of life insurance companies upon a fluctuating, and at times, a hazardous commercial real estate market. This, as may readily be seen, would affect the ability or lack of ability of any company so investing its funds in real estate, to pay its liabilities and losses under its policies. That is one of the particular things that comes within the prohibitory terms of Section 5 of Article XI of our Constitution and the statutes of this

State above referred to, which might eventuate if insurance companies were permitted to invest their funds in real estate, which hazard said Section 5 of Article XI of the Constitution of our State and the statutes in harmony therewith are designed to prevent, and which was so held by the St. Louis Court of Appeals in the above cited case.

#### CONCLUSION

It is, therefore, the opinion of this Department that:

1) Under the terms of Section 5, Article XI of the Constitution of this State no foreign insurance corporation shall "hold any real estate except such as is necessary and proper for carrying on its legitimate business; provided that any corporation may hold, for ten years and for such longer period as may be provided by general law, real estate acquired in payment of a debt, by a foreclosure or otherwise, and real estate exchanged therefor."

2) It is the further opinion of this Department that a foreign insurance corporation doing business in this State may not invest the capital or funds of any description of such insurance corporations in real estate in this State as an investment, and that to the extent that said Senate Bill #323 provides that foreign insurance corporations may invest any part of their capital, reserve and/or surplus in real estate in this State as an investment, said Senate Bill #323 contravenes said Section 5, Article XI of our Constitution, and is, therefore, void.

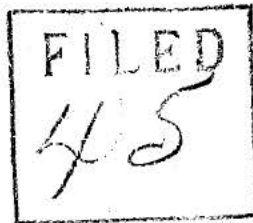
Respectfully submitted,

APPROVED:

GEORGE W. CROWLEY  
Assistant Attorney General

J. E. TAYLOR  
Attorney General

INSURANCE COMPANIES -- PREMIUM TAXES --  
DEDUCTIONS.



March 20, 1947

: Under Senate Bill #98 insurance  
: companies may take deductions for  
: the whole preceding year in com-  
: puting the amount of privilege or  
: license tax they are required by  
: Secs. 6098a and 6098b to pay for  
: the privilege of doing business in

this State during the en-  
suing year. Returns prepared  
by the Insurance Department for  
the use of companies in such  
computation should provide for  
deductions to be taken for the  
whole of the preceding year to  
the year in which such privilege  
tax must be paid.

Honorable Owen G. Jackson  
Superintendent  
Division of Insurance  
Jefferson City, Missouri

Attention: Honorable Ralph C. Lashly

Dear Superintendent Jackson:

This will acknowledge your letter of recent date, requesting an opinion from this Department respecting the deductions to be taken by insurance companies in computing premiums of 1946 on payment of their premium taxes in 1947, as Senate Bill #98 applies to the subject. Your letter requesting our opinion is as follows:

"Paragraph (b) of the paragraph titled 'Deduct:' of the Tax Return Schedule, copy of which is attached hereto, reads as follows:

"(b) All Dividends Allowed Policyholders during last six months of 1946 except those Applied to Purchase Paid-Up, Additional or Annuities."

"Does Senate Bill No. 98 restrict deduction which may be taken by the insurance company to the last six months of 1946, or are they entitled to deductions for the entire year?"

Your request for this opinion seems to be based upon the question of the interpretation of the meaning and effect of the tax return schedule under the paragraph beginning with the word "Deduct", comprised of sub-paragraphs (a) and (b), and ending with the blank for net premiums in dollars, as to whether the deductions that may be taken by the insurance companies should include the whole of the year

1946 or are confined to the last six months of 1946, rather than an outright opinion respecting the meaning and effect of Senate Bill #98, itself. The interpretation and construction to be given to the tax return schedule mentioned, however, will necessarily include the construction of said Senate Bill #98 as to its meaning and effect, so that we believe it proper and helpful to here quote Senate Bill #98, which is as follows:

"Section 1. Every insurance company or association organized in, or admitted to this state, which is now, or which may be hereafter required to pay a tax upon its premium receipts under any law of this state, may deduct, in computing the direct premiums received by it in this state, in addition to all other credits allowed by law, amounts returned to or declared and held for the benefit of the policyholders in this state upon which an agreed per-centum of interest is paid quarterly, semi-annually or annually, and any amounts returned to the holders of policies on risks located in this state, as unabsorbed premiums or dividends, whether paid in cash, or applied in reduction of premiums payable by such policyholders."

The paragraph of the tax return schedule under which the deductions may be taken by the insurance companies in making up their tax returns for the payment of premium taxes, under the title of "Deduct" on the face of the tax return schedule is as follows:

"Deduct:

"(a) Dividends Allowed Policyholders but Retained by the Company in Payment of Premiums during first six months of 1946 ....\$ \_\_\_\_\_

"(b) All Dividends Allowed Policyholders during last six months of 1946 except those Applied to Purchase Paid-Up Additional or Annuities .....\$ \_\_\_\_\_

"Total Divident Deductions .....\$ \_\_\_\_\_

Senate Bill #74 was passed April 28, 1945. This Act was an amendment of Article XII, Chapter 37, R.S. Mo. 1939, on the subject of "Taxation of Insurance Companies", by adding three sections immediately after Section 6098, to be known as Sections 6098a, 6098b and 6098c. There was no repealing clause in Senate Bill #74 repealing any of the sections of Article XII, Chapter 37, R.S. Mo. 1939. Later, however, House Bill #871 repealed Section 6098a of Senate Bill #74, and a new section, numbered 6098a, was enacted in lieu thereof, which became effective July 1, 1946. Also, later, Senate Bill #371 repealed Section 6098b of Senate Bill #74, and a new section numbered 6098b was enacted in lieu thereof, which also became effective July 1, 1946. Senate Bill #74 and Senate Bill #371 are printed and may be found in the Index of the Senate Bills Truly Agreed to and Finally Passed of the 63rd General Assembly, January 3, 1945, to July 8, 1946. House Bill #871 is printed and may be found in the Index of the House Bills Truly Agreed to and Finally Passed, 63rd General Assembly, January 3, 1945 to July 8, 1946. These new enactments, Sections 6098a and 6098b as they now exist are the law of this State on the subject, and are as follows, to-wit:

House Bill #871:

"Section 6098a. Every insurance company or association organized under the laws of the State of Missouri and doing business under the provisions of Articles 2, 7 and 17, of Chapter 37, Revised Statutes of Missouri, 1939, and every mutual fire insurance company organized under the provisions of Article 6, Chapter 37, Revised Statutes of Missouri, 1939, shall, as hereinafter provided, annually pay, beginning with the year 1945, a tax upon the direct premiums received by it from policyholders in this state, whether in cash or in notes, or on account of business done in this state, for insurance of life, property or interest in this state, at the rate of two per cent (2%) per annum, which amount of taxes shall be assessed and collected as hereinafter provided, and shall be in lieu of all taxes upon intangible personal property owned by such insurance companies or associations: PROVIDED, that fire and casualty insurance companies or associations shall be credited with cancelled or returned premiums actually paid



during the year in this state, and that life insurance companies shall be credited with dividends actually declared to policyholders in this state but held by the company and applied to the reduction of premiums payable by the policyholder."

Senate Bill #371:

"Section 6098b. Every such company shall, thirty days after the effective date of this Act, for the year 1945, and on or before the first day of March in each year thereafter, make a return verified by the affidavit of its President and Secretary, or other chief officers, to the Superintendent of the Insurance Department (or to the Director of Revenue, if provided by law) stating the amount of all direct premiums received by it from policyholders in this state, whether in cash or in notes, during the year ending on the 31st day of December next preceding. Upon receipt of such returns the Superintendent of the Insurance Department (or the Director of Revenue, if provided by law) shall verify the same and assess the tax upon the various companies on the basis and at the rate provided in the next preceding section, taking into consideration deductions and credits allowed by law. Immediately thereafter the Superintendent of the Insurance Department of the State of Missouri (or the Director of Revenue, if provided by law) shall notify the companies of the amount of taxes respectively due from them, and such taxes shall be paid into the State Treasury (or if otherwise provided by law such taxes shall be paid to the Director of Revenue), for the year 1945, within sixty days after the effective date of this Act, and on or before the first day of May in each year thereafter. If not so paid the State Treasurer (or the Director of Revenue, if provided by law) shall certify such fact to the Superintendent of the Insurance Department who shall thereafter suspend such

delinquent company or companies from the further transaction of business in this state until such taxes shall be paid, and such companies shall be subject to the provisions of Sections 6096, 6100, 6101, 6102, 6103 of Article 12, Chapter 37, Revised Statutes of Missouri, 1939. Upon receiving said money the State Treasurer shall receipt one-half thereof into the General Revenue Fund of the state, and one-half thereof to the credit of the County Foreign Insurance Fund for the purposes set forth in Section 6095 Revised Statutes of Missouri, 1939."

Thus we will observe that Section 6098c and the emergency clause in Senate Bill #74 were not disturbed and still remain sections of that Bill which, as hereinbefore stated, are as to Sections 6098a and 6098b, amendments of Article XII of Chapter 37, R.S. Mo. 1939. Therefore, it will be further observed that Sections 6098a and 6098b as enacted by House Bill #871 and by Senate Bill #371, respectively, and hereinabove quoted, upon the repeal by said House Bill #871 and Senate Bill #371, respectively, of Sections 6098a and 6098b of Senate Bill #74 such new enactments are now a part of Article XII, Chapter 37, R.S. Mo. 1939, and are to be read and understood as the present existing law of this State on the subject.

Senate Bill #74 was passed with an emergency clause. We believe it valid. We observe here the established rule of construction that every law passed by the Legislature is presumed to be constitutional until declared otherwise by proper authority. So, then, taking the emergency clause as valid it would appear that Senate Bill #74 went into effect on April 28, 1945.

We believe that in the construction of the effect of the tax return schedule hereinabove referred to, as to it specifying the time meant under which deductions may be taken by insurance companies in making their returns under "Deduct" therein, and along with the same, the construction of said Section 6098a and Section 6098b and Senate Bill #98, and their meaning being understood, it may be con-

clusively said to be that said Section 6098a, as a part of said Senate Bill #74, and as a part of Article XII, Chapter 37, R.S. Mo. 1939, is the section creating the obligation upon the part of domestic insurance companies to pay a like premium tax heretofore and still required to be paid by foreign insurance companies in this State; that Section 6098b, also as a part of said Senate Bill #74, and, also, thereby a part of Article XII, Chapter 37, R.S. Mo. 1939, is the measuring standard prescribing how the returns shall be made for the payment of the tax for the ensuing year, and using the amount of the premiums collected during the preceding year as such standard for fixing the amount of the tax to be paid for the privilege of doing business during the ensuing year; that Senate Bill #98 affects said Sections 6098a and 6098b only as to the identification and amount of deductions which insurance companies may take in computing the tax under said Section 6098b. It does not change the method or manner which shall be used as is prescribed by said Section 6098a in establishing the tax nor said Section 6098b in the manner of making the return. Said Senate Bill #98, we think, permits deductions for dividends over the entire year 1946, or any like previous year, as the means of fixing the net premiums upon which the privilege tax for the right of doing business by an insurance company is fixed for the year 1947, or any like ensuing year.

Prior to the enactment of Senate Bill #74, domestic insurance companies had never been required to pay a premium tax for the privilege of doing business in this State. It will be noted that Section 6098a prescribes that domestic insurance companies "shall, as hereinafter provided, annually pay, beginning with the year 1945, a tax upon the direct premiums received by it from policyholders in this state \* \* \*, at the rate of two per cent (2%) per annum, \* \* \*".

Section 6098b very clearly, we believe, reveals the legislative intent in the enactment of both Sections 6098a and 6098b when said Section 6098b states:

"Every such company shall, thirty days after the effective date of this Act, for the year 1945, and on or before the first day of March in each year thereafter, make a return verified by the affidavit of its President and Secretary, or other chief officers,

to the Superintendent of the Insurance Department (or to the Director of Revenue, if provided by law) stating the amount of all direct premiums received by it from policyholders in this state, whether in cash or in notes, during the year ending on the 31st day of December next preceding. \* \* \*".

to be that the whole of the previous year's taxes collected by insurance companies should be the standard of measurement of the tax to be paid the ensuing year by such companies for the privilege of doing business. Section 6098b uses these quoted significant words in determining the period of the collection of the taxes as "during the year ending on the 31st day of December next preceding". That statement could serve no other office or purpose whatsoever, as we view it, except to be and become the measuring standard for the fixing of the next year's excise tax. The State does not do a credit business in requiring the payment of license fees by licensees for the privilege of transacting business in the State. If it did so, and required the payment of a license tax at the end of the year after any person, corporation or other entity had exercised the privilege of transacting business in the State instead of requiring the payment of a license tax before they may begin the transaction of business in the State, many of such enterprises would perhaps cease transacting business in the State and withdraw from the State at the end of the license year rather than pay a new license tax. The requirement of the payment of the license tax before any licensed business may be transacted in the State is the only means and method whereby the State may supervise and control the conduct of persons or corporations so transacting such business. So it seems to be conclusive that the Legislature intended for the measuring and determining of the amount of tax to be paid by persons or corporations for the privilege of transacting business in this State was to be and is prospective and not retrospective.

If, then, Section 6098b fixes the amount of the previous year's collection of taxes as the measuring rule and standard whereby the amount of the tax to be paid by the licensee for the ensuing year covers the whole year up to December 31 of such "preceding year", and it does, it would be but fair and just, reading said Sections 6098a

and 6098b and Senate Bill #98 together, to say that if Section 6098b fixes the whole of the previous year as the basis of premium collections that the company should have the same period in which to take advantage of the deductions allowed by Senate Bill #98 for the whole of the year preceding the payment of the license tax in which to apply such deductions.

So construing Senate Bill #98 along with said Sections 6098a and 6098b, we believe it may reasonably bear no other construction. Said Senate Bill #98 in treating of the right of such deductions speaks of insurance companies or associations "which may be hereafter required to pay a tax upon its premium receipts under any law of this state" certainly does mean and refer to Sections 6098a and 6098b. These sections are the only laws in this state, of which we are advised, which require the payment by an insurance company of a tax upon its premium receipts. Then said Senate Bill #98 states that such insurance companies or associations "may deduct, in computing the direct premiums received by it in this state, in addition to all other credits allowed by law, amounts returned to or declared and held for the benefit of the policyholders in this state upon which an agreed per-centum of interest is paid quarterly, semi-annually or annually, and any amounts returned to the holders of policies on risks located in this state, as unabsorbed premiums or dividends, whether paid in cash, or applied in reduction of premiums payable by such policyholders." Thus, the insurance companies are required to compute the privilege tax to be paid for the ensuing year upon "its premium receipts under any law of this state" and if so, then we believe it is just as clearly stated and intended in said Senate Bill #98 that they may make the deductions for the same period of time in which they must compute the direct premiums received by them, that is to say, during the whole of the year preceding the payment of the tax. This construction of the statutes being discussed is further supported, we believe, by the requirement in Section 6098a that the payment of the tax "beginning with the year 1945" should be computed on the premiums received up to and including December 31st of the preceding year, and having observed that Senate Bill #74 was passed with an emergency clause, and treating said emergency clause, as we believe we must, as valid, then the computation of the amount of the premiums upon which the tax for 1945 would be paid includes the whole of the year 1944, and so on for successive years in like fashion.

Senate Bill #98 does not, in anywise, disturb that part of Section 6098a or any other provision thereof, except to increase the deductions to be allowed in the making up of a return. It appears that under the terms of Senate Bill #98 insurance companies would have the right to deduct dividends paid but retained by the company in payment of premiums and dividends allowed policyholders, and all dividends allowed policyholders, except those applied to purchase paid-up additional or annuities during the whole year of 1946.

The tax return prepared by the Division of Insurance submitted to us does not comply with said Senate Bill #98 in the deductions allowed for the full year of 1946, in measuring the privilege tax for 1947, and is erroneous to that extent. It should be changed to comply with the terms of said Senate Bill #98 in such regard.

The premium tax in previous years required of foreign insurance companies, and now required of them by the terms of Article XII, Chapter 37, R.S. Mo. 1939, and by reason of the amendments heretofore noted and discussed and now required of domestic insurance companies, is not a tax on the premiums collected themselves. It is a tax upon the privilege of either foreign or domestic insurance companies to do business in this State.

The question of whether the imposition of a premium tax imposed upon insurance companies, such as is provided in said Section 6098a is a tax upon the premiums collected themselves or is a privilege tax paid by the companies for the privilege of transacting business in this State, was before our Supreme Court in the case of Massachusetts Bonding & Insurance Company vs. Chorn, 274 Mo. 15, 201 S.W. 1122. The Court held that the tax imposed is a privilege tax and is not a tax upon the premiums. The Court, l.c. 1124, on the point, said:

"The thing taxed in this case is the right to transact the business of various kinds of so-called insurance, relating, among other things, to the life, health and safety of individuals, indemnity against liability of employers to employees injured in their service, and loss incurred by reason of their defaults. All these kinds are included under the general name of insurance, and, so far as this appellant is concerned, are under

the jurisdiction of the insurance department of the state by which the tax is ascertained and assessed. The payment of the tax entitles it, under the laws of the state, to transact this business in its capacity as a corporation. The amount of the tax is fixed at 2 per cent. on 'the premiums received, whether in cash or in notes, in this state, or on account of business done in this state.' \* \* \* "

The decisions of the Courts of other States of the Union are to like effect as the above cited case from our Supreme Court on similar tax laws, on the particular point that such premium taxes as are provided for in our said Sections 6098a and 6098b are a privilege tax, imposed solely for the privilege of doing business in the ensuing year.

The Supreme Court of the State of Kansas in the case of McNall vs. Metropolitan Life Insurance Company, 70 P. 604, on the question here involved, l.c. 605, among other things, said:

"\* \* \* The tax collected in 1899 was not levied on business done in the previous year. The amount of the premiums collected during the year before was used as a basis for determining the amount the company ought to pay for the privilege of writing insurance in this state for the subsequent year."

The Supreme Court of the State of Montana holds in like effect. The Supreme Court of that State had before it the case of State vs. J. C. Maguire Construction Company, 125 P. (2d) 433. The Court, l.c. 435, on the question said:

"The controversy here is as to the period of business activity covered by the tax required to be paid in each year. The language of the Act is clear and there can be no question of what was intended by the legislature. It provides that every corporation shall annually pay a license fee for carrying on business in the state, the amount of which is determined by taking a percentage of the preceding year's income as the measure. \* \* \* \* \*"

The result is that every corporation, domestic or foreign, doing business in the state is required each year to pay a tax for the privilege of doing business that year, the amount of which is fixed at a per centum of the amount of the net income received by the corporation during the preceding year from all Montana sources. The tax is imposed upon the privilege of doing business and not upon the income derived from the business done."

If, then, the premium tax imposed upon insurance companies is an excise or privilege tax for the right to transact business in this State, and the return as is provided in said Section 6098b shall be made "stating the amount of all direct premiums received by it from policyholders in this state whether in cash or in notes, during the year ending on the 31st day of December next preceding \* \* \* " then we will have no difficulty, we think, in arriving at the proper construction of the terms of Senate Bill #98 as to the deductions and the time for which deductions may be made in the making of the return by any insurance company. Senate Bill #98 provides that "Every insurance company or association organized in, or admitted to this state \* \* \*, may deduct, in computing the direct premiums received by it in this state \* \* \* amounts returned to or declared and held for the benefit of the policyholders in this state upon which an agreed per-centum of interest is paid quarterly, semi-annually, or annually, and any amounts returned to the holders of policies on risks located in this state, as unabsorbed premiums or dividends, whether paid in cash or applied in reductions of premiums paid by such policyholders." So also, if said Section 6098a is the measuring stick whereby it is to be determined what the tax for the ensuing year shall be, as applied to the premiums collected for the previous year for the privilege of transacting business in the ensuing year, we think it would be necessary, and that it was the intention of the Legislature in passing Senate Bill #98, to apply the deductions provided for in Senate Bill #98 to the whole of the period during which the taxes were collected in the previous year as the measuring stick under Section 6098a for the correct computation of the tax. In other words, taking for example the years specified in the tax return schedule of 1946 and 1947, the deductions provided for in Senate Bill #98 would apply to



Honorable Owen G. Jackson -12-

the whole of the year 1946, taking that year's premium collections as the measuring standard for the computation of the privilege tax for the next ensuing year, 1947, and said Senate Bill does not restrict such deductions to the last six months of 1946.

CONCLUSION.

It is, therefore, the opinion of this Department that:

1) Senate Bill #98 does not restrict deductions which may be taken by an insurance company to the last six months of 1946, as the measuring stick upon the premiums collected by any such company in the year 1946, by which the excise or privilege tax for doing business in this State in the ensuing year 1947, is to be computed, but that such deductions as are provided by law shall be taken for the entire year 1946.

2) That the form of the tax return schedule under the paragraph "Deduct" does not express or contain the language, effect, purpose and meaning of Senate Bill #98 in that it restricts the deductions to be taken by insurance companies making such return to the last six months of 1946, in certain instances, whereas the tax return schedule should express the right for any insurance company to take such deductions as are provided by law during the whole of the year 1946.

Respectfully submitted,

GEORGE W. CROWLEY  
Assistant Attorney General

APPROVED:

J. E. TAYLOR  
Attorney General

GWC:ir

March 29, 1947

FILED

45

Honorable Owen G. Jackson  
Director of Insurance of Missouri  
Jefferson City, Missouri

Dear Director Jackson:

This will acknowledge your letter of recent date, with which you enclosed certified copies of the proceedings of the Board of Directors of the Business Men's Assurance Company of America, held at its office at Kansas City, Missouri, on January 9, 1947, and of the proceedings of the meeting of the stockholders of said corporation on January 23, 1947, both of said meetings having been held for the purpose of amending the Articles of Incorporation of said corporation.

There is also submitted, proof of publication of the notice to the stockholders of said corporation of the time and place of said proposed stockholders' meeting, duly returned by the affidavit of Mr. Clifford B. Smith, one of the publishers of The Daily Record, a newspaper of general circulation, published daily, except Sundays, in Kansas City, Jackson County, Missouri, whereby it appears said notice was published in said newspaper ten days beginning on January 10, 1947, and in each of the issues thereafter, up to and including January 21, 1947.

That the amendment of the Articles of Incorporation of said corporation was duly had and done at its said meeting on January 23, 1947, the same being the annual meeting of said corporation, and that for the amendment as proposed and which is shown in the certified copies of such proceedings there were voted

For the amendment 18553 shares  
Against the amendment none shares.

That a copy of said notice in the form attached to the said affidavit of the said Clifford B. Smith

Honorable Owen G. Jackson -E-

was deposited in the United States Mails on January 10, 1947, addressed to each of the stockholders of said company at their last known addresses as shown in the records of said company.

We have examined and inspected the documents submitted and hereinabove named, and have compared them with the statutes of the State of Missouri, and find that such proceedings proposing and accomplishing the amendment of the Articles of Incorporation of said company comply with the statutes of the State of Missouri in such cases made and provided, and are not inconsistent with the Constitution of the State of Missouri and the Constitution of the United States.

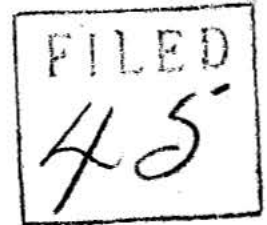
Respectfully submitted,

*George W. Crowley*  
GEORGE W. CROWLEY  
Assistant Attorney General

GWC:ir

INSURANCE: Amendment of Articles of Inc. of the American Central Insurance Company Insurance Company.

April 22, 1947



Honorable Owen G. Jackson  
Superintendent  
Division of Insurance  
Jefferson City, Missouri

Attention: Honorable Ralph C. Lashly

Dear Superintendent Jackson:

This will acknowledge the transmission to this Department of certified copies of amendments of the Articles of Incorporation of American Central Insurance Company, proposing to amend its Articles of Incorporation to authorize said corporation to write additional types of insurance, and the proceedings of the Board of Directors and the Stockholders of said corporation effecting such amendment, and upon the legality of which you request the opinion of this Department.

We have examined the documents and records of such proceedings, submitted, including proof of publication of the notice of the stockholders' annual and special meeting when and where the said amendment of said Articles of Incorporation was effectuated.

We find that these proceedings are all regular in form and substance, and it is the opinion of this Department that such proceedings comply with the laws of the State of Missouri, and that they are not inconsistent with the Constitution of the State of Missouri or the Constitution of the United States.

Respectfully submitted,

*George W. Crowley*  
GEORGE W. CROWLEY  
Assistant Attorney General

GWC:ir

INSURANCE: Amendment of Articles of Ass'n. of the Kansas City Fire and Marine Ins. Company.

DIVISION OF INSURANCE

DEPARTMENT OF REVENUE AND COMMERCE

April 22, 1947

FILED

45

Honorable Owen G. Jackson  
Superintendent  
Division of Insurance  
Jefferson City, Missouri

Attention: Honorable Ralph C. Lashly

Dear Superintendent Jackson:

This will acknowledge the transmission to this Department of certified copies of amendments of the Articles of Incorporation of the Kansas City Fire and Marine Insurance Company, proposing to amend its Articles of Incorporation to provide for a decrease in the number of Directors from twenty-one to seventeen, and the proceedings of the Board of Directors and the Stockholders of said corporation effecting such amendment, and upon the legality of which you request the opinion of this Department.

We have examined the documents and records of such proceedings, submitted, including proof of publication of the notice of the stockholders' annual and special meeting when and where the said amendment of said Articles of Incorporation was effectuated.

We find that these proceedings are all regular in form and substance, and it is the opinion of this Department that such proceedings comply with the laws of the State of Missouri, and that they are not inconsistent with the Constitution of the State of Missouri, or the Constitution of the United States.

Respectfully submitted,

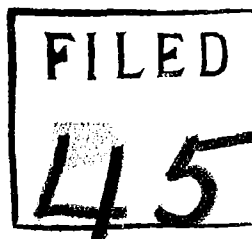
*George W. Crowley*  
GEORGE W. CROWLEY

Assistant Attorney General

GWC:ir

COUNTY COLLECTOR: Under Section 11068, R.S. Mo. 1939, County  
PUBLIC OFFICER: Collector not in default may also hold the  
office as member of Board of Directors of  
said School District.

May 2, 1947



Honorable Duncan R. Jennings  
Prosecuting Attorney  
Montgomery County  
Montgomery City, Missouri

Dear Sir:

This will acknowledge receipt of your request for an  
official opinion, which reads:

"I have been requested for a ruling on  
the interpretation of Sec. 11068, Art.  
8, Chap. 74 of the Revised Statutes of  
Missouri, 1939.

"Is the County Collector of Montgomery  
County eligible to be elected and serve  
on the Board of Directors of the Mont-  
gomery City School District while hold-  
ing office as said County Collector?"

You inquire if the County Collector, under Section  
11068, R.S. Mo. 1939, may legally hold that office and at  
the same time be elected and serve on the Board of Directors  
of the Montgomery City School District. Section 11068, R.S.  
Mo. 1939, reads:

"No collector or holder of public moneys,  
or any assistant or deputy of such holder  
or collector of public moneys, shall be  
eligible or appointed to any office of  
trust or profit until he shall have ac-  
counted for and paid over all sums for  
which he may be accountable."

The foregoing statute is practically the same as when  
enacted and found in Laws of 1866, Page 146. In the Constitu-  
tion of Missouri 1875, Section 19, Article 2, will be found  
practically the same provision, and while said constitutional  
provision was no doubt self-enforcing, the Legislature apparently  
passed such legislation to carry out the provisions of Section  
19, Article 2, supra. No similar constitutional restriction was

carried in the Constitution of Missouri 1945, however, Section 11068, supra, has not been repealed. We believe, in the absence of Section 11068, R.S. Mo. 1939, that a county collector could in all probability hold at the same time the office of county collector and serve as a member of the Board of Directors of said School District, as the duties of both offices do not conflict and are not incompatible. That under the common law there was no limit to the number of offices one might hold at the same time so long as they were compatible and consistent. Furthermore, that our courts have defined "incompatible" as to not consist in a physical inability of one person to discharge the duties of two or more offices. (See Section 46, Page 941, Vol. 46 C.J.)

The courts in this state had an occasion to construe Section 11068, supra, one time, and that was in the case of *State ex inf. v. Breuer*, 235 Mo. 240. However, under that decision the courts were confronted with facts different from those contained in your request. In that case a county collector, during his term of office as collector, became a candidate for circuit judge and was elected. Prior to qualifying for the office of circuit judge he resigned, the Governor made an appointment to fill out his term as county collector, and he made a complete accounting of all funds and secured a receipt for paying over all funds in his custody. There was no allegation of fraud or default. He then assumed the office of circuit judge the following January. That case went off on a construction of the words "shall be eligible" in Section 11068, supra. Furthermore, the court in that case construed the constitutional provision, Section 19, Article 2, hereinabove referred to, along with Section 11446, R.S. 1909, which today is Section 11068, R.S. Mo. 1939. With regard to the word "eligibility" the court said at l.c. 248:

"\* \* \* It may be conceded and it seems to be the fact that as stated in 29 Cyc. 1376, 'Most of the cases hold that the term "eligible" as used in a constitution or statute means capacity to be chosen, and that therefore the qualification must exist at the time of the election or appointment;' but there is respectable authority to the contrary, including a decision of this court and we think based upon the better reason. Besides, contemporaneous construction, as shown in the unquestioned recognition for forty years of the eligibility to

election to office of incumbents of the offices of county collector, county treasurer, state treasurer, sheriff, county clerk, circuit clerk, and many others that could be named, all collectors or receivers of public money, is a cogent reason for holding against relator's contention."

The court further held that such constitutional and statutory provisions should not be construed to prevent officers mentioned therein as in default and deny to them further political preferment while occupying such office. In so holding, the court said at l.c. 249, 250:

"It will be noticed that the catch-words of the section of the Constitution are: 'Collectors, receivers etc., in default, ineligible to office.' And the general rule of law upon the subject, as stated in 29 Cyc. 1385, is as follows: 'Statutes frequently disqualify for public office those who, having in their possession public funds, are in default. Such statutes disqualify only those who have been determined by legal authority to be in default, or admit that they are in default, and appear generally to be liberally construed in favor of eligibility to office. Thus "default" is said to mean a willful and corrupt omission to pay over funds.'

"The Reasonable and salutary interpretation given to the Constitution and statutory provisions under consideration, by this court, is not that those holding the offices mentioned shall be treated as in default and denied further political preferment while occupying such office, but rather that the door of the same office for another term, or of another office, shall be barred to them until, and only until, they shall have shown themselves eligible and worthy by a full settlement and payment of all public funds in their hands."

Furthermore, in State ex rel. McAllister v. Dunn, 277 Mo. 38, l.c. 43, the Supreme Court, in concluding that there was no



reason receding from the position taken by the court in *State ex inf. Breuer*, *supra*, said:

"\* \* \* This seems to us the correct conclusion. To apply to the word eligible in every case a fixed meaning without regard to the context, the law in pari materia, the evil to be remedied or averted, would be to overturn vital rules of construction and miss the legislative intent in each case in which the law-making body happened to use the word in another, though legitimate, sense. Upon this question this court has already declared itself. In *State ex inf. v. Breuer*, 235 Mo. l.c. 250, 251, in a concurring opinion by Valliant, J., this court, six judges concurring, held that whether the word eligible, used in a statute, is used with reference to the election or the time of taking office 'depends on the context and on the subject.' We had before us in that case most of the authorities cited in this. After a re-examination of these and others now brought to our attention, we see no reason for receding from the position taken in that case."

There are several well established rules of statutory construction to keep in mind. A primary rule for construing statutes is to ascertain the lawmakers' intent from words used, if possible, and give it that effect. See *Cummins v. Kansas City Public Service Co.*, 66 S.W. (2d) 920, 334 Mo. 672. Also, that statutes should receive a sensible construction such as will effectuate legislative intent, if possible, so as to avoid an unjust or absurd conclusion. See *Chrisman v. Terminal R. Ass'n of St. Louis*, 157 S.W. (2d) 230. Another rule is that the Legislature will not be presumed to have intended to use superfluous or meaningless words. See *Dodd v. Independence Stove and Furnace Co.*, 51 S.W. (2d) 114, 330 Mo. 662.

Certainly we must consider a member of the Board of Directors of said School District as an office of trust. In *State ex rel. Milligan et al. v. Jones*, 224 S.W. 1041, l.c. 1042, the Supreme Court of Tennessee, in holding the office of school director to be an office of trust, said:

"The public school system has developed into a great plan of the state government to educate its citizens and is based upon the thought that an educated citizenry is essential to a free government. The government has undertaken this trust, and for this purpose spends hundreds of thousands of dollars every year. The system is a great system and has many features, all of which may well be said to be essential. Included within this system is the school director, and we must hold that it is an office of the highest trust. It is not an office of profit, and it should not be made so, because usefulness of the office would be lessened if the cupidity of men were aroused over its possession. The motive which men are expected to exercise in seeking it is one of patriotism and disinterestedness. It is none the less an office of trust. The directors have within their control the employment of teachers, the payment of their salaries, the care and custody of school property, and many other things of financial interest, which would be sufficient, standing alone, to declare the office one of trust; but in addition the director has the decision of the character and nature of the school by the selection of teachers and other matters of great moral and spiritual trust. An examination of the sections of the Code cited will show that it was intended to make the director an important and essential part of the school system."

County collectors are required under the law to make regular settlements and turn over funds in their custody. Certainly if the Legislature had wanted to prevent such officers from holding other offices of trust at the same time, it would have been an easy matter to have enacted such a law in words that would need no construction, such as Section 13799, R.S. Mo. 1939, which reads:

"No sheriff, marshal, clerk or collector, or the deputy of any such officer, shall be eligible to the office of treasurer of any county."

Hon. Duncan R. Jennings

-6-

That was not done. So apparently the Legislature, in passing 11068, R.S. Mo. 1939, only wanted to restrict such public officers from holding another office of trust at the same time when in default. That seems to be the only reasonable construction to place upon said act.

CONCLUSION

Therefore, it is the opinion of this department that, since the office of county collector and member of Board of Directors of said School District are not incompatible, and assuming the County Collector in question has made all settlements required under the law and is not in default, the said County Collector may serve as Member of said Board of Directors in said School District at the same time.

Respectfully submitted,

AUBREY R. HAMMETT, Jr.  
Assistant Attorney General

APPROVED:

---

J. E. TAYLOR  
Attorney General

ARH:LR

TAXATION:  
SALES TAX:

Cost-plus-contractors who pay a sales tax on materials which they use in such contracts may bill the firm with which they are contracting for reimbursement of the amount of such tax and such contractors would not be required to remit the amount of such reimbursement to the State Collector of Revenue.

June 19, 1947



Honorable W. O. Jackson, Supervisor  
Sales Tax Unit  
Department of Revenue  
State Capitol Building  
Jefferson City, Missouri

Dear Mr. Jackson:

This is in reply to yours of recent date wherein you request an official opinion from this department on the following statement of facts:

"The question has arisen in regard to the collection of sales tax from certain contractors in the City of St. Louis and the opinion of the Attorney General is desired as to whether or not these contractors are liable to the State for the remittance of tax.

"The situation out of which this controversy arises, is as follows:

"Certain contractors in the handling of their Cost-plus-contracts, would use materials which they had purchased and upon which they had paid the sales tax, but in billing the firms with which they were contracting, they would include in their bill an item 'Two Per Cent Sales Tax \$30.99', or some other amount, being the amount of sales tax which the contractors had paid on the material used.

"Section 11416 of House Bill 652 enacted by the 63rd General Assembly, Laws of 1945, l.c. 1871, directs the filing of sales tax returns and the remittance of the tax collected and contains the following words:

'Including any and all monies collected from the purchaser as sales tax.'

June 19, 1947

"An opinion from your office will be greatly appreciated, advising us whether or not under the style of billing above described, the contractors doing contract work on a Cost-plus basis should remit to the State Collector of Revenue, the amounts shown in their invoices as sales tax."

The Missouri Sales Tax Act was passed originally in 1935; it has passed at each session of the General Assembly since that time and the latest act was passed in House Bill No. 652 by the 63rd General Assembly and is now found at page 1865, Laws of Missouri 1945.

Section 11416 of the act, and to which you refer in your request reads in part as follows:

"Every person making or rendering any sale, service or transaction taxable under this article, shall on or before the fifteenth day of the month after this article becomes effective, and on or before the fifteenth day of every calendar month thereafter, individually or by duly authorized officer or agent make and file with the Director of Revenue a written return, in the manner and form designated or prescribed by said Director of Revenue, and upon blanks furnished by him showing the amount of gross receipts from sales, services and taxable transactions by such person and the amount of tax due thereon during and for the preceding calendar month, or that portion thereof subsequent to the effective date of this article, and with such written return such person shall remit to the Director of Revenue the amount of said tax due, including any and all monies collected from a purchaser as sales tax. \* \* \* \* \*

The Sales Tax Act until 1939 did not include the clause "including any and all moneys collected from a purchaser as sales tax." This section was amended, Laws of Missouri 1939, page 862, by including the foregoing clause. The reason for this amendment was that in many instances, especially where the sales were of small items, the tax collected exceeded the amount which would be derived by multiplying the gross sales by two per cent (2%); the lawmakers taking the position that any moneys collected as a sales tax on retail sales belonged to the State and that the retailers should not be permitted to keep these excess taxes.

June 19, 1947

The sales tax is imposed on "retail sales" of tangible personal property for use and consumption and for certain services set out in the act. The term "retail sale" is defined in Subsection G of Section 11407 of the act, Laws of Missouri 1945, page 1867 as follows:

"'Sale at retail' means any transfer made by any person engaged in business as defined herein of the ownership of, or title to, tangible personal property to the purchaser, for use or consumption and not for resale in any form as tangible personal property, for a valuable consideration. Where necessary to conform to the context of this article and the tax imposed thereby, it shall be construed to embrace: \* \* \* \* \*

The Sales Tax Act has been before the Supreme Court for consideration on many occasions. One of the earliest cases wherein the act was being considered by the court was in *Kansas City Power & Light Company v. Smith*, 111 S. W. (2d) 513. In that case the court applied the following rules of construction with respect to the administration of the act, 1. c. 513-515.

"'Under our system of taxation, there can be no lawful collection of a tax until there is a lawful assessment, and there can be no lawful assessment except in the manner prescribed by law and of property designated by law for that purpose.' (Italics ours) \* \* \* \* \*

\* \* \* \* \*

"'It is a generally accepted rule that taxing statutes should be strictly construed in favor of the taxpayer, and such is the rule in this state.' \* \* \* \* \*

These rules have been applied throughout the administration of the Sales Tax Act.

In your request you refer to cost-plus-contractors. For the purpose of this opinion we are assuming that these are construction contracts for the improvement of real estate and are similar to the contracts which were before the Missouri Supreme Court in the case of *City of St. Louis v. Smith* 114 S. W. (2d) 1017. In that case the court had before it the question of whether or not the City of St. Louis for whom the contractor had contracted to pave streets, construct sewers and build a hospital, was the

June 19, 1947

purchaser of the materials which went into these contracts. The City of St. Louis took the position that it was not the purchaser of these materials within the meaning of the Sales Tax Act, and therefore was not liable for the payment of the sales tax. After setting out various provisions of the Sales Tax Act relative to the question and especially the definition of the term "sell at retail," The court said at l. c. 1019:

"It is clear from these statutory provisions that where one buys tangible personal property for his own use or consumption he is liable for the tax. On the other hand, it is equally clear that where one buys tangible personal property for the purpose of resale he is not liable for the tax. In this case, the contractors agreed with the city to furnish all labor and material necessary to construct, and to construct, the improvement in question for a fixed sum of money. It was necessary for the contractor to purchase and use all material necessary to complete said work in order to be in a position to deliver to the city a completed structure as provided in the contract. Our judgment is that it cannot be said by the contractor that he resold the materials to the city for its use, and did not use or consume them in the performance of his contract. \* \* \* \* \*

\* \* \* \* \*

"In our judgment the contractors in this case did not buy the materials in question for the purpose of reselling such materials to the city. They were under contract to deliver to the city a finished product. It was the inseparable commingling of labor and material that produced the finished product. Our conclusion is that the contractors used and consumed the material in order to produce the finished product in compliance with their contract. Since the contractors used and consumed the material, they and not the city are primarily liable for the one per cent sales tax. The sale of the materials by the dealer to the contractors was the taxable transaction, and it was the duty of the dealer to collect the tax from the contractors at the time the sale was made."

Following this authority the "retail sale" under the Sales Tax

June 19, 1947

Act has taken place between the cost-plus-contractor and his supplier and such cost-plus-contractor being held to be the purchaser under the Sales Tax Act should pay the tax to his supplier who is the seller under the act.

Then, since the taxable transaction has taken place between the cost-plus-contractor and his supplier the question arises, could the cost-plus-contractor be reimbursed the amount of this tax by the one for whom he performs the cost-plus-contract, and would such contractor be required to remit the amount so reimbursed to the Director of Revenue as sales tax collected. If the cost-plus-contractor is required to remit this tax for which he has been reimbursed, it is solely on account of the language used in said Section 11416 and quoted above which requires the seller to remit the tax due "including any and all moneys collected from a purchaser as a sales tax."

Under the ruling announced by the Missouri Supreme Court in the City of St. Louis case, supra, the contractor is the purchaser and he must pay the tax to his supplier. Then, if it should be held that the foregoing language of Section 11416 requires the contractor to remit this tax by which he has been reimbursed by the party with whom he has the construction contract and in which the reimbursement is for the tax on the same articles which went into the contract, then the State would be double taxing these transactions. We do not think that was the intention of the lawmakers when the Sales Tax Act was passed. In fact, the lawmakers in the act indicated a policy against double taxation of "retail sales."

Section 11409 of the act contains certain exemptions and in that section the lawmakers before setting out the exemptions of certain transactions uses this language, "in order to avoid double taxation under the provisions of this article." We think this language clearly demonstrates that the lawmakers when they enacted the sales tax act, and at each time it has been re-enacted, had no intention of double taxing any retail sale transaction. In this case the cost-plus-contractor has paid to his supplier the sales tax on the material used in the contract. The contractor then bills the firm with which he is contracting for the amount of the tax which he has paid to his supplier. If the contractor is required to remit this money which he collects from the firm to reimburse him for taxes which he has already paid on the sale of the same materials, then that would be a double tax on the same retail sale transaction.



June 19, 1947

Referring again to the clause "including any and all moneys collected from a purchaser as sales tax," and applying the principle announced and applied by the Supreme Court in the Kansas City Power & Light Company case, supra, the moneys must be collected from the "purchaser as a sales tax" before the person collecting such moneys is required to pay them into the State Treasury. There are two conditions in this clause which must be met before the State is entitled to the moneys collected under it they are: (a) there must be a purchaser, (b) the money must be collected as a sales tax. In this particular case is the firm with whom the cost-plus-contractor contracting a purchaser within the meaning of the Sales Tax Act? Subsection E of 11407 of the Sales Tax Act, Laws of Missouri 1945, page 1867 defines the word purchaser in the following language:

"The word 'purchaser' whenever used in this Act means a person who purchases tangible personal property or to whom are rendered services, receipts from which are taxable under this Act."

According to this definition the purchaser must be one who purchases tangible personal property, or to whom are rendered services, receipts from which are taxable under the act. In other words, the purchaser must be the one who purchases tangible personal property in a sale at retail as defined in the act. According to the ruling accounced by the Missouri Supreme Court in the case of City of St. Louis v. Smith, supra, the cost-plus-contractor is the "purchaser" of the materials used in the contract. Therefore, the firm for whom the cost-plus-contractor performs the contract could not also be considered the "purchaser" for these same materials. Before the State is entitled to moneys under this act they must be "sales tax moneys." The sales tax is derived from "retail sales." Section 11408 of the Act, Laws of Missouri 1945, page 1868 imposes the sales tax on retail sales of tangible personal property, etc.

The contractor may be reimbursed, by the firm with whom he is contracting for the cost-plus-contract, the amount of taxes which he has had to pay as a purchaser of the materials which he uses in such contract. However, we do not believe that this is such a collection as would be considered as belonging to the State as a sales tax paid by a purchaser under the Sales Tax Act. We base our conclusion here on the fact that: (a) the firm with whom the cost-plus-contractor is contracting is not the purchaser of the materials within the meaning of the Sales Tax Act, (b) that the moneys collected by the cost-plus-contractor from the firm are not sales tax moneys and, (c) that the transaction by the cost-plus-contractor and the firm with whom he is contracting is not a retail sales transaction within

Mr. W. O. Jackson

June 19, 1947

the meaning of the Sales Tax Act. Applying the principle announced by the court in the Kansas City Power & Light case that there can be no lawful collection of a tax until there is a lawful assessment, which must be made in the manner prescribed by law, then the transaction by the cost-plus-contractor and the firm which reimburses him for his sales tax would not be a transaction in which a lawful assessment of the tax could be imposed.

#### CONCLUSION

From the foregoing it is the opinion of this department that cost-plus-contractors who pay a sales tax on materials which they use in such contract may bill the firm with which they are contracting for reimbursement of the amount of such tax and that such contractors would not be required to remit the amount of such reimbursement as a sales tax to the State Collector of Revenue.

Respectfully submitted

TYRE W. BURTON  
Assistant Attorney General

APPROVED:

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J. E. TAYLOR  
ATTORNEY GENERAL

TWB:ma

INCORPORATION BY PRO  
FORMA DECREE:

An organization by an association of persons under a mutual benefit proposal, where its Articles of Association and By-Laws show the proposed corporation would be making a profit for some of the members at the expense of other members, in insurance. Such association may not be incorporated under Section 5437, Article 10, Chapter 33, R.S.Mo. 1939, under a pro forma decree.

July 9, 1947



Honorable Owen G. Jackson  
Superintendent of Insurance  
Jefferson City, Missouri

Attention: Hon. A. R. Troxell, Counsel

Dear Mr. Jackson:

This will acknowledge your request for an opinion from this department respecting the right of an association calling itself, under a proposed pro forma decree, Unit Casualty Service, Inc., to be incorporated as a non-profit corporation.

Your letter requesting the opinion of this department on the subject, is as follows:

"The Articles of Association and By-Laws of the Unit Casualty Service, Incorporated are enclosed for your inspection.

"The Articles of Association are now pending in the Circuit Court of St. Louis, and were forwarded to me by Mr. Harry Gershenson, Amicus Curiae. It appears that the intention is to have the company incorporated as a non-profit company, but the provisions set out do not appear to come within the confines of the subject companies.

"An opinion from your office will be appreciated as to whether this application for charter complies with the laws pertaining thereto."

Subsequent to receiving your letter, in company with your Mr. Ralph C. Lashly, this department had a conference with the counsel for said proposed company and two of its proposed officers.

Complete copies of the Articles of Association, and the By-Laws

Hon. Owen G. Jackson

of said proposed corporation were submitted to the writer of this opinion for inspection at the time of said conference.

We have inspected and considered said Articles of Incorporation and By-Laws with the most careful attention we have been able to give to them.

The proposed incorporation of this body of persons under a pro forma decree by the Circuit Court manifestly is a proceeding under Section 5437, Article 10, Chapter 33, R. S. Mo. 1939.

The title to Article 10, permitting and authorizing persons in any number not less than three to associate themselves together and obtain from the Circuit Court having jurisdiction, a pro forma decree of incorporation, is as follows:

"Benevolent, Religious, Scientific, Fraternal-Beneficial, Educational and Miscellaneous Associations."

It has been impossible for the writer to reconcile or harmonize the proceedings here proposed as coming under, or responsive to, the provisions of Article 10, Chapter 33, R. S. Mo. 1939, providing for the incorporation by pro forma decree of "benevolent, religious, scientific, fraternal-beneficial, educational and miscellaneous associations."

The whole of Article 10, Chapter 33, R. S. Mo. 1939 respecting the organization of corporations by pro forma decree must, we believe, be read and all of its sections and provisions must be considered together in determining its effect. Section 5444, under the subject of "what associations not to incorporate under this article-- \* \* \*" states:

"No association, society or company formed for manufacturing, agricultural or business purposes of any kinds, or for pecuniary profit in any form, nor any corporation having a capital stock divided into shares, shall be incorporated under this article: \* \* \* \* \*"

Section 2 of Article 1 of the Articles of Association submitted to us for inspection and construction, is as follows:

"Section 2. Objects and Purposes

"This Association is formed for the purpose of providing to its members the sick

Hon. Owen G. Jackson

benefits, disability benefits, jury service benefits, death benefits, and such other benefits as may be set out and provided for in the By-Laws of the Association."

Section 1 of Article 9 of the proposed Articles of Association respecting the amendment of the Articles of Association, is as follows:

"Section 1. Amendment

"This Constitution shall be subject to amendment but such amendment shall be adopted only upon strict compliance with the By-Laws of the Association."

It would eventuate, therefore, under said Article 9, itself, that the Articles of Association of the organization would be controlled by the By-Laws whereby the Articles of Association might be amended so that the purposes and object of the organization may be changed at will by the management of the organization rather than by the statutes governing such associations.

We think it proper here to quote that part of Section 6003, Article 10, Chapter 37, R. S. Mo. 1939, which is as follows:

"No company shall transact in this state any insurance business unless it shall first procure from the superintendent of the insurance department of this state a certificate stating that the requirements of the insurance laws of this state have been complied with authorizing it to do business; \* \* \* "

By-Law 3 of the proposed By-Laws of the organization subdivided in sub-sections a, b, c, and d, is as follows:

"BY-LAW THREE

"a. ANY MEMBER OR MEMBERS WHO BECOME DELINQUENT IN HIS OR HER DUES, SHALL THEREBY CEASE TO BE ENTITLED TO ANY BENEFITS OF MEMBERSHIP: A MEMBER IS DELINQUENT WHO FAILS TO PAY HIS OR HER

Hon. Owen G. Jackson

DUES BEFORE THE END OF THE SECOND CONTRACT MONTH DURING WHICH TIME AND FOR WHICH PERIOD SUCH DUES HAVE NOT BEEN PAID.

"b. NON PAYMENT WITHIN THE ABOVE STATED GRACE PERIOD SHALL BE DEEMED A VIOLATION AND SHALL AUTOMATICALLY TERMINATE THE MEMBERSHIP WITHOUT NOTICE OR DEMAND.

"c. FOR VIOLATIONS OTHER THAN NON PAYMENT, SUCH AS REFUSAL TO TRANSFER TO AN ESTABLISHED UNIT, AS AN EMPLOYEE OF A FIRM OR MEMBER OF AN ORGANIZATION, WHERE SUCH UNIT IS IN OPERATION - UNIT CASUALTY SERVICE, INC. RESERVES THE RIGHT TO CANCEL THE MEMBERSHIP AT THE END OF ANY MONTHLY PERIOD FOR WHICH PAYMENT HAS BEEN ACCEPTED, BY MAILING OF NOTICE OF SUCH CANCELLATION TO THE MEMBER, AT HIS OR HER LAST ADDRESS SHOWN ON THE RECORDS OF THE UNIT CASUALTY SERVICE, INC.

"d. IN CASES OF NON PAYMENT OF DUES AS STATED IN THIS BY-LAW, WHERE MEMBERSHIP HAS BEEN TERMINATED, LAPSED OR VIOLATED IN ANY MANNER AS HEREIN PROVIDED - UNIT CASUALTY SERVICE, INC., MAY REINSTATE SUCH FORMER MEMBERSHIP AT ITS SOLE DISCRETION AND UPON SUCH CONDITIONS AND TERMS AS MAY BE DETERMINED BY UNIT CASUALTY SERVICE, INC."

This said By-Law 3 undoubtedly provides in all of said subsections, and in each of them, for the profiting and advantage of certain members of the association at the expense and loss of others against whom such forfeitures would be imposed. This, it is believed, shows that this association, if permitted to operate under a pro forma decree, would be operating solely upon an insurance basis, and that it would be, and is, prohibited under that part of said Section 6003, Article 10, Chapter 37, R. S. Mo. 1939, hereinabove quoted, because it would be operating without having procured from the Superintendent of the Insurance Department of this State the certificate required by said Section.

Moreover, we think this proposed organization comes within the prohibition of the holding in the case of State vs. Black, 145 S. W. (2d) 406, 1. c. 409, where the opinion states the following:

"Moreover, the evidence in this case shows that this association, against which these proceedings were brought, is operating solely upon an insurance basis, and is not by any means one 'where all pecuniary profit is excluded.' Some members can profit at the expense of others from the forfeitures (hereinafter shown to be provided) included in its policies. It certainly offends the purposes of the benevolent corporation laws in all the respects pointed out by the Kansas City Court of Appeals in the case of In re Henry County Mutual Burial Association, supra. \* \* \*"

Said opinion in quoting Section 2 of the By-Laws of the organization there being considered, in the righthand column on page 409 of said decision, and for the purpose of pointing out that part of the By-Laws which provided for forfeitures, and by which forfeitures some members of the association would profit at the expense and loss of some of the other members, said:

"12. Any person to be eligible for membership and certificate of benefit of the Association shall be at the time of making application for membership be in good health and free from any chronic disease and within the age limits hereinafter specified, and any misrepresentations as to age or health condition forfeits all rights to benefits from the Association.

We have paid particular attention to By-Law 15 of said proposed association respecting the employment by the board of directors of a managing director for the association. Said By-Law 15, in part, is as follows:

"SUCH MANAGING DIRECTOR SHALL BE PAID, AS MONTHLY COMPENSATION, A SUM EQUAL TO FOURTEEN PER CENT (14%) OF THE AMOUNT OF DUES COLLECTED FROM THE MEMBERS IN THAT MONTH, BUT SUCH COMPENSATION SHALL NOT EXCEED THE SUM OF FIVE HUNDRED DOLLARS (\$500.00) FOR ANY ONE MONTH."

By-Law 16 of the proposed organization is in like vein, and with like object, respecting the compensation of an assistant managing director, and said By-Law 16 is, in part, as follows:

Hon. Owen G. Jackson

"SUCH ASSISTANT MANAGING DIRECTOR SHALL BE PAID, AS MONTHLY COMPENSATION, A SUM EQUAL TO EIGHT PERCENT (8%) OF THE AMOUNT OF DUES COLLECTED FROM THE MEMBERS IN THAT MONTH, BUT SUCH COMPENSATION SHALL NOT EXCEED THE SUM OF FIVE HUNDRED DOLLARS (\$500.00) FOR ANY ONE MONTH."

It will be observed that these proposed salaries shall be computed upon a percentage basis in each said By-Laws 15 and 16, upon the "amount of dues collected from the members in that month." That means upon the gross dues paid by the membership of the association. This would be taking no account of losses, benefits and other liabilities of the organization. This would be, to say the least, a very unusual procedure. That plan itself shows that it must inevitably result in a profit to these persons in the management of the proposed organization at the expense and loss of the membership generally.

We believe this proposed organization comes definitely within the provisions of the insurance laws of this State, and is subject to supervision and control by them.

#### CONCLUSION

It is, therefore, the opinion of this department, from the facts stated in the Articles of Association, and the By-Laws, and the authorities and statutes hereinabove quoted, that this is a plan for doing an insurance business for the benefit and profit of the persons conducting and managing the organization and for the benefit of some of the membership at the expense of others of the membership of the organization, and is not entitled to a pro forma decree in the premises.

Respectfully submitted

GEORGE W. CROWLEY  
Assistant Attorney General

APPROVED: -

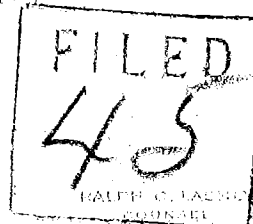
J. E. TAYLOR  
Attorney General

GWC:ir



DEPARTMENT OF BUSINESS AND ADMINISTRATION

August 8, 1947



OWEN G. JACKSON  
SUPERINTENDENT

Honorable Owen G. Jackson  
Superintendent of Insurance  
Department of Business and Administration  
Jefferson City, Missouri

Dear Superintendent Jackson:

This will acknowledge the receipt of certified copy of Articles of Agreement for the incorporation of the American Standard Life Insurance Company, under the stipulated premium plan as provided in Article 4, Chapter 37, R.S. Mo. 1939, submitted to this Department for our opinion whether these Articles of Agreement comply with the law.

We have examined these documents, and it is the opinion of this Department that such Articles of Agreement for incorporation of said company comply with the insurance laws of the State of Missouri, and that such Articles are not inconsistent with the Constitution of the State of Missouri, or the Constitution of the United States.

Very truly yours,

Respectfully submitted,

*George W. Crowley*

GEORGE W. CROWLEY  
Assistant Attorney General

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and Louree



DEPARTMENT OF COMMERCE  
DIVISION OF INSURANCE

September 3, 1947

FILED

45

Honorable Owen G. Jackson  
Commissioner of Insurance  
of Missouri  
Jefferson City, Missouri

Attention: Honorable Ralph C. Lashly

Dear Mr. Jackson:

This will acknowledge the receipt of a copy of the Articles of Agreement of the Accredited Hospital and Life Insurance Company, an association of persons proposing to form a corporation for the purpose of carrying on an insurance business under the terms of Article 4, Chapter 37, R.S. Mo. 1939, and amendments thereto, in St. Louis, Missouri, with the request for an opinion from this Department as to the legality of said Articles of Agreement.

We have examined this document, and it is the opinion of this Department that such Articles of Agreement made for the purposes therein set forth, comply with the laws of the State of Missouri, and that such Articles of Agreement are not inconsistent with the Constitution of the State of Missouri, or the Constitution of the United States.

Respectfully submitted,

*George W. Chowley*  
GEORGE W. CHOWLEY  
Assistant Attorney General

Obc:lr

SEP 10 1947

September 3, 1947

FILED

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HONORABLE OWEN G. JACKSON  
Commissioner of Insurance  
of Missouri  
Jefferson City, Missouri

Attention: Honorable Ralph C. Lashly

Dear Mr. Jackson:

This will acknowledge the receipt of an executed, sworn-to and acknowledged copy of the Articles of Agreement of Security Life and Accident Insurance Company, an association of persons desiring to form a corporation for the purpose of carrying on an insurance business in the City of St. Louis, Missouri, under the provisions of Article 4, Chapter 37, R.S. Mo. 1939, and amendments thereto, with the request to this Department for an opinion as to the legality of such Articles of Agreement.

We have examined this document and it is the opinion of this Department that such Articles of Agreement comply with the laws of the State of Missouri, and that such Articles of Agreement are not inconsistent with the Constitution of the State of Missouri or the Constitution of the United States.

Respectfully submitted,

*George W. Crowley*  
GEORGE W. CROWLEY  
Assistant Attorney General

GWC:ir

MOTOR VEHICLE SAFETY RESPONSIBILITY : Taxicabs licensed and  
ACT. : operating in municipalities  
: as common carriers which  
: are not regulated by or-  
: dinances, are subject to  
: the provisions of the  
: Motor Vehicle Safety  
September 16, 1947: Responsibility Act.  
:  
:

Honorable Owen G. Jackson  
Superintendent  
Division of Insurance  
Jefferson City, Missouri

717  
FILED  
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Attention: Honorable Ralph C. Lashly

Dear Mr. Jackson:

This opinion is in response to your letter recently received, which letter is as follows:

"I have a copy of your opinion to Mr. Hinkle Statler, Motor Vehicle Registration Unit, construing the position of taxicabs under Section 8470.15 Mo. R.S.A.

"Would you please advise this Division whether taxicabs, exempt from the provisions of the Public Service Commission Act and licensed to operate within municipalities having no regulatory ordinance requiring bond, or insurance, are subject to the provisions of the Motor Vehicle Safety Responsibility Act."

Neither "common carriers" nor "taxicabs" are defined in the MOTOR VEHICLE SAFETY RESPONSIBILITY ACT.

According to the holding in the case of State ex rel. Anderson vs. Witthaus, 102 S.W. (2d) 99, 1.c. 101, cited and quoted in the former opinion supplied to Mr. Hinkle Statler by this Department, that case does point out and defines what constitutes a "common carrier". We refer you to that case as cited and quoted on page 2 of the former opinion from this Department.

Sub-section (d) of Section 5720 of Article 8, Chapter 35, I.C. 253, Volume 15, Mo. R.S.A. of the PUBLIC SERVICE COMMISSION ACT defines the term "taxicab" as follows:

"(d) The term 'taxicab' when used in this article, shall mean every motor vehicle designated and/or constructed to accommodate and transport passengers, not more than five in number, exclusive of the driver, and fitted with taximeters and/or using or having some other device, method or system, to indicate and determine the passenger fare charged for distance traveled, and the principal operations of which taxicabs are confined to the area within the corporate limits of cities of the state and suburban territory as herein defined."

Section 5721 of said Article, Chapter and Act exempts taxicabs from the terms of said PUBLIC SERVICE COMMISSION ACT. For the sake of brevity we do not deem it necessary to quote said Section 5721, but respectfully call attention to the Section. However, said Section 5721 does state, as a part thereof, the following:

"\* \* \* No provision of this article shall be so construed as to deprive any county or municipality within this state of the right of police control over the use of its public highways, or the state highway commission of the right of police control over the use of state highways.  
\* \* \*"

Your specific question to be considered is whether if taxicabs are exempt from the terms of the PUBLIC SERVICE COMMISSION ACT, and if taxicabs are operated and licensed in municipalities having no regulatory ordinance relating to taxicabs requiring bond, insurance or proof of financial responsibility imposed by such regulatory authority having jurisdiction over the carrier's operations, they are subject

to the provisions of the Motor Vehicle Safety Responsibility Act.

We think the answer to the solution of the question lies in sub-section (b), pocket edition to Mo. R.S.A., page 119 of Volume 18, Section 8470.15, Article 5, Chapter 45, also found as Section 4, Laws of Missouri, 1945, 1207, 1.c. 1210, 1211, of the MOTOR VEHICLE SAFETY RESPONSIBILITY ACT.

The former opinion of this Department to Mr. Statler on page 1, sets out and quotes in full said sub-section (b) of said Section 8470.15.

The only basis upon which taxicabs, as will be observed by reading sub-section (b) of said Section 8470.15 and also of said Section 4, Laws of Missouri, 1945, 1.c. 1210, 1211, are exempted from the terms of the "MOTOR VEHICLE SAFETY RESPONSIBILITY ACT" is that taxicabs are left thereby to be governed by regulatory ordinances of municipalities served by such common carriers, if the facts show they are common carriers, and which shall have satisfied such municipalities, in obedience to such ordinance, or ordinances, that they have provided bond, insurance, or proof of financial responsibility imposed by such ordinance, or ordinances.

This brings us at once to a further consideration of said Section 5721 of the PUBLIC SERVICE COMMISSION ACT whereby said Section exempts taxicabs from the provisions of said Act, and further states, among other provisions, that county or municipalities within this State shall not be deprived by said Act of the right of police control over the use of its public highways, etc.

Taxicabs being exempt from the terms of the PUBLIC SERVICE COMMISSION ACT by said Section 5721, leaves them subject only, according to the terms of said sub-section (b), Section 4, Laws of Missouri, 1945, 1.c. 1210, 1211, and Section 8470.15, Mo. R.S.A., pocket edition, Volume 18, page 119, to municipal ordinance regulations, and if not regulated by municipal ordinances in the particulars named in said sub-section (b), supra, they are subject to the terms of the MOTOR VEHICLE SAFETY RESPONSIBILITY ACT. So of course the question would resolve into this:

We have in Section 5720 of the PUBLIC SERVICE COMMISSION ACT, supra, a definition of "taxicab".

Honorable Owen G. Jackson    -4-

We have a decision and definition in the Anderson case, quoted in the former opinion of this Department, that taxicabs are common carriers.

We have the question in your letter whether taxicabs operating within municipalities having no regulatory ordinance requiring bond, insurance, and which have not made proof of financial responsibility, are subject to the terms of the MOTOR VEHICLE SAFETY RESPONSIBILITY ACT. We think there is but one answer to this question under the statutes quoted and under the conditions you submit, and under the holding of the former opinion of this Department to Mr. Statler, that taxicabs are, under such conditions, subject to the terms and provisions of the MOTOR VEHICLE SAFETY RESPONSIBILITY ACT.

CONCLUSION.

It is, therefore, the opinion of this Department that taxicabs licensed by and operating in municipalities of this State and their respective suburban territories, as common carriers, if the facts show they are common carriers, and which municipalities do not have in force regulatory ordinances supervising taxicabs by requiring bonds, insurance or proof of financial responsibility, are subject to the provisions of the MOTOR VEHICLE SAFETY RESPONSIBILITY ACT.

Respectfully submitted,

GEORGE W. CROWLEY  
Assistant Attorney General

APPROVED:

J. E. TAYLOR  
Attorney General

GWC:ir

DIVISION OF INSURANCE

October 7, 1947

FILED  
45

OWEN G. JACKSON  
SUPERINTENDENT

Honorable Owen G. Jackson  
Superintendent  
Division of Insurance  
Jefferson City, Missouri

Attn: Honorable Ralph C. Lashly

Dear Mr. Jackson:

This will acknowledge the transmission to this Department of certified copies of the Articles of Incorporation of the Supreme Mutual Casualty Company, together with proof of publication of the notice of the intention of the incorporators to incorporate under the provisions of Article 7, Chapter 37, R.S. Mo. 1939, and amendments thereto, relative to the formation of a mutual insurance company other than life and fire, with the request for an opinion from this Department upon the legality of such Articles of Incorporation.

We have examined the Articles of Incorporation submitted, and the proof of publication thereof. We find that these documents and proceedings are regular in form and substance, and it is the opinion of this Department that such proceedings comply with the Laws of the State of Missouri, and that they are not inconsistent with the Constitution of the State of Missouri or the Constitution of the United States.

Respectfully submitted,

*George W. Crowley*  
GEORGE W. CROWLEY  
Assistant Attorney General

OWC:lr  
encl



DEPARTMENT OF PUBLIC

HEALTH AND WELFARE:

DIVISION OF HEALTH :

The Division of Health does not have power to operate a general hospital without legislative authority.

November 18, 1947

FILED

45

12/16

Dr. R. M. James, Director  
Division of Health  
Department of Public Health & Welfare  
Jefferson City, Missouri

Dear Dr. James:

This is in reply to your letter of October 31, 1947, in which you requested an opinion from this department, reading as follows:

"In cooperation with the Federal Works' Agency the Division of Health has operated the Waynesville General Hospital at Waynesville. This institution was built and equipped by the Federal Works' Agency under the provision of the Lanham Act and under this law will have to liquidate their holdings within six months after the end of the emergency.

"This institution has been operated as an experimental unit offering a method by which hospital facilities could be provided to rural communities that were recognized as adequate in all phases of hospital care.

"In the operation of this hospital no medical care itself is offered by the operating agency. Only hospital care including generalized nursing service has been provided. Adequate hospital care is an essential in a good public health program.

"Much has been learned in relationship to rural hospitals that will be applicable to the development of the State Hospital Plan and Hospital Construction Program which will

be carried out under Public Law 725. I wish to point out again in the operation of this institution no areas in the State are excluded from the use of its facilities.

"The people of Pulaski County feel that operation of a hospital of this type could not be carried out successfully at the local level and desire to purchase the property from the Federal Works' Agency, and to transfer the title to the State. This brings up several problems on which we would like to have an opinion.

"1. Can this Division accept gifts of property such as outlined above?

"2. Can the deed transferring such property, if decided to the State, stipulate what it will be used for?

"3. Can the Division of Health operate a general hospital when there are no restrictions as to residency, race, creed or color?

"4. Pending specific Legislation, if needed, can the income from such a general hospital be used for operation and maintenance purpose?"

Because of the view this department takes in answering part 3 of your inquiry, it will be unnecessary to consider at this time parts 1, 2 and 4.

The general duties and powers of the Division of Health are set out in Section 14, Laws of 1945, at page 949:

"It shall be the general duty and responsibility of the division of health to safeguard the health of the people in the state and all its subdivisions. It shall make a study of the causes and prevention of diseases. It shall designate those diseases which are infectious, contagious, communicable or dangerous in their nature and shall make and enforce adequate orders and findings to prevent the spread of such diseases and to determine the prevalence

of such diseases within the state. It shall have power and authority, with approval of the director of public health and welfare, to make such orders and findings as will prevent the entrance of infectious, contagious and communicable diseases into the state."

Elsewhere in the act providing for the Department of Public Health and Welfare, and for a Division of Health within the department, are provisions containing specific powers and duties of the Division of Health. Nowhere in the act is there any express provision for the operation of a general hospital at waynesville, Missouri, or any other location. If the division has such power, it must be implied, and we are of the opinion that it is not.

In Laws of Missouri, 1945, commencing with page 969, House Bill No. 280 is set out, providing for the establishment of county health centers. Certainly a reading of the provisions of this bill leads one to believe it was the intent of the Legislature that the operation of hospitals or health centers, such as the one in question, should be done by local authorities. Along this general line, see also Laws of 1945, pages 980-987.

Nor can we say that the Division of Health has implied power to operate a general hospital under the powers given to the Division by Section 3, Laws of 1945, page 973:

"The Division of Health of the Department of Public Health and Welfare is hereby designated the official state agency to receive any and all Federal and other grants and aids for making a survey and for the construction of hospitals and health centers: Provided, that private grants and aids to private hospitals, health centers and units in this state, by will, deed or gift shall vest in such private institutions under the terms and provisions of such will, deed or gift and the Division of Health of the Department of Public Health and Welfare shall have no right, title, interest or control over grants and aids to private hospitals so granted, unless granted in said will, deed or gift. It shall be empowered to receive

any and all such grants and aids under the terms of such grants and aids and to pay them out under any and all provisions as may be attached to such grants and aids. It shall be authorized to render such reports as may be required under any and all grants and aids; provide such minimum standards for maintenance and operation of hospitals and health centers as may be required under the terms of such grants and aids; and to require compliance with such standards in the case of hospitals and health centers which shall have received such grants and aids."

Under this section, the Division of Health is designated the official state agency to receive such grants and aids which might be forthcoming from the Federal government for the particular purposes enumerated. Again, we are unable to find language which empowers a Division of Health to operate a general hospital.

Next, there arises the question of appropriations for such a purpose. In House Bill No. 175 of the 64th General Assembly, the appropriation bill for the Division of Health, nowhere is there mention of an appropriation of moneys to be expended for the operation of a general hospital at Waynesville, Missouri. We realize that at the present the hospital is being conducted with Federal funds given to the State for public health purposes. However, if the State of Missouri is not to take over complete operation of this hospital, we believe that the Legislature would have to make appropriations for that purpose. Under the provisions of Article IV, Section 28 of the Constitution of 1945, it is doubtful if the State Treasurer could issue warrants for the payment of obligations incurred by the hospital, in the absence of an appropriation. Article IV, Section 28, reads as follows:

"No money shall be withdrawn from the state treasury except by warrant drawn in accordance with an appropriation made by law, nor shall any obligation for the payment of money be incurred unless the comptroller certifies it for payment and the state auditor certifies that the expenditure is within the purpose of the appropriation and that there is in the appropriation an unencumbered balance sufficient to pay it. At the time of issuance each such certification shall be entered on the general

accounting books as an encumbrance on the appropriation. No appropriation shall confer authority to incur an obligation after the termination of the fiscal period to which it relates, and every appropriation shall expire six months after the end of the period for which made."

The State Board of Health has an opinion from this Department under date of July 13, 1943, addressed to Dr. James Stewart, stating as its conclusion:

"From the foregoing, it is the opinion of this department that the State Board of Health would be acting within the scope of its authority to operate a general hospital when all funds to be used in the operation and maintenance of such institution are granted to the State Board of Health by an agency of the Federal Government."

We do not now disaffirm that opinion, but we do say that when Federal funds and the conditions of the Federal grants are no longer present for operating this hospital, the Division of Health may not continue to operate the same without legislative authority.

Indeed, there must be a tacit admission on the part of some that legislative action is needed before the Division will be enabled to operate the particular hospital in question, as witness the wording of Senate Bill No. 277, introduced in the 64th General Assembly, referred to the committee on Public Health and Welfare and not as yet reported upon:

"Section 1. That an act of the 63rd General Assembly known as Senate Bill No. 349, approved May 3, 1943, be and the same is hereby amended by inserting immediately following Section 13 of said Senate Bill No. 349 one new section, to be known as Section 13a and to read as follows:

"Section 13a. The Division of Health is hereby authorized to operate the Trachoma Hospital at Molla, Missouri, and the General Hospital at Maysville, Missouri."

Mr. R. H. James, Director -6-

Conclusion.

It is the opinion of this department that the Division of Health does not have the power, express or implied, to operate a general hospital without legislative authority.

Respectfully submitted,

JOHN R. DATA  
Assistant Attorney General

APPROVED:

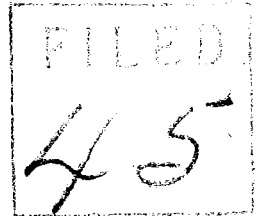
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J. R. TAYLOR  
Attorney General

JH:ml

INSURANCE:

Payment of claims, Insurance and Emergency Fund;  
Reserve fund, annual statement - stipulated premium  
company.



November 19, 1947

Honorable Owen G. Jackson  
Commissioner of Insurance  
Jefferson City, Missouri

Dear Mr. Jackson:

This will acknowledge the receipt of your letter requesting the opinion of this Department on the subjects set forth therein in eight separate questions. Your letter is as follows:

"I would appreciate your opinion on the following questions with respect to companies organized under Article 4, Chapter 37, R.S. Mo. 1939:

"1. Are death claims incurred during the first policy year to be paid out of the mortuary premiums for the first policy year?

"2. Does not the Insurance Fund consist of the renewal mortuary premiums (other than first year) together with interest of at least 4% per annum thereon but excluding the special loading for limited payment policies and interest thereon?

"3. Does not the Emergency Fund consist of the balance remaining in the Insurance Fund after paying for death, disability and other policy claims (excluding such claims during the first policy year)?

"4. Is the amount of the Emergency Fund required to be shown as a liability in an annual statement or examination report in order to determine the financial condition of a company?

"5. Is the amount of the Reserve Fund, computed as set forth in Section 5876, required to be shown as a liability in addition to the Emergency Fund in an annual statement or examination report in order to determine the financial condition of a company?

"6. Can funds be transferred from the Emergency Fund to provide for the Reserve Fund, thus reducing the Emergency Fund below the amount required by Section 5875?

"7. Can a stipulated premium company continue to operate even though the Emergency Fund is impaired but not exhausted?

"8. Is a stipulated premium company insolvent when its admitted assets are less than its unpaid claims and other liabilities including the amounts of the Emergency and Reserve Funds?

"The report of examination, together with exceptions filed thereto, and a transcript of testimony recently taken at a hearing, accompany this request in the belief that they will provide whatever additional information might be needed to properly understand the questions presented."

The question you submit in paragraph 1 of the letter is: Whether death claims incurred during the first policy year are to be paid out of the mortuary premiums for the first policy year. It would appear from reading both Sections 5874 and 5875, Article 4, Chapter 37, R.S. Mo. 1939, that this question should be answered in the affirmative.

Said Section 5874 is as follows:

"Every corporation, company or association doing business under the provisions



of this article shall charge a mortuary premium at least equal to that of yearly term insurance at age of entry according to the actuaries' or combined experience mortality table, with interest at four per cent, and such mortuary premium shall be increased by a loading of not less than twenty per cent for age twenty and all ages under twenty, and one per cent additional for each additional year of age, renewable term policies excepted from such loading. Said premium may be paid annually, semi-annually, quarterly, bi-monthly or monthly in advance."

We observe no reason or cause for charging a mortuary premium at least equal to that of yearly term insurance at age of entry with interest at four per cent, and the increase thereof by a loading of not less than twenty per cent for age twenty and all ages under twenty, and one per cent additional for each additional year of age, renewable term policies excepted from such loading, unless such provisions pointed toward the necessity of paying death claims incurred during the first policy year out of the mortuary premiums paid for the first policy year.

We believe the terms and conditions of said Section 5875 confirm this construction of said Section 5874 by stating, in part, that:

"After the first policy year the mortuary premium, according to the terms of premium payments of each policy, with the loading of the same as provided in section 5874, together with all interest and other accumulations of said fund, except the special loading for limited payment policies, with interest thereon as provided in section 5876, shall constitute the insurance fund of the corporation, company, or association from which all policy obligations shall be paid, \* \* \*".

There would be, we believe, no sound reason in providing the terms of Section 5875 for procedure "After the first policy year the mortuary premiums \* \* \* shall constitute the insurance fund of the corporation, company, or association from which all policy obligations shall be paid"

unless it was intended by the Legislature that the death claims incurred during the first policy year should be paid out of the mortuary premiums for the first policy year, leaving the terms of said Section 5875 to control and direct all policy obligations "after the first policy year."

The question submitted in paragraph 2 of your letter is, whether the Insurance Fund consists of the renewal mortuary premiums (other than first year) together with interest of at least 4% per annum thereon but excluding the special loading for limited payment policies and interest thereon. We think this question also is to be answered in the affirmative. We believe the plain terms contained in said Section 5875 permit no other construction of the language of that Section. That Section on this question states:

"After the first policy year the mortuary premium, according to the terms of premium payments of each policy, with the loading of the same as provided in section 5874, together with all interest and other accumulations of said fund, except the special loading for limited payment policies, with interest thereon as provided in section 5876, (Section 5876 provides for four per cent), shall constitute the insurance fund of the corporation, \* \* \*".

We find no other section, or part of any section, in said Article 4, contrary to the terms of said Section 5875 respecting what constitutes the Insurance Fund.

The question submitted in paragraph 3 of your letter is: Whether the Emergency Fund consists of the balance remaining in the Insurance Fund after paying for death, disability and other policy claims (excluding such claims during the first policy year). We think this question also should be answered in the affirmative.

This takes us back again to Section 5875, Article 4, Chapter 37, R.S. Mo. 1939. That section provides what shall constitute the Emergency Fund. Said Section 5875, after providing for "what shall constitute the Insurance Fund" in part, states: "and the amount remaining in said fund (evidently referring to the Insurance Fund) not required to provide for death, disability and other policy

claims, shall be set aside as an emergency fund, and may be deposited with the insurance department." We think it clear and beyond controversy that the provisions of said Section 5875 point out from whence shall be derived the Emergency Fund, and what shall constitute the said fund.

The question submitted in paragraph 4 of your letter is: Whether the amount of the Emergency Fund is required to be shown as a liability in an annual statement or examination report in order to determine the financial condition of a company.

We think this question also must be answered in the affirmative.

Section 5889 of said Article and Chapter, provides for the annual report. That section is as follows:

"The annual business of each and every corporation, company or association transacting business under the provisions of this article shall close on the 31st day of December of each year, and it shall, within sixty days thereafter, prepare and file in the office of the superintendent or other officer having supervision of insurance matters, a detailed statement, made upon blanks furnished by the insurance department, and verified under oath by the president and secretary of the company or association, giving all information in detail, that the insurance department may require, so that its true financial condition may be known."

Said Section 5889, supra, provides in the latter part thereof, that such annual report shall be a "detailed statement, made upon blanks furnished by the insurance department, and verified under oath by the president and secretary of the company or association, giving all information in detail that the insurance department may require, so that its true financial condition may be known." (Under-scoring ours). This would seem to make it imperative that the Emergency Fund provided for in said Section 5875 be included in the annual report so that the true financial condition of the company may be known to the Insurance Department. Without this item in the report it certainly would be withholding information which the Insurance Department might vitally need.

The question submitted in paragraph 5 of your letter is: Whether the amount of the Reserve Fund computed as set forth in Section 5876, Article 4, Chapter 37, R.S. Mo. 1939, is required to be shown as a liability in addition to the Emergency Fund in an annual statement or examination report in order to determine the financial condition of a company.

This question is also to be answered in the affirmative.

Said Section 5876 provides for the issuing of limited payment or any form of investment policies. Said Section further provides the amount of premiums shall not be less than the net term rate for the kind of policy issued, increased by such sum as will, improved at four per cent, equal the net single premium for the attained age at the end of the paying term of the policy, according to the actuaries' or combined experience table of mortality on which its calculations are based. Then said Section 5876 states that such increase of premium shall be reserved in a separate fund for the purpose of sustaining such policies after the cessation of premium payments, and shall be deposited with the Insurance Department in such securities as are now required by law. Thus, it seems there is created by said Section 5876 a Reserve Fund for the payment of limited payment policies or any form of investment policies issued by a company. These policies like other policies or contracts of an insurance company, we think, become liabilities. The Insurance Department would be entitled to such information in the annual statement or examination report, touching the question of the extent of the liability of a company growing out of such policies in order to determine whether there is sufficient assets in the Reserve Fund to discharge the liabilities of the companies on such policies, and in order for the Insurance Department to determine the financial condition of any such company. Said Reserve Fund is made up, insofar as limited payment policies are concerned, of premiums fixed at certain amounts as hereinabove pointed out. Said Section 5876 provides further that if any corporation doing business under the provisions of said Article 4, shall fail to state in its limited payment policies the portion of each of the premiums to be held by it for the purpose of sustaining the policies after the years during which the premiums are to be paid, then all such limited payment policies or investments that may be issued shall be valued according to the actuaries' or combined experience table and interest at four per cent. Thus, it seems that an extra penalty is placed upon the holders of such policies if the correct amount

of premiums as allocated to each policy shall not be stated therein. These assets and liabilities so shown would show, we think, the financial condition of any such company operating under said Article 4. We believe this condition, as well as others hereinabove pointed out, requires that the Reserve Fund computed as set forth in said Section 5876 is required to be shown as an asset in addition to the Emergency Fund in the annual statement or examination report of a company, in order to determine the financial condition of such company.

The question submitted in paragraph 6 of your letter is: Whether funds may be transferred from the Emergency Fund to provide for the Reserve Fund, thus reducing the Emergency Fund below the amount required by Section 5875.

This question, we believe, is to be answered in the negative. We find no statutory authority authorizing the transfer of the Emergency Fund or any part thereof to supplement or increase the Reserve Fund in any manner whatsoever.

Section 5875, as hereinabove pointed out, provides the source from which is derived and the quantity of the fund which shall constitute the Emergency Fund, and provides further, that such fund when created may be deposited with the Insurance Department. Said Section 5875 does provide that if, by any reason of excessive mortality, or other cause, the Emergency Fund as first constituted shall become exhausted, then the Superintendent of Insurance shall require the officers of such corporation, company or association, to notify all policyholders to pay an extra premium, sufficient to meet the amount of the maximum of the policies issued, apportioned equitably, and providing further that if the members fail to pay such extra premium within 30 days, such policies shall be commuted proportionately, and the corporation shall be liable only for such policies as thus commuted. This is the only reference made in said Article 4, as we observe such provisions, regarding any depletion of the Emergency Fund. Without statutory authority for the transfer from the Emergency Fund of funds to provide for the Reserve Fund a company would have no authority to make such transfer, we believe, especially if the Emergency Fund should be reduced below the amount required by said Section 5875.

The question you submit in paragraph 7 of your letter is: Whether a stipulated premium company may continue to operate even though the Emergency Fund is impaired but not exhausted. It is our opinion that a company may continue to

operate under such circumstances.

Referring again to said Section 5875 we find that the Legislature, in passing said Section as a part of said Article 4, anticipated that by excessive mortality, or other cause, the Emergency Fund, derived from the Insurance Fund, and being the balance remaining in said fund not required to provide for death, disability and other claims, might become "exhausted". Further provisions of said Section 5875 follow and provide the means and method of re-establishing said fund. But said Section 5875 makes no provision or demand that such a company discontinue business because of the depletion of the Emergency Fund. The sole penalty it seems, provided in said Section 5875 for the failure to re-establish the Emergency Fund, is visited upon the policyholders by providing that the policies of the members shall be commuted as is stated in said Section 5875. So, it would seem that the intent of the Legislature was that any company operating under said Article 4 could continue business even though its Emergency Fund were exhausted, and for the greater reason we believe it may continue to transact business where the Emergency Fund is only impaired.

The question submitted in paragraph 8 of your letter is: Whether a stipulated premium company is insolvent when its admitted assets are less than its unpaid claims, and other liabilities, including the amounts of the Emergency and Reserve Funds. We believe this question must be answered in the affirmative.

The lexicographers and the decisions of the Courts have many times given academic and active definitions of the word "insolvent". Our Supreme Court and our Courts of Appeals have upon numerous occasions defined the word. We shall use only one citation from our Supreme Court here. The question of what constituted insolvency of a firm doing business was before our Supreme Court in the case of Mitchell et al. vs. Bradstreet Co., 116 Mo. 226. The Court, defining the word, l.c. 240, (citing Bouvier's Dictionary, Insolvency, 809), said:

"\* \* \* A firm is understood to be insolvent when unable to pay their debts as they fall due in the usual course of trade or business. Bouvier's Dictionary, Insolvency, 809. It 'implies as well the present ability of the debtor to pay out of his estate all his debts, as also such attitude of his property as that it may be reached and subjected by process of law, without his consent, to the payment of such debts.' Eddy v. Baldwin, 32 Mo. 369; Thompson v. Thompson 4 Cush. 127; Bank v. Walton, 5 L.R.A. 765."

It would seem to be conclusive that if a company doing business on the stipulated premium plan does not have sufficient assets to pay its unpaid claims, and other liabilities, including those incident to the Emergency and Reserve Funds, it would be, according to the above definition of our Supreme Court, insolvent.

### C O N C L U S I O N

It is, therefore, the opinion of this Department, in view of the provisions of the above cited and quoted statutes that, with respect to companies organized under Article 4, Chapter 37, R.S. Mo. 1939:

- 1) Death claims incurred during the first policy year are to be paid out of the mortuary premiums for the first policy year.
- 2) That the Insurance Fund of such companies consists of the renewal mortuary premiums (other than first year) together with interest of at least four per cent per annum thereon, but excluding the special loading for limited payment policies and interest thereon.
- 3) That the Emergency Fund of such Article 4 companies consists of the balance remaining in the Insurance Fund created by Section 5875, R.S. Mo. 1939, after paying for death, disability and other policy claims, excluding such claims during the first policy year.
- 4) That the Emergency Fund is required to be shown as a liability in the annual statement or examination report of any such company.
- 5) That the Reserve Fund computed as set forth in Section 5876, R.S. Mo. 1939, is required to be shown in the annual statement or examination report.
- 6) That funds may not be transferred from the Emergency Fund to the Reserve Fund reducing the Emergency Fund below the amount thereof required by Section 5875, R.S. Mo. 1939.

Honorable Owen G. Jackson -10-

7) That a stipulated premium company may continue to operate even though the Emergency Fund is impaired but not exhausted.

8) That a stipulated premium company is to be regarded as insolvent if such company does not have sufficient assets to pay its unpaid claims, and other liabilities, including those incident to the Emergency and Reserve Funds.

Respectfully submitted,

GEORGE W. CROWLEY  
Assistant Attorney General

APPROVED:

J. E. TAYLOR  
Attorney General

GWC:ir

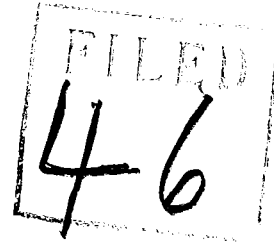


TAXATION:  
COUNTY COLLECTOR:

Acceptance of tender of undisputed taxes on Railway property will in no way affect right to enforce collection of taxes, the validity or constitutionality of which is denied by the Railway. Nonacceptance of tender of part of taxes on Railway's property will result in penalties attaching to entire amount of taxes due if any one or more of disputed levies are held valid, but penalties will not attach to the entire amount of taxes if all of disputed tax levies are held invalid.

January 15, 1947

Honorable William K. Journey  
Prosecuting Attorney  
Henry County  
Clinton, Missouri



Dear Sir:

This is in reply to a letter from Honorable Ray R. Pryer, formerly Prosecuting Attorney of Henry County, Missouri, requesting an official opinion of this department, and reading as follows:

"The Frisco Railway Co. has sent a check to the County Collector for the sum of \$7,877.14 for the current years taxes. However, they refused to pay the sum of \$606.36, which was on a County Library District Levy; the sum of \$79.83, which was a levy in a Special Road District in Henry County; and the sum of \$21.19 to the City of Deepwater, Mo. on city taxes.

"As to the Library Tax levy they claim that no law exists on which to make the levy.

"On the Special Road District Tax they claim it exceeds the constitutional limit.

"The Deepwater city tax they claim, also, is unconstitutional.

"On the voucher that is attached to the check the Company specifies that no prejudice shall inure against the enforcement of collection of said taxes by the proper units involved. However, the collector refuses to accept the check until he has an opinion as to whether acceptance of the check, as is, will work against attempted collection of the contested tax amounts."

In a telephone call to this office you further informed us that several taxpayers in your county have refused to pay the special road district tax and have not included the payment of such tax in their tender for taxes, and that other taxpayers have tendered payment of taxes due, including that part of the special road district tax which such taxpayers claim does not exceed the constitutional limit, but have refused to pay the amount of the special road district tax which such taxpayers claim exceeds the constitutional limit, and you requested an opinion on the effect of the acceptance or nonacceptance of these tenders by the collector.

It is stated in the letter that we received from Mr. Pryer that the Frisco Railway specifies in the voucher attached to the check for \$7,877.14 that no prejudice shall inure against the collection of taxes for which the Railway did not tender payment. Even though this provision had not been included in the voucher that the Railway attached to its check, the collection of the taxes assessed against the Railway and not paid could proceed, as the taxpayer is liable for such taxes, and it is the duty of the collector to enforce the collection of all unpaid taxes.

In the case of State ex rel. Buck v. St. Louis-San Francisco Ry. Co., 174 S. W. 64, the railroad claimed that a tax rate of 65¢ per \$100 valuation for school taxes was the maximum that could legally be levied, and in that case paid only that part of the school tax which would have been payable if the school tax had been levied at the rate of 65¢ per \$100 valuation. The collector accepted such tender and sued for the amount of taxes due on the railroad's property from that part of the tax rate for school purposes over and above the rate of 65¢ per \$100 valuation. Although the collector did not have to accept the tender of that part of the school tax that was admitted to be valid in that case (as was held in the case of State ex rel. v. Kansas City, Ft. S. & M. Ry. Co., 178 S. W. 444), he did accept such payment, and his right to collect the disputed portion of the tax was not challenged in the court.

In the case of State ex rel. v. Kansas City, Ft. S. & M. Ry. Co., cited above, the collector for the year 1912 accepted tender of all that amount of taxes levied for the year 1912 except \$23.56, which amount the railroad claimed was not due because it represented that part of the tax which was invalid as exceeding the constitutional limit that could be validly levied, as well as for the entire amount of taxes levied for the year 1913. The court held that the tax levied did not

exceed the constitutional limit and allowed recovery of the disputed amount which the railroad had refused to pay.

In the case of State ex rel. v. Southwestern Bell Tel. Co., 352 Mo. 715, 179 S. W. (2d) 77, a suit was brought for all taxes due to Audrain County for 1942 and for special road district taxes due to said county for 1941. It appears from the facts, as stated in the report of that case, that the county had accepted the tender of all taxes due the county for 1941 except the special road district tax. There was no contention made in the case that the collector could not enforce the collection of a valid special road district tax after accepting tender of all other taxes due the county for 1941.

The rule in this state regarding the effect of the non-acceptance by a collector of a tender of a part of the taxes assessed against any specific property is that if the disputed taxes are held to be valid levies, the penalties provided by law will attach to the entire amount of taxes due on such property. State ex rel. v. Kansas City, Ft. S. & M. Ry. Co., 178 S. W. 444.

In the case cited, the facts, as stated in the report, were:

"This is a suit against said railroad company and its receivers for taxes. There was a judgment for plaintiff for full amount sued for, and defendants have appealed.

"The total taxes against defendants' property in Bates county for the year 1912 were \$2,349.01 and for the year 1913 they were \$2,257.44. The defendants paid all the taxes for the year 1912, except \$23.56, and in December, 1913, tendered to the collector \$2,228.48 in full payment of the taxes for 1913. The tender was refused.

"The real controversy at the trial was in regard to the unpaid balance for the year 1912 and the difference of \$28.96 between the total tax for the year 1913 and the amount tendered. Those two disputed amounts represented that portion of the school taxes which defendants contended were illegal, in this: That various school districts in the county, which were formed of cities and adjoining territory, had increased their rate of levy beyond 65 cents on the \$100 assessed valuation, and that such

excess had resulted in the increase of defendants' taxes by the amounts so in dispute."

The Supreme Court of Missouri, in its opinion, said:

"The defendants in apparent good faith contended at the trial of the cause that such disputed portion of the taxes was void by reason of the provisions of section 11 of article 10 of our state Constitution. That contention was decided in favor of the validity of the taxes in an opinion by Faris, J., in *State ex rel. v. St. Louis & S. F. R. Co.*, 174 S. W. 64, decided since this appeal was taken. Appellants do not now insist on reopening that question, but protest that they should not be adjudged to pay the penalty of 1 per cent. a month. They contend that, if they are to be adjudged to pay such penalty, it should be estimated only on the amount the legality of which was disputed, and not on the amount which was tendered and not accepted. They say, that section 11459, Rev. Stat. 1909, requires the collector to receive and receipt for the taxes which may be tendered on any part of a tract of land. That section does not apply to any taxes, except taxes on land. It contemplates the payment of all taxes on a specified part or on an undivided part of the whole tract; but it does not contemplate the payment of a part of the taxes on the whole property. That section has no application to the facts in this case. We know of no law requiring the collector to accept a part of the taxes under the circumstances of this case. The collector's refusal to accept the amount tendered did not result in relieving defendant of the payment of the penalty on the amount tendered.

"We have no power to relieve the defendants of the penalty, nor to diminish it. \* \* \*"  
(Emphasis ours.)

It will be noted that the decision of the court in this case did not rest on the fact that the tender of \$2,228.48 for the taxes for 1913 was "in full payment" of such taxes, but the decision did rest on the fact that the taxpayer has no right to force the collector to accept payment for part of the taxes on the whole property.

Honorable William E. Journey - 5

If the disputed tax is held to be invalid or unconstitutional, no penalties will attach to the undisputed valid taxes, tender of which has been made to the collector. The Supreme Court of Missouri said in the case of State ex rel. v. Southwestern Bell Tel. Co., 352 Mo. 715, 1. c. 724-725:

"In view of the conclusion reached on the constitutional validity of Sec. 8716, it will not be necessary to rule the question on the refusal of the tender made in No. 38,801, since the refusal was on the sole ground that defendant did not include the special road district taxes in the tender.

"The judgment in No. 38,800 should be reversed, and the judgment in No. 38,801 should be reversed and the cause remanded with direction to the trial court to permit defendant to pay, without penalty and court costs, and without attorney's fee, the taxes there involved, except the special road district taxes. \* \* \*

#### CONCLUSION

It is the opinion of this department that the acceptance of the check for \$7,877.14 from the Frisco Railway Company will in no way affect the right to enforce collection of the taxes, the validity or constitutionality of which is denied by the Railway.

It is further the opinion of this department that if the collector refuses the tender made by the Railway Company, and any one or more of the disputed taxes are held to be valid levies, the penalties provided by law will attach to the entire amount of taxes on the Railway property, but if all of the disputed taxes are held invalid, no penalties will attach to the amount of the undisputed taxes tendered to the collector by the Railway.

Respectfully submitted,

APPROVED:

C. B. BURNS, Jr.  
Assistant Attorney General

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J. E. TAYLOR  
Attorney General

CBB:HR

COUNTY SCHOOL FUND:

LIQUIDATION AND DISTRIBUTION:

) If the proposal to distribute the  
) county school funds is approved,  
) such distribution shall be made as  
) soon as practicable or within a  
) reasonable time.

May 2, 1947

FILED

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*Copy to Mr. Jones*

Honorable Roy A. Jones  
Prosecuting Attorney  
Johnson County  
Warrensburg, Missouri

Dear Mr. Jones:

We have your letter of April 25, 1947, requesting an opinion from this department, which reads as follows:

"Pursuant to the Provisions of Senate Bill No. 186 passed by the 63rd General Assembly, a petition has been filed having the necessary number of signers and our county court has authorized a special election for Tuesday, May 27, 1947, for the purpose of deciding whether or not there shall be an annual distribution of the capital of the liquidated county and township school funds of Johnson County, Missouri.

"At the present time, \$152,600.00 of these funds are invested in U. S. Government bonds series "G". We have the sum of \$1441.54 not invested.

"If it is mandatory that the county court should request redemption of the funds invested in the series "G" bonds and distribute the proceeds forthwith, in the event the proposal carries, we will sustain a loss of \$3,357.20 as will be shown by the enclosed sheet.

"I would like to have your opinion as to whether or not we can hold these bonds

until maturity before making distribution or if we must redeem the bonds and take the loss in the event the proposal carries."

We are enclosing herewith a copy of our opinion rendered to Honorable Emory L. Melton, Prosecuting Attorney of Barry County, under date of February 7, 1947, holding that the capital of township and county school funds, which has been liquidated according to Section 7 of Article IX of the 1945 Constitution, and immediately reinvested in government bonds, may again be liquidated by the county court at any time such action is authorized by a majority of the voters voting in an election called to determine whether or not the capital of said fund shall be distributed annually to the schools of the county as provided by law.

The question now presented is, in the event such an election decrees distribution, is it mandatory for the county court to redeem the government bonds as soon as possible or should the county hold said bonds until maturity, which is 12 years in this case, before making the distribution?

Section 7 of Article IX of the Constitution is, in part, as follows:

"\* \* \* Any county or the city of St. Louis by a majority vote of the qualified electors voting thereon may elect to distribute annually to its schools the proceeds of the liquidated school fund, at the time and in the manner prescribed by law. \* \* \*"

Section 10376.2, Mo. R.S.A., which is one of the provisions enacted by the Legislature to implement the above constitutional provision, is, in part, as follows:

"\* \* \* Such special election shall be governed in all respects by the general election laws except wherein such general election laws are in conflict with this article. The results of the balloting at each election precinct shall be certified by the judges of election of such election precinct and attested by the clerks and transmitted to the body having control of the capital of the county and

township school funds, which said body shall, from such results so certified and attested, within ten days, determine whether the proposal to distribute annually the liquidated capital of the county and township school funds has received a majority of the votes cast in the county or City of St. Louis wherein such election shall have been held. If the proposal to distribute annually the capital of the liquidated county and township school funds shall receive a majority of the votes cast, the body having control of such county and township school funds shall proceed to thereafter distribute annually such liquidated funds to the school districts. The accumulated balance of such funds shall be apportioned on or before August 31 of each year, until such funds are liquidated and said apportionment shall be based upon the last enumeration on file in the office of the county clerk. \* \* \*

The answer to the question propounded depends upon the construction given the provision "If the proposal to distribute annually the capital of the liquidated county and township school funds shall receive a majority of the votes cast, the body having control of such county and township school funds shall proceed to thereafter distribute annually such liquidated funds \* \* \*." We submit that the phrase "shall proceed to thereafter distribute annually," should be interpreted as it reads, thus calling for annual distribution to begin as soon as practicable or within a reasonable time after the result of the election has been determined. This view is supported in *Donnelly Garment Co. v. Keitel*, 193 S. W. (2d) 577, where the court said at page 581:

"\* \* \* And a primary rule of construction of a statute is to ascertain from the language used the intent of the lawmakers if possible, and to put upon the language its plain and rational meaning in order to promote the object and purpose of the statute. *Haynes v. Unemployment Compensation Commission*, supra, 183 S. W. 2d loc. cit. 81, and cases there cited."



And also in the case of O'Malley v. Continental Life Ins. Co., 75 S. W. (2d) 837, 1. c. 839:

"The legislative intent in the enactment of the law is to be sought and effecuated. This is the rule of first importance in statutory interpretation. To ascertain such intent we invoke as aids such of the auxiliary rules of interpretation as may seem to bear with incidence as direct as may be upon the matter in hand. Briefly stated, these in substance recognize and require that the language of the act be considered (25 R. C. L., Sec. 216, p. 961); that each word be accorded its ordinary meaning, generally speaking; \* \*"

Following the above decisions, the intent of the Legislature is found by giving the language of the statute its ordinary and rational meaning.

We further submit that the above quoted phrase is mandatory in requiring the county court to act within a reasonable time. The use of the word "shall" in said phrase and the frequent use of the words "distribute annually" make this construction clear. The court said in Warrington v. Bobb, 56 S.W. (2d) 835, at page 837:

"\* \* \* in determining whether a statute is directory or mandatory, the prime object is to ascertain the legislative intention disclosed by the statutory terms and provisions in relation to the object of the legislation. Provisions relating to the essence of the thing to be done, that is, matters of substance, are mandatory, while, generally, statutory provisions not relating to the essence of the thing to be done, and as to which compliance is not a matter of substance, are directory. State ex rel. v. Brown, 326 Mo. 627, 33 S. W. (2d) 104, 107."

And also in the case of State v. Flynn, 147 S. W. (2d) 210, where it was said, at page 211:

"\* \* \* There is no absolute test by which the question here presented may be resolved, but in passing upon the matter (whether statute is directory or mandatory), the prime object is to ascertain the legislative intent from a consideration of the statute as a whole, bearing in mind its object and the consequences that would result from construing it one way or the other. State ex rel. Ellis v. Brown, 326 Mo. 627, 33 S. W. 2d 104. \* \* \*"

The provision calling for the time of distribution certainly is a matter of substance and relates to the essence of the thing to be done. The context of the statute shows that the primary object or purpose of said statute is to make possible the distribution of said fund to the schools. That is why the people vote on this proposition. And if it was not intended that such distribution should be made as soon as practicable or within a reasonable time, the people would not petition and vote at that particular time. The spirit of the law speaks of such distribution and we believe that there is no possible ground upon which to base the contention that distribution should be delayed until maturity of said bonds, that is, for 12 years.

Of course, this conclusion will make reliquidation of said fund through redemption of the government bonds necessary, but it must be presumed that the people are aware of what they are voting for and the benefits or complications that may result from the approval of such a proposition.

#### Conclusion

Therefore, it is the opinion of this department that if the proposal to distribute annually the capital of the liquidated county and township school funds which has been reinvested in government bonds as a county school fund, shall, under the provisions of Sections 10376.1 and 10376.2, Mo. R.S.A., receive a majority of the votes cast, the body having control of such fund shall proceed as soon as practicable or within a reasonable

Hon. Roy A. Jones

-6-

time to reliquidate said fund through redemption of said government bonds so that said fund may be distributed to the school districts.

Respectfully submitted,

DAVID DONNELLY  
Assistant Attorney General

APPROVED:

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J. E. TAYLOR  
Attorney General

DD:EG  
Enc.

TAXATION: Real estate belonging to non-profit organizations  
EXEMPTION: is not exempt from taxation.

May 15, 1947

FILED

*Copy to  
J. Smith*

Honorable Roy A. Jones  
Prosecuting Attorney  
Johnson County  
Warrensburg, Missouri

Dear Sir:

This is in reply to your letter of recent date wherein you submit a request for an opinion on the following statement of facts:

"The question has arisen here, as to whether a certain tract of land with the building on it, should be taxed for general State, County and School Taxes; or, whether it may be exempt from the Taxation under the Constitution and the Act of the last General Assembly, as to what property shall be exempt from Taxation.

"The whole situation, is this:-

"A Committee from the Chamber of Commerce contacted the Town And Country Shoe Company, to try to induce them to open a Shoe Factory here in Warrensburg. This Shoe Company agreed to come to Warrensburg, with a Factory; provided a suitable building was provided for them, with a minimum area of floor space; and, provided, this building should be leased to them, rent free, for a period of Twenty (20) years.

"The securing of a site and the erection of such a building would require quite a considerable outlay of money. The Board of Directors of the Chamber of Commerce canvassed the situation among quite a number of business men and found most of them willing to contribute to such an enterprise; some of them being willing to contribute this money without any return to them

whatsoever, in any event. Others of them were willing to contribute, but felt, that if at the end of the Twenty (20) years, this building might be occupied by a tenant willing to pay a fair rental, which might to some extent work a return on their contribution, they wanted that done.

"In pursuance of this whole plan, a Corporation was formed, known as the Warrensburg Industrial Development Corporation, with an authorized capital stock of \$100,000, divided into 2,000 Shares, of the par value of \$50 each; then various citizens and business men were solicited for contribution to the Chamber of Commerce, which would be turned over to the Warrensburg Industrial Development Corporation, to be used in the securing of a site for erection of the proposed building, or for the purchase of Stock in the Corporation.

"A good many of the contributors contributed their money to the Chamber of Commerce, with the Chamber of Commerce turning it over to the Corporation. Others of them took stock and part of the stock so taken, has been turned over to the Chamber of Commerce; so, that a fair amount of the stock belongs to the Chamber of Commerce.

"Almost immediately after the granting of the Charter of incorporation, to the Warrensburg Industrial Development Corporation, that Corporation made a contract with the Warrensburg Chamber of Commerce, by which it agreed to secure the location and erect a necessary building thereon, and lease said property, when completed and ready for occupancy, to the Chamber of Commerce for a period of Twenty (20) years, for a rental of One Dollar (\$1) per year, only.

"The Chamber of Commerce is sub-letting under this Contract and lease agreement to the Town And Country Shoe Company, for

One Dollar (\$1) per year, for a period of Twenty (20) years; the Shoe Company paying utility bills, in addition to the One Dollar (\$1).

"It is the contention of the Warrensburg Industrial Development Corporation and the Chamber of Commerce, that for this Twenty (20) year period, at least, this is strictly a 'no-profit' Corporation, and a 'no-profit' transaction; and, that so long as said building is used and occupied under such a lease agreement, that same should be and is, exempt under the Constitution and under the Act of the Last Session of the Legislature.

"The County Authorities are in doubt, as to what should be done; though, I believe that they feel under all the circumstances above outlined, that the property should not be taxed; but, want to be sure, that the property is really tax exempt; otherwise, it will be retained on the Tax Roll, as it was in the hands of an individual and on the Tax Roll for Taxes due in the year 1946."

I note from your request that the Industrial Development Corporation of the Chamber of Commerce is under the impression that since this organization is a strictly non-profit corporation and the transaction described in your request is a non-profit transaction, that for that reason the real estate owned by this corporation should be exempted from taxes during the term of the contract with the manufacturer to whom the corporation proposes to lease the premises for a period of twenty years.

Section 6 of Article X of the Constitution of 1945 provides as follows:

"All property, real and personal, of the state, counties and other political subdivisions, and non-profit cemeteries, shall be exempt from taxation; and all property, real and personal, not held for private

or corporate profit and used exclusively for religious worship, for schools and colleges, for purposes purely charitable, or for agricultural and horticultural societies may be exempted from taxation by general law. All laws exempting from taxation property other than the property enumerated in this article, shall be void."

Section 5 of House Committee Substitute for House Bill No. 471, passed by the 63rd General Assembly, which is the enabling act to carry out the provisions of said Section 6 of the Constitution, provides as follows:

"The following subjects shall be exempt from taxation for state, county or local purposes: First, lands and other property belonging to this state; Second, lands and other property belonging to any city, county or other political subdivision in this state, including market houses, town halls and other public structures, with their furniture and equipments and on public squares and lots kept open for health, use or ornament; Third, lands or lots of ground granted by the United States or this state to any county, city or town, village or township, for the purpose of education, until disposed of to individuals by sale or lease; Fourth, non-profit cemeteries; Fifth, the real estate and tangible personal property which is used exclusively for agricultural or horticultural societies heretofore organized, or which may be hereafter organized in this state; Sixth, all property, real and personal actually and regularly used exclusively for religious worship, for schools and colleges, or for purposes purely charitable, and not held for private or corporate profit shall be exempted from taxation for state, city, county, school, and local purposes; provided, however, that the exemption herein granted shall not include real property not actually used or occupied for the purpose of the organization but held or used as investment

even though the income or rentals received therefrom be used wholly for religious, educational, or charitable purposes."

If the lands referred to in your request are exempt from taxation, it is by virtue of the provisions of subsection 6 of Section 5 of said H.C.S.H.B. No. 471, supra. From an examination of said subdivision 6 and from an examination of Section 6 of Article X of the Constitution, we do not find where an organization is exempted from taxation solely on account of it being a non-profit organization. This subdivision does authorize exemption from taxation for property used exclusively for religious worship, for schools and colleges, or for purposes purely charitable and not held for private or corporate profit. In the case of *State ex rel. v. Gehner*, 11 S.W. (2d) 30, the Missouri Supreme Court, in considering the exemption provisions of the Constitution of 1875, quoted the following rules which we think are applicable under the Constitution of 1945, at l.c. 34:

"As the burden of taxation ordinarily should fall upon all persons alike, when one claims an exemption therefrom he must be able to point to the law granting such immunity and it must be clear and unambiguous.' *Kansas Exposition Driving Park v. Kansas City*, 174 Mo. loc. cit. 433, 74 S.W. 981.

"Such statute and constitutional provisions are construed with strictness and most strongly against those claiming the exemption.' *Beach on Public Corp.* par. 1443; *Dillon on Munic. Corp.* (3d Ed.) par. 776, and cases cited; 1 *Burroughs on Taxation*, Section 70; 1 *Desty on Taxation*, p. 108; *Cooley on Taxation*, pp. 204, 205.

"And very recently this court, by Walker, J., said: 'The policy of our law, constitutional and statutory, is that no property than that enumerated shall be exempt from taxation.' *State ex rel. Globe-Democrat Pub. Co. v. Gehner*, 316 Mo. 696, 294 S.W. loc. cit. 1018.



"A grant of exemption from taxation is never presumed; on the contrary, in all cases of doubt as to the legislative intention, or as to the inclusion of particular property within the terms of the statute, the presumption is in favor of the taxing power, and the burden is on the claimant to establish clearly his right to exemption." \* \* \* "

In the case of Memphis Chamber of Commerce v. City of Memphis, 232 S.W. 73, the question of whether or not the property of a Chamber of Commerce was exempt from taxation under a statute of that state was before the court. In that state, the Constitution authorized the General Assembly to exempt properties of non-profit corporations which were used for purposes purely religious, charitable, etc. The General Assembly of that state enacted enabling legislation to that provision of the Constitution and provided that (l.c. 74):

"All property belonging to any religious, charitable, scientific, or educational institutions, when used exclusively for the purpose for which the institution was created, or is unimproved and yields no income. All property belonging to such institution used in secular business and competing with a like business that pays taxes to the state shall be taxed on its whole or partial value in proportion as the same may be used in competition with secular business."

At l.c. 74, the court, in discussing the application of the exemption clause to the Chamber of Commerce, said:

"Now, can complainant be termed a corporation operated exclusively for religious, charitable, scientific or educational purposes?

"We think not. It is true it is not a corporation for profit, but, as before stated, its primary object is to promote the business and commercial interests of the city of Memphis. This is expressly stated in its charter. We are of the opinion, therefore, that it cannot claim

the benefit of the exemption extended to religious, charitable, scientific, or educational institutions. The mere fact that it administers to charity, or may give instructions of an educational nature along certain lines, does not render it an educational or charitable institution in the sense of our Constitution and statute exempting the property of such institutions from taxation."

A similar question was before the Massachusetts Supreme Judicial Court in the case of Boston Chamber of Commerce v. Assessors of Boston, 54 N.E. (2d) 199, cited in 152 A.L.R. 174. In that case, the court held (l.c. 174):

"A chamber of commerce the dominant purpose of which is to promote business and trade and to foster good business practices and relations in the community, with a view to increased profits as well as general public benefit, is not a 'charitable' or 'benevolent' institution within the meaning of a tax exemption statute."

While it appears from your request that the Chamber of Commerce is claiming exemptions because the organization is a non-profit organization, still if it were contended that the purposes of this organization are charitable, under the two cases hereinabove cited, the exemption provisions of the Constitution and statutes would not permit the exemption of this property from taxation.

Applying the above principles, we do not think the property held by the Warrensburg Industrial Development Corporation for the purposes stated in your letter would be exempt from taxation under the statutory and constitutional provisions hereinbefore set out.

#### CONCLUSION

It is therefore the opinion of this department that real estate and tangible personal property held by a non-profit

Hon. Roy A. Jones

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corporation is not exempt from taxation merely on account of the fact that such corporation is a non-profit corporation.

Respectfully submitted,

*Tyre W. Burton*

TYRE W. BURTON  
Assistant Attorney General

APPROVED:

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J. E. TAYLOR  
Attorney General

TWB:VLM

COURT

ENGINEER

The duly elected or appointed surveyor of Henry County is ex officio county highway engineer until January 1, 1949. County court is vested with the power to employ road and bridge foremen and other employees; highway engineer selects his assistants, subject to approval by the county court.

August 27, 1947

FILED

46

Honorable W. K. Journey  
Prosecuting Attorney  
Henry County  
Clinton, Missouri

Dear Sir:

This is in reply to your letter of July 28, 1947, wherein you request an opinion of this department relative to a question involving your county highway engineer. Said letter reads, in part, as follows:

"Henry County, Missouri, a county in class three, and one where highway engineer is dispensed with, under the provisions of section 8658, Mo. R.S., and being governed by section 8659 which provides that the county surveyor shall be ex-officio county highway engineer and among other things that the county surveyor, when acting as county highway engineer, to employ such assistants as may be deemed necessary by the court's orders.

"The 53rd General Assembly passed H.C.S. for H.B. 792 which repeals section 8658, but provides that in section 8659, Laws of Missouri, 1945, that the acts shall be and become effective January 1, 1949: Provided that any part of this section which may be necessary to remove any inconsistency with the Constitution of this State shall be and become effective July 1, 1946.

"Question 1. Is the duly elected or appointed surveyor of Henry County, Missouri the ex officio county highway engineer of

Henry County, Missouri until January 1, 1949?

"Question 2. Does the county highway engineer have the power to select and designate the road and bridge foremen and other employees that may be necessary to carry out the county court's orders, or is this power vested in the county court?"

Section 8668, R.S. Mo. 1939, provides that by a vote of the people of any county the provisions of the article relating to county highway engineer may be suspended, and in such event the provisions of the law relating to the appointment and duties of a county highway engineer shall not be enforced in such county.

According to the letter of request, Henry County did so vote, under the provisions of said Section 8668, to suspend the provisions of the law relating to county highway engineer. Section 8669, R.S. Mo. 1939, would then apply to said county, the pertinent part of which section reads as follows:

"In all counties in this state that may vote against the county highway engineer law in the manner prescribed in section 8668 of this article, all matters relating to roads and highways and the expenditures of the public funds thereon shall be governed by the laws then in force in such counties, except that part of the law pertaining to the appointment of the county highway engineer. In all counties wherein the services of a county highway engineer are dispensed with, as provided by section 8668 of this article, the county surveyor shall be ex officio county highway engineer, and, as such, shall perform such services pertaining to the working, improvement, repairing and maintenance of the roads and highways, and the building of bridges and culverts as provided by this article to be done and performed by the county highway engineer, or as may be ordered by the county

court; and for his services as ex officio county highway engineer he shall receive such compensation as may be allowed by the county court, of not less than three dollars nor more than five dollars for each day he may be actually employed or engaged as such county highway engineer.  
\* \* \* \*

From the above, we see that in accordance with Section 8669 the surveyor of Henry County is ex officio county highway engineer.

House Committee Substitute for House Bill No. 792, Laws of Missouri 1945, page 1493, passed by the 63rd General Assembly, repealed, among others, Sections 8668 and 8669, R.S. Mo. 1939. But it is to be noted that Section 8659 of said House Bill No. 792 says:

"The provisions of this act shall be and become effective January 1, 1949:  
Provided that any part of this act which shall be necessary to remove any inconsistency with the constitution of this state shall be and become effective July 1, 1946."

It might be contended that the repeal of certain of those enumerated sections is necessary to remove an inconsistency with the Constitution, but we do not agree with such contention. We feel that a true picture of the legislative intent in this and two companion bills may be better obtained by a brief review of these three bills passed by the 63rd General Assembly.

House Bill No. 792 repealed certain sections of the 1939 Revised Statutes relating to the office, appointment and duties of the county highway engineer. Said bill provides that the county courts in counties of the second, third and fourth class have authority to appoint a highway engineer and that the county court may appoint a county surveyor as highway engineer. As we have above indicated, Section 8659 provides that "the provisions of this act shall be and become effective January 1, 1949."

House Bill No. 793, found at page 1759 in Laws of Missouri 1945, repealed Section 13190, R.S. Mo. 1939, which

provided for the election of a surveyor in every county in this State at the November election in 1868, and every four years thereafter. Said House Bill No. 793 provided in lieu thereof for the election of a surveyor in counties of the second, third and fourth class in the year 1948, and every four years thereafter.

House Bill No. 794 is to be found in Laws of Missouri 1945, page 1400. Section 1 thereof says:

"In all counties of class one in this state there is hereby created the office of county highway engineer and surveyor, to be known and designated as highway engineer, who shall be the chief officer in such county in all matters pertaining to highways, roads, bridges, culverts and surveys. At the general election in the year 1948, and every four years thereafter, the qualified voters of each such county shall elect a highway engineer, who shall hold his office for four years and until his successor is elected, commissioned and qualified."

The remaining sections of said bill set out the duties of the county highway engineer in class one counties.

From a reading of these three bills it is quite obvious to see that the Legislature intended to, and we believe did, revise and rewrite the provisions affecting surveyors and county highway engineers as those offices relate to every county in this State. The three bills fit together to form a complete pattern for the offices of county surveyor and highway engineer which begin with the election in 1948, the offices to be taken January 1, 1949. The terms of the present surveyors, elected in 1944, are to continue unaffected for the remainder of their present terms. Such an interpretation and consideration of the three bills is the application of a principle of statutory construction, well recognized by the courts of this State. In *Grimes v. Reynolds*, 94 Mo. App. 576, the St. Louis Court of Appeals said at l.c. 584:

"Another principle of interpretation which must be closely adhered to is to consider all the statutes treating of the same subject-matter so that the meaning of any particular provision may be enlightened by a view of the general purpose pervading the entire law of the subject."

In *Glaser v. Rothschild*, 221 Mo. 180, it was stated at l.c. 209:

"There is no better settled rule of construction than the one which requires the court to read all acts and statutes relating to the same subject-matter, briefly called statutes in pari materia, and construe them together and gather from all of them the legislative intent. (*Sales v. Barber Asphalt Paving Co.*, 166 Mo. l.c. 677 and 678.)"

We feel the intent of the Legislature was strongly evidenced in the enactment of these three bills. As was stated in the *Reynolds* case, *supra*, at l.c. 584:

"The object of all rational interpretation is to reach the true intent and meaning of the lawmaking authority as expressed in the language it has employed to convey its thought. All other rules are subordinate to that great one."

The above is further strengthened by a reading of Section 13190a of House Bill No. 793, Laws of Missouri 1945, page 1759, which says:

"In all counties of this state the terms of all persons holding the office of county surveyor at the time of the effective date of this act shall not be vacated, or otherwise affected thereby, and all the provisions of law relating to the office of surveyor shall remain in full force and effect for the period of the term of such persons holding the office of county surveyor at the time of the effective date of this act, unless otherwise provided by



law. Otherwise the provisions of this article shall hereafter apply only to counties of Classes 2, 3 and 4."

Section 8, Article VI of the 1945 Constitution, says:

"Provision shall be made by general laws for the organization and classification of counties except as provided in this Constitution. The number of classes shall not exceed four, and the organization and powers of each class shall be defined by general laws so that all counties within the same class shall possess the same powers and be subject to the same restrictions. A law applicable to any county shall apply to all counties in the class to which such county belongs."

Section 8659 of House Bill No. 792, Laws of Missouri 1945, page 1493, supra, says that "any part of this act which shall be necessary to remove any inconsistency with the constitution of this state shall be and become effective July 1, 1946." Even if certain parts of this act were needed to remove inconsistencies with the Constitution in accordance with the above-quoted constitutional provision, such would not be true in the case at hand since Henry County elected, under the general provisions of Section 8668, R.S. Mo. 1939 (a provision applicable to all counties), to suspend the "engineer law." In the case of such an election by any county, Section 8669, R.S. Mo. 1939, provides that the county surveyor of such county shall be ex officio county highway engineer.

Your second and final question relates to the selection of road and bridge employees. The pertinent part relating to this question is found in Section 8669, R.S. Mo. 1939, the relevant part of which reads as follows:

" \* \* \* The county court may empower the county highway engineer, or the county surveyor when acting as county highway engineer, to employ such assistants as may be deemed necessary to carry out the court's orders and at such compensation as may be fixed by the court, not to exceed the sum of four dollars per day for

deputy county highway engineer nor more than three dollars per day for each other assistant for each day they may be actually employed."

In an interpretation of such a section we believe the word "may" is to be considered as directory and not mandatory; thus leaving it within the sound discretion of the county court to empower a county highway engineer to employ such assistants as may be deemed necessary. We feel that this above-quoted provision gives to the county court the authority to approve the appointment of assistants to the county highway engineer, and the proper exercise of the discretion given to the county court is to determine the question of whether an assistant is necessary; and it is proper for the county court to decide how many assistants are necessary to carry on the work delegated to the highway engineer. This authority extended to the county court does not extend or give the county court authority to say who shall be employed by the county highway engineer as an assistant. The power of choosing the man or men who are to be assistants to the engineer is vested exclusively in the highway engineer himself, subject to approval by the county court.

The above, of course, is limited to assistants and must be interpreted in light of Section 8595, R.S. Mo. 1939, the pertinent part of which reads as follows:

"Whenever any public money, whether arising from taxation or from bonds heretofore or hereafter issued, is to be expended in the construction, reconstruction or other improvement of any road, or bridge or culvert, the county court, township board or road district commissioners, as the case may be, shall have full power and authority to construct, reconstruct or otherwise improve any road, and to construct any bridge or culvert in such county or other political subdivision of the state, and to that end may contract for such work, or may purchase machinery, employ operators and purchase needed materials and employ necessary help and do such work by day labor. The county court, the township board or road district commissioners may

accept donations of labor or materials from interested parties either on road improvements or bridge constructions and said authority may employ labor or contractors to complete said improvements. \* \* \* Provided, that all such work shall be done under the supervision and direction of the county highway engineer, or some other competent engineer employed by the county court or other proper authority, at such compensation as may be agreed upon, payable wholly or in part out of the particular fund to be expended on said construction, reconstruction or other improvement."

#### CONCLUSION.

In view of the above, it is the opinion of this department that the intent and purpose of the Legislature was so strongly evidenced by the enactment of House Bills Nos. 792, 793 and 794 by the 63rd General Assembly as to lead to the conclusion that the effective date of House Bill No. 792 is January 1, 1949, as was expressly stated in Section 8659 of said bill. There is also no inconsistency with the Constitution in the laws relating to county highway engineer as they affect Henry County which would necessitate the acceleration of the effective date of House Bill No. 792 from that expressly provided for in the bill, which is January 1, 1949. It would thus follow that the County Surveyor of Henry County, by virtue of Section 8669, R.S. Mo. 1939, is ex officio County Highway Engineer until January 1, 1949. It is further the opinion of this department that the authority is vested in the county court to employ road and bridge foremen and other employees that may be necessary to carry out the county court's orders, except an assistant or assistants to the engineer, which power to choose is vested exclusively in the highway engineer, subject to the approval by the county court.

Respectfully submitted,

Wm. C. COCKRILL  
Assistant Attorney General

APPROVED:

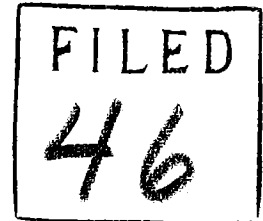
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J. E. TAYLOR  
Attorney General  
WCC:ml:lr

TAXATION: Taxes levied and assessed against land while under private ownership, and which is subsequently transferred to a state college, cannot be collected against said college while land is used and occupied for the purpose of the organization. The transferor does remain liable for such taxes, and his personal property may be levied on for the amount due.

September 5, 1947

Honorable Roy A. Jones  
Prosecuting Attorney  
Johnson County  
Warrensburg, Missouri



Dear Sir:

This is in reply to your letter dated August 9, 1947, wherein you requested an opinion of this office relative to a question on taxation. Said letter reads as follows:

"I would like to have your opinion on the following cases pertaining to taxation:

"Case No. 1.

"On June 28, 1943 Wm. B. Turnbow and Mary G. Turnbow, his wife, transferred by warranty deed certain real estate to the Board of Regents of Central Missouri State Teachers College, its successors and assigns. At that time there existed a tax lien against this property, in an amount unknown, occasioned by the assessments of June 1, 1942 and June 1, 1943. These assessments falling due on September 1, 1943 and September 1, 1944 respectively. Please rule as to what disposition should be made of the charge for these two last state years which are still shown delinquent on the tax record.

"Case No. 2.

"On May 20, 1946 George H. Richardson and Josephine Richardson, his wife, transferred by warranty deed certain real estate to the College Dormitory and Development Association, a non profit corporation, their successors and assigns. At that time there existed a tax lien against this property

in an amount unknown, occasioned by the assessment of January 1, 1946. Please rule as to what disposition should be made of the 1946 tax which is shown delinquent on the tax records."

Section 6, Article X of the 1945 Constitution provides as follows:

"All property, real and personal, of the state, counties and other political subdivisions, and non-profit cemeteries, shall be exempt from taxation; and all property, real and personal, not held for private or corporate profit and used exclusively for religious worship, for schools and colleges, for purposes purely charitable, or for agricultural and horticultural societies may be exempted from taxation by general law. All laws exempting from taxation property other than the property enumerated in this article, shall be void."

House Committee Substitute for House Bill No. 471, relating to taxation and revenue, was passed by the 63rd General Assembly, and is found in Missouri Laws of 1945, page 1799. Section 5 of said act provides that certain property is exempt from taxation, and reads as follows:

"The following subjects shall be exempt from taxation for state, county or local purposes: First, lands and other property belonging to this state; Second, lands and other property belonging to any city, county or other political subdivision in this state, including market houses, town halls and other public structures, with their furniture and equipments and on public squares and lots kept open for health, use or ornament; Third, lands or lots of ground granted by the United States or this state to any county, city or town, village or township, for the purpose of education, until disposed of to individuals by sale or

lease; Fourth, non-profit cemeteries; Fifth, the real estate and tangible personal property which is used exclusively for agricultural or horticultural societies heretofore organized, or which may be hereafter organized in this state; Sixth, all property, real and personal actually and regularly used exclusively for religious worship, for schools and colleges, or for purposes purely charitable, and not held for private or corporate profit shall be exempted from taxation for state, city, county, school, and local purposes; provided, however, that the exemption herein granted shall not include real property not actually used or occupied for the purpose of the organization but held or used as investment even though the income or rentals received therefrom be used wholly for religious, educational, or charitable purposes."

State ex rel. City of St. Louis v. Baumann, Collector of Revenue, 153 S.W. (2d) 31, involved a situation where the City of St. Louis was the highest bidder and received a certificate of purchase to a lot in the City of St. Louis which had been offered for sale because of taxes delinquent. After the redemption period had elapsed without the lot being redeemed, the city presented its certificate and demanded a deed from the Collector, who refused same because of the statutory provision which says that before a certificate holder may apply for a deed he must pay all taxes which accrued prior to and since the issuance of the certificate. The city contended that, since by the Constitution it is not subject to taxes, the statutory provision could not apply to it and it was entitled to the deed without first paying any taxes. The Supreme Court, In Banc, held at l.c. 35:

"It is our conclusion that the City is entitled to a deed to the land involved, and it is the duty of the collector to execute and deliver one, as the City is not required to pay the outstanding taxes. The same decision on a similar state of facts was reached in Lancaster County v. Trimble 34 Neb. 752, 52 N.W. 711."

At l.c. 34 the court said:

"Even though taxes have been levied and assessed against a tract of land while under private ownership, if it be afterwards acquired by a governmental agency such taxes may not be collected. *Bannon v. Burnes*, C.C.W.D.Mo., 39 F. 892. And see cases cited in the notes in 30 A.L.R. 413 and 2 A.L.R. 1535. Since the City is seeking to purchase the land in its public governmental capacity and not as a mere fiduciary, the land becomes immune from taxation as soon as the City becomes the owner of it and such immunity would extend to taxes previously assessed and levied."

This principle is further expressed in the annotation of 2 A.L.R., where it is stated at page 1536:

"This distinction is also clearly made in *Foster v. Duluth* (1913) 120 Minn. 484, 48 L.R.A. (N.S.) 707, 140 N.W. 129, in holding that property of the city could not be sold for taxes which were a lien upon the land at the time the city acquired it. The court said: 'After its purchase by the city in July, 1905, the property was devoted to public uses, and became public property. It was not thereafter subject to taxation. This is conceded by plaintiff. It is technically inaccurate to say that it was exempt from taxation, for the term "exemption" rather presupposes a liability removed by some constitutional or statutory provision. The property is "exempt," not because of any such provision declaring it exempt, but because of its character as public property devoted to a public use. The property of the state and of its political subdivisions, arms, or agencies, such as cities within its borders, when used exclusively for public purposes, is not subject to taxation, in the absence of constitutional or statutory provisions making public property subject to the tax laws of the state.\* \* \*"

And at page 1538 it is stated:

"Under a statute providing that all lands exempted from taxation, including lands of any school district, shall not be affected by any sale made for taxes, etc., the sale of land acquired by a school district by condemnation is invalid, although the land was assessed and the tax for which it was sold was levied before title had been acquired by the district. Independent School Dist. v. Hewitt (1898) 105 Iowa, 663, 75 N. W. 497."

From the above, then, it may be concluded that land acquired by the state or its instrumentalities or a governmental agency would be immune from the payment of taxes as soon as such instrumentality becomes the owner; and such immunity would extend to taxes previously assessed and levied. In *Gillian v. Adams*, 180 Tenn. 74, the court said that education is a "governmental function." And, in *School District No. 3 of Town of Adams v. Callahan*, 237 Wis. 560, it is stated that the establishment of a system of public instruction in a state is a "governmental function." The reasoning employed in the cases above referred to, as relates to city owned property, would, we feel, be likewise applicable to the land in question; namely, that the property partakes of a public nature, used exclusively for public purposes, devoted to a public use. The taxation of public property owned by the state or its municipal divisions would mean that the state would be taxing itself in order to raise money to pay over to itself, and the collection of such taxes might result in destroying the public character of the property. It would thus logically follow that real estate acquired by a state college, which is used and occupied for the purpose of the organization, would be considered as having been acquired by a governmental agency so as to be controlled by the holding of the *Baumann* case, *supra*. Therefore, taxes levied and assessed against real estate while under private ownership cannot be collected after such real estate has been acquired by a state college, while being used and occupied for the purpose of the organization. The real estate becomes immune from taxation as soon as the college becomes the owner, and such immunity would extend to taxes previously assessed and levied.

The above is in answer to Case No. 1, which you presented in your letter of request. In answer to Case No. 2, on the facts presented, inasmuch as the College Dormitory and Development Association is a non-profit corporation operating solely for the



purpose of the state college, that is, housing some of the students, it is our opinion that the same reasoning employed in answer to Case No. 1 would be applicable to the instant case, if such application is not excluded by the proviso of Section 5 of House Bill No. 471, Missouri Laws of 1945, page 1799, which reads as follows:

"\* \* \* provided, however, that the exemption herein granted shall not include real property not actually used or occupied for the purpose of the organization but held or used as investment even though the income or rentals received therefrom be used wholly for religious, educational, or charitable purposes."

In an opinion rendered by this office August 6, 1942, to Mr. R. W. Starling, Member of the Board of Regents of Central Missouri State Teachers College, it was held that real estate conveyed to this College Dormitory and Development Association and used for the purpose of this Association was exempt from taxation. This holding is in line with the holding of the Illinois case cited in 157 A.L.R. 851, since the facts are quite analogous to the case at hand. There it is stated:

"The fact that property to which a nonprofit corporation, organized to promote the interests of a state university, holds the legal title in trust for the university, is leased by it to the university for a term of years at an annual rental which will suffice to discharge obligations incurred in the construction of buildings thereon, does not affect its exemption from taxation as property used for public educational purposes."

Therefore, subject to the qualifications contained in the above quoted proviso of 1945 Missouri Laws, page 1799, it may be concluded that the property in both Case No. 1 and Case No. 2 is exempt from taxation by virtue of the constitutional and statutory exemption hereinabove referred to. Since the property in question, as regards its character and public use by an instrumentality of the state, is quite analogous to property acquired by the city, as was involved in the Baumann case, supra, and the reasons for exempting such property from taxation are quite the same, we feel that the principle established in the Baumann case would likewise apply to the two cases presented herein, and that

such immunity from taxation would extend to taxes previously assessed and levied.

While it is true that a personal judgment may not be obtained in Missouri against a taxpayer for taxes against his land, Section 11086, R.S. Mo. 1939, provides in part as follows:

"The collector shall diligently endeavor and use all lawful means to collect all taxes which they are required to collect in their respective counties, and to that end they shall have the power to seize and sell the goods and chattels of the person liable for taxes, in the same manner as goods and chattels are or may be required to be seized and sold under execution issued on judgments at law, and no property whatever shall be exempt from seizure and sale for taxes due on lands or personal property: \* \* \*"

In commenting on this section, the court in *State ex rel. Hayes v. Snyder*, 139 Mo. 549, said at l.c.555:

"There are therefore two different methods provided by statute for the collection of taxes against real estate, viz., one by suit to enforce the State's lien against the land, the other to distrain personal property for 'all taxes.' In re Life Association of America, 12 Mo. App. 40, it was said: 'The right thus given to distrain personal property for "all taxes," as well before as after they have become delinquent, shows that all taxes are personal charges against the owner of the property in respect of which they are levied. It is true that a tax is not a mere debt in the sense that a common law action will lie for its recovery. It is an impost levied upon the citizen in invitum; and for coercing its payment the State is limited to the modes pointed out by statute.' Carondelet v. Picot, supra."

Since, then, in our particular case the lien may not be enforced against this exempt body, is there anyone else to whom the collector may look for the collection of the delinquent

taxes in question; namely, those taxes which were assessed to the owner prior to the transfer, and which still remain unpaid? In line with the theory that the taxes on land are a personal charge against the owner, Section 10940, R.S.Mo. 1939, reads as follows:

"Every person owning or holding property on the first day of June, including all such property purchased on that day, shall be liable for taxes thereon for the ensuing year."

Although Section 10940 was repealed by House Committee Substitute for House Bill No. 471 by the 63rd General Assembly, the provisions as to liability for taxes were the same, the date merely being changed from the first day of June to the first day of January. In 61 C.J., page 207, it is stated:

"\* \* \* But where property is required to be assessed as of a certain day in the year, and is then properly assessed to the person owning it on that day, he is not relieved from liability for such taxes by his subsequent transfer or conveyance of it to another, although made before the tax became payable, unless the statute makes some provision for apportionment of the tax between the buyer and seller.\* \* \*"

In *Atlantic & Pacific Railroad Co. v. Cleino*, 2 Dillon 175, the United States Circuit Court for the Eighth Circuit had before it a case where the vendee had acquired land which had outstanding against it taxes assessed against it while in the hands of the vendor prior to the transfer. The sheriff had attempted to seize certain personal property of the vendee for these taxes assessed against the vendor. The vendor sold the property by authority of an act of 1870. The court at 1.c. 181 said:

"\* \* \* Neither the act of 1870, nor any other act, authorizes a levy for back taxes on real estate, to be made on the personal property of any one, save the person who was the owner of the land at the time the assessment was made.\* \* \*"

CONCLUSION

It is, therefore, the opinion of this department that, on real estate transferred by warranty deed on June 28, 1943, to the Board of Regents of Central Missouri State Teachers College, its successors and assigns, a tax lien on such real estate occasioned by assessments of June 1, 1942, and June 1, 1943, is not enforceable against the present transferees. It is further the opinion of this department that, on real estate transferred on May 20, 1946, by warranty deed to the College Dormitory and Development Association, a non-profit corporation, their successors and assigns, a tax lien on such real estate occasioned by the assessment of January 1, 1946, is not enforceable against the present transferees.

It is also the opinion of this department that, because by statute the owner of property on tax day is made liable for taxes thereon, and because of Section 11086, R.S. Mo. 1939, supra, a levy may be made on the personal property of the transferor for taxes due which were assessed against the transferor prior to the transfer.

Respectfully submitted,

Wm. C. COCKRILL  
Assistant Attorney General

APPROVED:

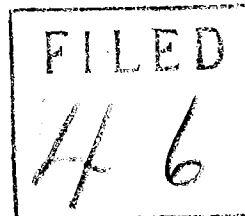
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J. E. TAYLOR  
Attorney General

NEWSPAPERS: A newspaper which suspended publication during the war because of the owner being inducted into the armed forces may be reinstated within one year after hostilities have ceased with all benefits theretofore held in the matter of publishing legal notices.

October 30, 1947

Honorable Kelso Journey  
Prosecuting Attorney  
Henry County  
Clinton, Missouri



Dear Sir:

This is in response to your letter of recent date wherein you submit to this office a request for an official opinion upon the following statement of facts and question:

"David D. Scroggs, Sr. and David D. Scroggs, Jr., operating under the firm name of Scroggs and Son, have been the owners of the Montrose, Missouri Tidings, a weekly newspaper of this state since July 1, 1938. With the approach of World War No. 2, the junior member of the firm being subject to military service, the paper was leased to Glen A. Campbell on July 1, 1941 and Mr. Campbell operated the paper until August 1, 1943 as the publisher, after which he left the newspaper work and enlisted in the Navy. On August 1, 1943, the newspaper was taken over by David D. Scroggs, Sr., who operated it until December 9, 1943 when the paper discontinued publication due wholly to conditions attributable to the war. The junior member of the firm, David D. Scroggs, Jr., enlisted in the Coast Guard in February, 1942, and was discharged in November of 1945. The publication of the paper was resumed on July 19, 1947 and was re-admitted to the U. S. mails as second class matter on the same date. The owners of the paper have filed with the Secretary of State the proper notice of intention to republish said newspaper, setting forth the name of the publication, its volume and cost, its frequency of publication, and its re-admittance to the Post Office where it was previously listed as second class mail matter. Hostilities were terminated by presidential proclamation on December 31, 1946.

"Question: Are public advertisements and orders of publication in the above paper under the provisions of Section 14968, Chapter 119, Revised Statutes of Missouri, 1939, as amended August 2, 1943, valid and legal as coming within the proviso in the above statute in said section in regard to newspapers which were forced to suspend publication during the war?"

From the statement of facts which you have submitted, it appears that David D. Scroggs, Sr., and David D. Scroggs, Jr., have owned a certain newspaper since July 1, 1938, and that on account of hostilities the junior member of the firm entered military service, and during the time while he was in military service, the newspaper was leased to two parties who operated it up until December 9, 1943, at which time publication was discontinued. It also appears that the junior member of this firm was in military service from 1942 to 1945 and that in 1947 the publication of the paper was resumed and entered in the United States mails as second class matter. The provisions to the statute applicable to your question are found in Laws of Missouri, 1943, at page 860. Section 14968 of this act provides in part as follows:

"All public advertisements and orders of publication required by law to be made and all legal publications affecting the title to real estate, shall be published in some daily, tri-weekly, semi-weekly or weekly newspaper of general circulation in the county where located and which shall have been admitted to the post office as second class matter in the city of publication; shall have been published regularly and consecutively for a period of three years; shall have a list of bona fide subscribers voluntarily engaged as such, who have paid or agreed to pay a stated price for a subscription for a definite period of time: Provided, that when a public notice, required by law, to be published once a week for a given number of weeks, shall be published in a daily, tri-weekly, semi-weekly or weekly newspaper, the notice shall appear once a week, on the same day of each week, and further provided, that every affidavit to proof of publication shall state that the newspaper in which such notice was published has complied with the provisions

of this section: Provided further, that the duration of consecutive publication herein provided for shall not affect newspapers which have become legal publications prior to the effective date of this section. Provided, however, that when any newspaper shall be forced to suspend publication in any time of war, due to the owner or publisher being inducted into the armed forces of the United States, the same may be reinstated within one year after actual hostilities shall have ceased, with all the benefits under the provisions of this section, upon the filing with the Secretary of State of notice of intention of said owner or publisher, his widow or legal heirs, to republish said newspaper, setting forth the name of the publication, its volume and number, its frequency of publication, and its readmission to the post office where it was previously entered as second class mail matter, and when it shall have a list of bona fide subscribers voluntarily engaged as such who have paid or agreed to pay a stated price for subscription for a definite period of time. \* \* \* "

From your letter, it appears that all the provisions of the act have been complied with, and the only question now is, is David D. Scroggs, Jr., who was one of the owners of this newspaper and who was in military service at the time the publication was discontinued, qualified to resume publication of this newspaper and able to publish legal notices therein. This statute is somewhat penal in nature and should receive a strict construction, and unless one is clearly within the provisions of it, it should not be applied against him. We find this is somewhat penal in nature for the reason that where a publication is discontinued for a certain length of time, then the publisher or owner is not authorized to publish legal notices until he can qualify under the statute.

Under the proviso clause in said Section 14968, it is provided that when the newspaper is forced to suspend publication in any time of war due to the owner or publisher having been inducted into the armed forces that such newspaper may be reinstated within one year after actual hostilities have ceased. When such paper is so reinstated, then it has all the benefits under the laws which it had prior to such suspension. As stated in your inquiry, hostilities were terminated by presidential proclamation on December 31, 1946,

so, insofar as time is concerned, application for reinstatement is timely.

From our research on this question, we have come to the conclusion that the answer of it will depend on whether or not the junior member of this firm would be classed as an owner of the newspaper during the time that he was in service. Referring to the statute again, it will be seen that it does not provide that the owner shall be the sole owner or sole publisher, but merely an owner. According to the definitions of the term "owner" which we have been able to find, we do not think the lawmakers used the word with the intention of it meaning the sole owner. In Volume 30, Permanent Edition, Words and Phrases, page 117 of the Pocket Part, we find where the Missouri Supreme Court defined the term "owner" as follows:

"Upon owner's failure to redeem from tax sale within the period allowed for such redemption, the holder of tax sale certificate is such an 'owner' as may call in the legal title upon producing his certificate and paying the taxes then standing against the land. \* \* \*"

At page 119 of the same Pocket Part, we find the term "owner" defined as follows:

"The word 'owner' as used in statutes providing for eminent domain proceedings includes all persons who have an interest or estate in the property taken or injured. Mesich v. Board of Com'rs of McKinley County, 129 P. 2d 974, 976, 977, 46 N.M. 412."

Under these definitions, it would seem that anyone who has an interest in property would be termed and held as an owner. According to that holding, the junior member of the firm of Scroggs and Son would be considered as an owner of the Montrose, Missouri, Tidings during the time that he was in service.

#### CONCLUSION

From the foregoing, it is the opinion of this department that public advertisements and orders of publication in a



Hon. Kelso Journey - 5

newspaper, namely, the Montrose, Missouri, Tidings, which discontinued publication due wholly to conditions attributable to the war, would be valid and legal publications under the Missouri law in said newspaper which has resumed publication on July 19, 1947, and which has been readmitted to the United States mails as second class matter.

Respectfully submitted,

TYRE W. BURTON  
Assistant Attorney General

APPROVED:

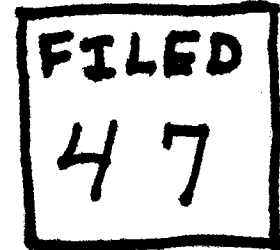
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J. E. TAYLOR  
Attorney General

TWB:VLM

MAGISTRATE COURT: In re: Three questions on sheriff, jury and  
SHERIFF: witness fees in magistrate court.  
FEES:

September 3, 1947



Honorable O. A. Kamp  
Judge of Magistrate Court  
Montgomery County  
Montgomery City, Missouri

Dear Sir:

This will acknowledge your request for an opinion which, in part, reads:

"I would like to have information from your office in answer to the following questions:

"1. What fee should the sheriff receive for summoning a jury for Magistrate Court?

"2. What fee should jurors in Magistrate Court receive?

"3. What fee should witnesses in Magistrate Court receive?"

We shall endeavor to answer the three questions set out in your request in the order in which they appear.

Regarding the selection and summoning of juries for magistrate courts Senate Bill No. 107 was enacted by the 64th General Assembly with an emergency clause and was approved by the Governor and became effective June 23, 1947.

This bill generally provides that the county court shall select the names of prospective jurors to make up the jury list and upon request of any magistrate the clerk of the county court shall certify to the magistrate the first twenty-four names appearing on the jury list. Thereafter the clerk of the magistrate court shall summons each person on said list by registered mail. Thus, Section 7 of Senate Bill No. 107 in part provides:

"Upon receipt of the list of names certified by the county clerk, the clerk of the magistrate court shall summons each person on said

Hon. O. A. Kamp

list by registered mail, requesting a return receipt signed by addressee only, to appear before the magistrate on the date fixed by the magistrate and each person so summoned shall appear in obedience to such summons and shall serve as a juror until excused by the magistrate, \* \* \* "

When this procedure is followed the sheriff does not summons the jurors and consequently would receive no fee.

However, Section 15a of Senate Bill No. 107 further provides in part:

"In any county now or hereafter having a population of less than 70,000 inhabitants, the magistrate or magistrates may, by order of record, direct that jurors be selected by issuing a summons to the sheriff or other officer ordering him to summons the appropriate number of jurors. \* \* \* In the event that the magistrate or magistrates make the order herein provided for, the order shall have the effect of suspending the provisions of this act in the selection of the general county panel and the selection of jurors thereunder; and such provisions shall remain suspended until such order is rescinded."

Where the alternative procedure for summoning a jury as provided above is adopted the magistrate in making such order would be ordering a "special venire" which would have to be executed by the sheriff.

Montgomery County is a county of the 3rd class and regarding fees to be charged and collected by the sheriff from such counties Section 3, Laws Missouri 1945, page 1562 in part provides:

"It shall be the duty of the sheriff in counties of the third class to charge and collect in all instances every fee, both civil and criminal, including mileage, accruing to his office by law, except such criminal fees as are chargeable to the county, \* \* \* " (Underscoring ours.)

Since the above quoted section provides that the sheriff shall charge and collect all fees "accruing to his office by law" except such criminal fees as are chargeable to the county we must look to the existing fee statutes to determine the amount of such fees which

the sheriff is authorized to collect. Section 13411, R.S. Mo. 1939 which sets out the fees of the sheriff in part provides:

"For executing and returning a special  
venire facias - - - - - 2.00"

Therefore, in answer to your first question, where the magistrate orders a special venire as provided in Section 15a of Senate Bill No. 107, the sheriff would charge and collect a fee of \$2.00 for executing and returning it. However, if the jury summoned by the sheriff serves in a misdemeanor case where the defendant is acquitted the sheriff's fee for summoning the jury would be a criminal fee chargeable to the county and consequently would not be collected by the sheriff. We further point out that under Section 3, Laws Missouri, 1945, page 1562, the sheriff may only retain fees collected by him in civil matters.

In answer to your second question regarding juror's fees in the magistrate court, we again direct your attention to Senate Bill No. 107. Where the jurors on a regular panel are summoned by registered mail as provided in Section 7 of the Act, supra, the following is provided in Section 10 of the Act relating to the fees that they shall receive:

"Each juror on the regular panel summoned under this act shall receive three dollars per day for every day he may actually serve as such, and five cents for every mile he may necessarily travel going from his place of residence to the courthouse, or other place of service on the jury where the trial may be held at a place other than the courthouse, and returning to the same, to be paid out of the county treasury."

Where extra jurors are summoned for a specific case Section 10a of Senate Bill No. 107 provides as follows regarding the fees:

"Each juror summoned for service in a specific case and who actually serves in such case shall receive the same compensation as a juror on the regular panel and each juror summoned for a specific case but who does not actually serve in such case shall receive one dollar except that jurors summoned or serving in more than one case at the same place on the same day shall only be allowed fees in one case."

Where a jury is selected and summoned as provided in Section 15a of the Act, supra, each juror shall receive \$1.00 per day for every day he actually serves. Thus, Section 15a provides:

"\* \* \* In such event, each juror summoned shall receive one dollar per day for every day he may actually serve as such, and five cents for every mile he may necessarily travel going from his place of residence to the place where the trial is held, and such fees and expenses shall be taxed as costs in the particular case tried.

\* \* \* "

Regarding the fees that witnesses in the magistrate court receive we are enclosing an opinion submitted to the Honorable Forrest Smith, State Auditor, dated July 29, 1947, which directly answers this question.

#### CONCLUSION

It is, therefore, the opinion of this department that: (1) Where a jury is selected and summoned by order of the magistrate as provided in Section 15a of Senate Bill No. 107 or where extra jurors are summoned by the sheriff for a specific case the sheriff shall charge and collect a fee of \$2.00 unless such fee is a criminal fee chargeable to the county. The fee of \$2.00 in a criminal case which is not chargeable to the county must be paid over to the county treasurer. The fee of \$2.00 in a civil case shall be retained by the sheriff. (2) Each juror on the regular panel and extra jurors summoned for service in a specific case shall receive \$3.00 per day for every day actually served and .05¢ for every mile necessarily traveled going from his place of residence to the place where trial is held and return; jurors selected and summoned by order of the magistrate as provided in Section 15a of Senate Bill No. 107 shall receive \$1.00 per day for every day actually served and .05¢ for every mile necessarily traveled in going from his place of residence to the place where the trial is held and return. (3) Witnesses in the magistrate court shall receive \$1.00 for each day of actual attendance.

Respectfully submitted,

APPROVED:

RICHARD F. THOMPSON  
Assistant Attorney General

J. E. TAYLOR  
Attorney General

RFT:mw:ir  
Enc.

PUBLIC WELFARE: Appointment by County Court in  
SUPERINTENDENT: counties of the third and fourth  
class.

FILED

48

January 24, 1947

2/4

Honorable Esco V. Kell  
Prosecuting Attorney  
Howell County  
West Plains, Missouri

Dear Sir:

This acknowledges your recent request for an opinion,  
based on the following facts:

"The question has come up in this county  
regarding the appointment of County  
Superintendent of Public Welfare and  
whose authority it is to make such an  
appointment.

"Section 9719, Laws of Missouri, March,  
1946, provides as follows: 'The county  
court in counties of the third and  
fourth classes may in its discretion,  
with an order of the juvenile court  
showing approval, appoint a county super-  
intendent of public welfare, and such  
assistants as it may deem necessary,  
-----'

"The question is, then, whether the  
County Court makes the appointment of  
the Superintendent of Public Welfare or  
does the Juvenile Court make it.

"May I have the opinion of your office  
regarding the interpretation of the  
above portion of Section 9719, Laws of  
Missouri, 1946?"

The appointment of a County Superintendent of Public  
Welfare, and such assistants as are necessary, in third and  
fourth class counties is provided for in Section 9719, Mo.

R.S.A., March 1946 Pamphlet, House Bill No. 682, and is as follows:

"The county court in counties of the third and fourth classes may in its discretion, with an order of the juvenile court showing approval, appoint a county superintendent of public welfare, and such assistants as it may deem necessary. Whenever the county court or any county has appointed a superintendent of public welfare such officer shall assume all the powers and duties now conferred by law upon the probation or parole officer of such county and shall assume all the powers and duties of the attendance officer in said county and all the powers and the duties of the attendance officer in any incorporated town or village having a population of more than 1,000 inhabitants, and no other or different probation or parole officer or attendance officer or officers shall be appointed by the judge of the juvenile court, by the county superintendent of public schools, or by the school board or any incorporated city, town, or village school district or consolidated school district."

The functions of the Juvenile Court under this section are only to sanction and order the County Court to appoint such superintendent. The actual power to appoint is lodged with the County Court, and then it is only discretionary with the Court as to whether or not the appointment shall be made. Said section goes further in clarifying the Court's power to appoint the Superintendent of Public Welfare wherein it reads, "Whenever the county court of any county has appointed a superintendent of public welfare." This section clearly places the appointment with the County Court.

Honorable Esco V. Kell

-3-

Conclusion.

It is therefore the opinion of this Department that when the Juvenile Court orders and approves the appointment of a County Superintendent of Public Welfare in third and fourth class counties, the County Court has authority, in its discretion, to appoint such superintendent.

Respectfully submitted,

E. BRADY DUNCAN  
Assistant Attorney General

WED:ml

APPROVED:

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J. E. TAYLOR  
Attorney General



ASSESSORS: Township assessors take office on the  
TOWNSHIP ORGANIZATION: first day of September following  
COUNTIES: election.

November 7, 1947



Honorable William M. Kimberlin  
Prosecuting Attorney  
Cass County  
Harrisonville, Missouri

Dear Sir:

This is in reply to your letter of recent date wherein you submit the question as to the time when a township assessor takes office.

Under Section 13944, R. S. Mo. 1939, township elections are held biennially on the last Tuesday in March. Under Section 13945, R. S. Mo. 1939, it is provided in part as follows:

"There shall be chosen at the biennial election in each township one trustee, who shall be ex officio treasurer of the township, one township collector, and one township clerk, who shall be ex officio township assessor, one constable, two members of the board, and two justices of the peace: \* \* \*

It will be found from this section that the person who is elected township clerk is also ex officio township assessor. Under Section 13950, R. S. Mo. 1939, it is the duty of the township clerk to transmit to the county clerk a list of the names of the officers elected at the township election, and under Section 13951, R. S. Mo. 1939, it is the duty of the township clerk to notify the officers who have been elected at the township elections. Under Section 13954, R. S. Mo. 1939, as amended, Laws of Missouri, 1945, page 1969, it is provided:

"Every person chosen or appointed to the office of township trustee and ex officio treasurer, member of the township board, township collector, or township clerk, and ex officio township assessor, or constable, before he enters on the duties of his office and within ten days after he shall be notified of his election or appointment, shall take and subscribe, before any officer authorized to administer oaths,

such oath or affirmation as is prescribed by law; provided, that every person elected to the office of township clerk and ex officio township assessor, after the effective date of this act, shall take office on the first day of September."

The last proviso clause in this section provides that the person who is elected to the office of township clerk and ex officio township assessor shall take his office on the first day of September. The language of this section is clear and explicit and does not need any construction.

#### CONCLUSION

It is, therefore, the opinion of this department that the township clerk and ex officio township assessor, who is one and the same person, takes his office on the first day of September following township elections.

Respectfully submitted,

TYRE W. BURTON  
Assistant Attorney General

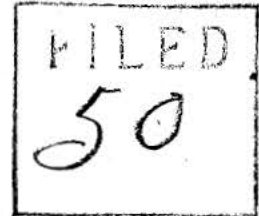
APPROVED: -

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J. E. TAYLOR  
Attorney General

TWB:VLM

RECORDERS: Recorder of Deeds of St. Louis City has no  
MORTGAGES: authority to release deed of trust which  
secures notes not mentioned in the deed of  
trust.



March 14, 1947

3/26

Mrs. Ruby Koelling  
Recorder of Deeds  
City of St. Louis  
St. Louis, Missouri

Dear Mrs. Koelling:

We have received your request, which is as follows:

"Enclosed find forms of Deed of Trust  
Note, Deed of Trust, and proposed rider  
to-gether with a letter from the  
Prudential Insurance Company of America.

"One of my deputies, Mr. Dueringer,  
talked to Mr. Hayward relative to this  
rider and at the time explained that if  
the original identified note described  
in the Deed of Trust was endorsed by the  
payee and marked paid our office would  
release the Deed of Trust on the margin.  
This, of course, would relieve the  
Recorder of any responsibility, however,  
I am not sure that if a rider such as  
the one suggested were attached to the  
original deed of trust, that we could  
legally release a deed of trust without  
knowing definitely that there were no  
supplementary notes of advances unpaid.

"I request an opinion of your office as  
to the legal position in my acceptance of  
this rider. Would it not open a way to  
concealing indebtedness? As it now  
stands new deeds of trust would have to  
be made and recorded subject to the prior  
deed of trust on record."

You have also enclosed a proposed additional clause which someone contemplates inserting in their deed of trust.

Your question comprehends the method that may be lawfully used to release of record a deed of trust, and is based on the following:

The deed of trust secures a note described therein for a stated amount and interest. It is proposed that an addition be made to the deed of trust by inserting another clause to provide: "That upon request of the mortgagor the mortgagee may hereafter, at its option, at any time before full payment of this mortgage, make further advances to the mortgagor, and the same, with interest, shall be secured by this mortgage."

In considering your authority as Recorder of Deeds, the law is stated thus in 53 C. J., page 1072, par. 11:

"A register of deeds can be compelled to perform only such duties or services as are imposed on him by law. \* \* \*"

We know of no provision of the Constitution creating the office of Recorder of Deeds, but on the contrary the office and its duties spring from laws enacted by the Legislature. Section 13147, R.S. 1939, creates the office. It says:

"There shall be an office of recorder in each county in the state containing 20,000 inhabitants or more, to be styled, 'The office of the Recorder of Deeds.'"

Subsequent sections of Chapter 89 of the 1939 Revision confer certain duties and rights on the office of Recorder of Deeds, but said chapter is silent as to the duties of said office or the person holding the same with reference to cancellation of notes when releases of mortgages are executed.

Chapter 23 of the 1939 Revision, and particularly Article 2 thereof, appears to be the sole statutory authority of the Recorder of Deeds in making releases of deeds of trusts or mortgages, and for the purpose of this opinion the term "mortgage" is used to include also deeds of trusts, and the

provisions of said chapter related to the subject should be considered together in order to determine the meaning of a particular section therein. The general section therein is 3465, which provides:

"If any mortgagee, cestui que trust or assignee, or administrator of the mortgage, cestui que trust or assignee, receive full satisfaction of any mortgage or deed of trust, he shall, at the request and cost of the person making the same, acknowledge satisfaction of the mortgage or deed of trust on the margin of the record thereof, or deliver to such person a sufficient deed of release of the mortgage or deed of trust; but it shall not in any case be necessary for the trustee to join in such acknowledgment of satisfaction or in such deed of release; and provided further, that when any mortgage or deed of trust shall be satisfied by a deed of release, the recorder shall note on the margin of the record of such deed of trust the book and page where such deed of release is recorded. In case satisfaction be acknowledged by the payee or assignee, or in case a full deed of release is offered for record, the note or notes secured shall be produced and canceled in the presence of the recorder, who shall enter that fact on the margin of the record and attest the same with his official signature; and no full deed of release shall be admitted to record unless the note or notes are so produced and canceled, and that fact entered on the margin of the record and attested as above provided. If such note or notes are not presented for cancellation for the alleged reason that they have been lost or destroyed, the recorder, before allowing any entry of satisfaction to be made on the record or any deed of release to be placed on the file or record, shall require the cestui que trust named in the mortgage or deed of trust desired to be released or his legal representatives, to make oath, in writing, stating that the

note or other evidences of debt named in the mortgage or deed of trust sought to be released have been paid and delivered to the maker thereof or his representative, and the recorder shall also require the maker of such note or notes, or his legal representative, to make affidavit, in writing, that the note or notes in question have been paid, and cannot be produced because lost or destroyed, and that they are not then in the possession of any person having any lawful claim to the same: Provided, however, that, if such note or notes shall not have been delivered to the maker or his legal representative, the affidavit so required of the cestui que trust or his legal representative shall recite that the note or other evidence of the debt named in said mortgage or deed of trust has been paid and cannot be produced because lost or destroyed, and that they are not then in the possession of any person having any lawful claim to the same, and the term legal representatives as used in this section shall include the assigns; and the affidavit of the maker of such note or notes or his legal representative shall recite that said note or notes have been paid; the affidavits so required shall be recorded in the same manner as deeds, in a permanent record, and the recorder shall make a notation upon the margin of the mortgage so satisfied giving the number of the book and page wherein said affidavit has been recorded: Provided, that nothing in this article shall be so construed as to require that any interest coupon notes shall be produced and canceled in the presence of the recorder, but that all such interest coupon notes shall conclusively be taken and be deemed to have been paid in full, when the principal note described in the mortgage or deed of trust shall have been produced and canceled in the presence of the recorder as provided for in this article."

It will be observed that said statute places the duty (on request of the mortgagor and at his cost) on the "mortgagee,



cestui que trust or assignee," or administrator of any of them, after having received payment of the mortgage debt, to "acknowledge satisfaction of the mortgage or deed of trust on the margin of the record thereof," or "deliver to such person a sufficient deed of release." It further provides that when the mortgage is satisfied by a release deed the recorder shall note on the margin of the record of such deed of trust the book and page where the release deed is recorded. Then it says this: "In case satisfaction be acknowledged by the payee or assignee," which evidently refers to the marginal release, "the note or notes secured shall be produced and canceled in the presence of the recorder, who shall enter that fact on the margin of the record and attest the same with his official signature."

The statute provides two methods by which the recorder may officially assist in making the record release; one being by the marginal release first above pointed out, and the other being by a release deed placed of record. In each instance, however, the statute requires that "the note or notes secured shall be produced and canceled in the presence of the recorder," and the official enters that fact on the record and officially attests the same.

The production and cancellation on the record of the notes secured appear to be a dominant thought of the statute. It then provides that if the note is lost or destroyed the recorder shall require the beneficiary or his legal representatives to make oath that the notes "named in the mortgage or deed of trust sought to be released have been paid and delivered to the maker thereof," and also a like affidavit from the maker or his legal representative that the note or notes have been paid and cannot be produced "because lost or destroyed, and that they are not then in the possession of any person having any lawful claim to the same."

Then a later provision is that if such note or notes shall not have been delivered to the maker or his legal representatives, the affidavit required of the beneficiary shall state that the note or other evidence "of the debt named in said mortgage or deed of trust" has been paid and lost, etc., along with the affidavit of the maker of "such note or notes" that "said note or notes," etc.

We believe said statute is founded on the idea that the note secured by the mortgage or deed of trust shall be produced and canceled by the recorder as a part of the record

release of the encumbrance, and that the language used in said statute fairly interpreted means that the notes or debts secured by the mortgage shall be named in the mortgage itself. If the notes were not named in the mortgage and they were lost, it appears that the statute provides no method of making a release thereof even though they have been paid.

In a similar situation our Court, in *Hollweg v. Bush*, 228 Mo. App. 876, 74 S.W.2d (2d) 89 (1934), said, 1.c. S.W.2d 93:

"The statute requires that, if the notes secured by the deed of trust are not presented for cancellation for the alleged reason that they have been lost or destroyed, the recorder, before allowing any entry of satisfaction, 'shall require the cestui que trust named in the mortgage or deed of trust desired to be released or his legal representatives, to make oath, in writing, stating that the note or other evidences of debt named in the mortgage or deed of trust sought to be released have been paid and delivered to the maker thereof,' etc. Section 3078, R.S. Mo. 1929 (Mo. St. Ann. Sec. 3078, p. 1909). Therefore the release in this case was not in accordance with the provisions of the statute and, to say the least, was irregular. \* \* \* \* (Emphasis ours.)"

The statute first refers to "the note or notes secured." It next refers to them as "such note or notes." It next refers to them as "the note or other evidences of debt named in the mortgage or deed of trust sought to be released." It next refers to "such note or notes." It next refers to them as "the note or other evidence of the debt named in said mortgage or deed of trust."

As here above stated, the meaning of this section should be construed in the light of other associated or related sections. Section 3467, R.S. Mo. 1929, provides a method for releasing of record those encumbrances executed by railroads and public utility companies and it should be followed in releasing mortgages executed by them.

No provision is made therein for release on the margin by the recorder where the debt secured is not named or



described in the mortgage.

Section 3469, R.S. Mo. 1939, says "where a number of notes are named in any mortgage," that on payment of any one or more the maker may present the same to the recorder who shall cancel and so note on the margin of the record. But that section is based solely on the notes being described in the mortgage.

Section 3483, R.S. Mo. 1939, provides: "Hereafter when any mortgage \* \* \* to secure the payment of any specific obligation is created on real estate \* \* \* the instrument evidencing such debt \* \* \* so secured may be presented to the recorder at the time of filing for record such mortgage \* \* \*," and the recorder shall identify said notes to be the ones so secured. It further provides that on release thereof the recorder shall certify that these identified notes have been produced and canceled. This section evidently contemplates that all of the notes secured by the mortgage shall be named in the mortgage and shall be presented to the recorder when the mortgage is filed.

Section 3484, R.S. Mo. 1939, provides that in cities of over 600,000 population and counties of over 200,000 population and less than 400,000 population the unpaid notes shall be produced to the recorder when foreclosure occurs, and this is a condition precedent to acceptance by the recorder of the trustee's deed for record. How could he know when all of said notes had been so presented if they were not named in the mortgage?

We are not here dealing with the legality of the kind of mortgage considered, but it appears to us that even assuming the legality the proposed method of mortgage would be impractical; it would create confusion and uncertainty which might create a cloud on the land title which would require a suit and a decree of court to remove; and the virtues of such a provision are so scant, considering the many and serious difficulties which might ensue upon the using of such a provision, that the use thereof should not be encouraged in the State of Missouri, and this is especially true because these possible dangers would be obviated by following the usual form of mortgage. We make no observation as to the propriety of such a mortgage clause in other states, but because of the law, and particularly the statutory law in this state, we make the observations immediately here above.

Mrs. Ruby Koelling

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Conclusion.

It is our opinion that you, as Recorder of Deeds of the City of St. Louis, do not have authority to execute a marginal release of a mortgage which secures or may by its terms secure notes that are not named or described in the deed of trust, but which notes were or may have been afterward, by mutual agreement of the mortgagor and mortgagee, executed as additional debts (within the limits of the amounts of the original debt) to be secured by the original mortgage, when the statutes from which you derive your authority to act do not provide for such a release and, in the writer's opinion, there is no statutory authority therefor.

Very truly yours,

DRAKE WATSON  
Assistant Attorney General

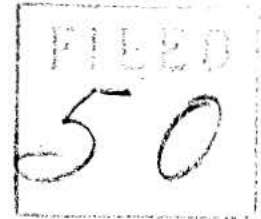
APPROVED:

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J. E. TAYLOR  
Attorney General

DW:ml

MARRIAGE: Marriage between aunt and nephew of half  
RECORDER OF DEEDS: blood valid. Documents relating to  
corporations can be recorded by making  
photostatic copies thereof.



November 21, 1947

Mrs. Ruby Koelling  
Recorder of Deeds  
City of St. Louis  
St. Louis, Missouri

Dear Mrs. Koelling:

This is in reply to your letter of recent date wherein two questions were presented for our consideration, the first of which is whether or not an aunt and a nephew of the half blood can legally marry, and the second concerns the authority of the Recorder of Deeds of the City of St. Louis to record articles of incorporation and other documents relating to corporations by the making of photostatic copies.

With reference to your first question, we direct your attention to Section 3361, R.S. Mo. 1939, which prohibits certain marriages. Said section provides, in part, as follows:

"All marriages between parents and children, including grandparents and grandchildren of every degree, between brothers and sisters of the half as well as the whole blood, between uncles and nieces, aunts and nephews, first cousins, white persons and negroes or white persons and Mongolians, and between persons either of whom is insane, mentally imbecile, feeble-minded or epileptic, are prohibited and declared absolutely void; \* \* \*"

It will be noted that the first prohibition is against marriages between parents and children, including grandparents and grandchildren of "every degree," and the second is against marriages between brothers and sisters "of the half as well as the whole blood." The next prohibition is against marriages between uncles and nieces, aunts and nephews, but there is no mention of half blood or degree of relation. Such a phrase

cannot be interpolated or injected into the statute. This rule is set out in *Gendron v. Dwight Chapin Co.*, 37 S.W. (2d) 486, where the court said at page 488:

" \* \* \* we (the court) have no right, by construction, to substitute any ideas concerning legislative intent contrary to those unmistakably expressed in the legislative words (*Clark v. Railroad Co.*, 219 Mo. loc. cit. 534, 118 S.W. loc. cit. 44)." (Words in first parenthesis ours.)

See also *Kateman v. Mink*, 180 S.W. (2d) 253, 1.c. 256.

It is evident that the Legislature thought it necessary to mention the half blood in order to include that degree of relationship in the application of the statute. In *State v. Bartley*, 263 S.W. 95, it was held that uncles and nieces of the half blood were not in the degrees of relationship prohibited by Section 4649, R.S. Mo. 1939, which defines incest and uses almost identical language to that of Section 3361. The Supreme Court, in adopting the appellant judge's dissenting opinion in which he treated Section 3361 as in the same category as Section 4649, said at page 96:

" \* \* \* We cannot interpolate into the statute the words 'uncles and aunts of the half blood.' *State v. Owens*, 268 Mo. 481, 485, 187 S.W. 1189. We might, with equal propriety, interpolate the words 'first cousins' into the statute, because section 7299, R.S. 1919, forbids their intermarriage. The statute cannot be regarded as including anything not within its letter, as well as its spirit; which is not clearly and intelligibly described in the words of the statute, as well as manifestly intended by the Legislature.' *State ex inf. Collins v. St. Louis, etc., R. Co.*, 238 Mo. 605, 612, 142 S.W. 279, 281.

"After quoting sections 3511 and 7299, R.S. 1919, supra, Judge Pland, in his dissenting opinion, said:

"Both of these statutes mention brothers and sisters of the half, as well as the whole, blood. It is apparent that the Legislature, in enacting these statutes, had in

mind relationships of the half, as well as the whole, blood, and if it intended the statutes to cover aunts and nieces of the half blood, why did it not say so? I think that the well-established canon of statutory construction, "expressio unius est exclusio alterius," applies to these statutes. When the Legislature mentioned brothers and sisters of the half blood, it necessarily excluded all other relationships of the half blood.'

"We concur in Judge Gland's opinion. \* \* \*

(Section 7299, R.S. No. 1919, now Section 3361, and Section 3511, R.S. No. 1919, now Section 4649.)

The above case was cited approvingly in *State v. Light*, 189 S.W. (2d) 162, 1.c. 165.

We believe the *Bartley* case is authority for holding that aunts and nephews of the half blood are not within the prohibited degrees of relationship. This conclusion is in harmony with the purpose of the statute which is to prohibit marriages within the same blood strain, except where the degree of relationship is very remote.

With regard to the legality of recording articles of incorporation and other documents relating to corporations by making photostatic copies; we will quote Section 4997.51, Mo. R.S.A., which deals generally with the recording of such documents:

"The articles of incorporation, in duplicate, signed, sworn to and acknowledged by all the incorporators as required in section 49 shall be delivered to the office of the Secretary of State. If the Secretary of State finds that the articles of incorporation conform to law, he shall, when the required organization taxes or fees have been paid, file the same, and one of such copies shall be retained by the Secretary of State as a permanent record. The Secretary of State thereupon shall issue a certificate of incorporation under the seal of the State that said corporation has been duly organized, such certificate to set forth

the name of the corporation, the amount of its authorized shares, the period of its existence and the address of its initial registered office. Said Secretary of State shall also issue a certified copy of such certificate, which shall be attached to the other copy of the articles of incorporation so filed with him and such certificate of incorporation, together with the certified copy thereof attached to the copy of said articles of incorporation, shall be delivered by him to the incorporators who shall cause such certified copy of the certificate of incorporation and attached articles of incorporation to be filed and recorded in the office of the Recorder of Deeds of the county or city in which the registered office of the corporation is situated."

The above section provides that said documents must be recorded in the office of the Recorder of Deeds in the county or city. No method of recordation is specified, so we must look to the recordation statutes for authority.

Section 13188, R.S. No. 1939, found in the chapter relating to the Recorder of Deeds, provides as follows:

"Wherever the statutes require deeds, mortgages, conveyances, deeds of trust, bonds, covenants, documents, marriage contracts, certificates of marriage, commissions, official bonds, statements, records, plats, surveys, schedules, papers, patents, or other instruments of writing to be recorded, the making of photographic copies of such deeds or other instruments of writing shall be deemed recording within the meaning of this chapter. Such photographic copies shall be bound, paged and indexed wherever it is so provided for deeds or other instruments recorded by hand, and such photographic copies when bound together shall be deemed record books within the meaning of this chapter."

(Underscoring ours.)

Section 13166, Mo. A.S.A., a special statute relating to recorders in cities of 600,000 inhabitants or more and counties of the first class, provides:

"In all cities in this state which now have or which may hereafter have or contain 600,000 inhabitants or more and in all counties in class one, the recorder shall record, without delay, every deed, mortgage, conveyance, deed of trust, bond, commission or other writing delivered to him for record, with the acknowledgment, proofs and certificates written on or under the same, by writing them, word for word, in a fair hand, or by typewriting them or by photostating them, noting at the foot of such record all interlineations and erasures, and the words visibly written on erasures, and noting, at the foot of the record, the day and time of the day, month and year when the instrument so recorded was delivered to him, or brought to his office for record; and the same shall be considered as recorded from the time it was so delivered. Except when otherwise provided by law it shall be the duty of the recorder to deliver to the person holding his receipt therefor every instrument so recorded within sixty days from the date upon which it was presented for recording."

(Underscoring ours.)

In view of the foregoing statutes, it is quite clear that the Recorder of Deeds in the City of St. Louis is authorized to choose one of three optional methods of recording articles of incorporation and other documents relating to corporations, and that the recordation of said documents by the making of photostatic copies fully meets the requirements of the statute.

#### Conclusion.

It is the opinion of this department that marriages between aunts and nephews of the half blood are not within the prohibited degrees of relationship. It is our further opinion that the

Mrs. Ruby Koelling

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Recorder of Deeds for the City of St. Louis is authorized to record articles of incorporation and other documents relating to corporations by the making of photostatic copies of such documents.

Respectfully submitted,

DAVID DONNELLY

Assistant Attorney General

APPROVED:

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J. E. TAYLOR  
Attorney General

DD:ml



PROBATE JUDGE:

FEEES:

RECORDER OF DEEDS:

Count. Court of Boone County cannot make allowance to Probate Court of more than \$1800.00 per year for clerks, assistants and stenographers. Recorder of Deeds of Boone County, whose term expired January, 1947, is liable to county for fees received by him in 1945 and 1946 in excess of \$4000.00 plus payments to necessary deputies and assistants for each year.

January 25, 1947

FILED

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2/6

Honorable Howard B. Lang, Jr.  
Prosecuting Attorney  
Boone County  
Columbia, Missouri

Dear Sir:

This is in reply to your letter of recent date, requesting an official opinion of this department, and reading as follows:

"Boone County has an assessed valuation of more than \$18,000,000.00 but less than \$30,000,000.00. The Probate Judge of this county has requested that I write you for an opinion as to the payment of clerks, assistants and stenographers in his office. Prior to the enactment of Senate Bill No. 198 by the Sixty-third General Assembly, this office was strictly a fee office. Our County Court allowed to the Probate Judge for stenographic and typing service the sum of \$100.00 per month. This was paid in addition to the compensation of the judge and clerk which was derived from the fees of the office.

"Under the provisions of Senate Bill No. 198, an allowance of not to exceed \$1,800.00 is made for such services. The Probate Judge of this county has made a request in his budget for 1947 for an additional allowance for clerical, stenographic and typing service, in addition to the \$1,800.00. This request is based on the provisions of Section 2004, R. S. Mo. 1939, which makes it incumbent upon the judge of the Probate Court to see that the records of the court are properly kept, and on the provisions of Section 2447, R. S. Mo.

1939 which makes it the duty of the county to pay certain expenses designated as 'necessaries.'

"An opinion was rendered in the year 1945 by your office stating that the word 'necessaries' included stenographic and typist hire, and ruled that the Probate Clerk could receive a salary from the county for stenographic and typing service, in addition to the amount received by her as clerk from the Probate Judge.

"The questions submitted are:

"1. Can the County Court make an allowance to the Probate Court of more than \$1,800.00 for deputy, clerical, assistants and stenographic help?

"2. If so, can this be paid to the clerk for stenographic and typing service, in addition to the amount paid her as clerk?

"3. What effect, if any, does Senate Bill No. 198 have on your prior opinion which was issued in 1945?

"4. If your answer to question No. 1 is yes, must the County Court make an allowance above \$1,800.00 upon the proper showing that such expense is necessary in the proper operation of the office and in the keeping of the records thereof?

"Your attention to this matter will be greatly appreciated, because the County Court is now passing on the budget requirements of the various offices of the county."

Section 5 of Senate Committee Substitute for Senate Bill No. 198 of the 63rd General Assembly provides, in part, as follows:

"In all counties now or hereafter having more than 30,000 inhabitants, the probate judge shall appoint their own clerks, assistants and stenographers, and shall determine their number and their salaries by order of record, and may remove them when in the discretion of

such judges it is deemed advisable. All salaries of such judges and their appointees shall be paid monthly by the county, upon requisition issued by the judge of such court. In all counties now or hereafter having more than 30,000 and less than 70,000 inhabitants, the total salaries of all clerks, assistants and stenographers in the probate court for any one calendar year shall not (a) in counties with an assessed valuation of \$18,000,000 or less exceed the sum of \$1200.-00; (b) in counties with an assessed valuation of more than \$18,000,000 and not more than \$30,000,000 exceed the sum of \$1800; \* \* \* (Emphasis ours.)

It will be noted that the opinion which you refer to in your letter was not based upon either Section 2004 or Section 2447, R. S. Mo. 1939, but was based upon the ruling of the court in the case of Rinehart v. Howell County, 348 Mo. 421, 153 S. W. (2d) 381. The opinion held, in part, as follows:

"The Rinehart case is authority, we think, for the conclusion that if a county court determines that stenographic services for a county officer are necessary for the proper conduct of the duties of such officer, such services can be paid for by the county court out of the county revenues, and further that if stenographic services are in fact indispensable to the proper functioning of a county office, and the county court refuses to provide same, and the officer is compelled to provide them himself, then such officer can recover from the county his reasonable and actual expenditures for such services. Whether stenographic services are indispensable to any county officer is a question of fact to be determined in the first instance by the county court, and if that body acts arbitrarily in such determination, then by a court of law in a suit by the officer for recovery of his expenditures for such services."

The holding in the opinion above quoted was arrived at on the basis of the fact that if it could be established as a fact that such help was indispensable to the proper functioning of the public office of probate judge, it became the duty of the county court to furnish such help.

Senate Committee Substitute for Senate Bill No. 198 is a direct expression of the legislative determination of the maximum amount of money necessary to be expended for the payment of clerks, assistants and stenographers necessary for the proper conduct of the office of probate judge.

However, even if it were held that Sections 2004 and 2447, R. S. No. 1939, authorize or provide any basis for a claim for additional deputies, clerks, assistants and stenographers, such provisions would be in conflict with that part of Senate Committee Substitute for Senate Bill No. 198 which provides that "the total salaries of all clerks, assistants and stenographers in the probate court for any one calendar year shall not \* \* \* in counties with an assessed valuation of more than \$18,000,000 and not more than \$30,000,000 exceed the sum of \$1800."

A rule of statutory construction is found in *State v. Gehner*, 280 S. W. 416, 1. c. 418, where the Supreme Court of Missouri said:

"Where there is one statute dealing with a subject in general and comprehensive terms, and another dealing with a part of the same subject in a more minute and definite way, the two should be read together and harmonized, if possible, with a view to giving effect to a consistent legislative policy; but, to the extent of any necessary repugnancy between them, the special will prevail over the general statute. Where the special statute is later, it will be regarded as an exception to or qualification of the prior general one, and, where the general act is later, the special act will be construed as remaining an exception to its terms unless it is repealed in express words or by necessary implication." 36 Cyc. p. 1151."

Senate Committee Substitute for Senate Bill No. 198 is a specific, clear and definite determination by the Legislature of this state of the amount to be paid in counties of a specified population for clerks, assistants and stenographers in the probate court. This bill must be regarded as a special provision which prevails over the provisions of Sections 2004 and 2447, R. S. No. 1939. Such bill governs the maximum amount to be paid to such clerks, assistants and stenographers in the counties covered by the provisions of this bill, and the county court cannot increase the amount provided by this statute.

Honorable Howard B. Lang - 5

The second request in your communication is in regard to the right of the recorder of deeds whose term expired in January, 1947, to withhold from the fees received by him an amount greater than \$4000.00 plus the necessary payment for deputies and assistants for each year.

Section 13187, U. S. Mo. 1939, provides as follows:

"The recorder of each county in which the offices of recorder of deeds and clerk of the circuit court are separate shall keep a full, true and faithful account of all fees of every kind received, and make a report thereof every year to the county court; and all the fees received by him, over and above the sum of four thousand dollars, for each year of his official term, after paying out of such fees and emoluments such amounts for deputies and assistants in his office as the county court may deem necessary, shall be paid into the county treasury, to form a part of the jury fund of the county." (Emphasis ours.)

Section 1 of House Bill No. 772 of the 63rd General Assembly provides as follows:

"The recorder in counties of the third class, wherein there shall be a separate circuit clerk and recorder, shall keep a full, true and faithful account of all fees of every kind received, and make a report thereof every year to the county court; and all fees received by him, over and above the sum of \$4000 except those set out in Section 2 hereof, for each year of his official term, after paying out of such fees and emoluments such amounts for deputies and assistants in his office as the county court may deem necessary, shall be paid into the county treasury."

The maximum amount that may be retained in any one year by the recorder of deeds, exclusive of the amount paid to necessary deputies and assistants, is clearly, then, set out in the statute, and such payments are to be made out of the fees received by such recorder of deeds. It is specifically provided that \$4000.00 is the maximum to be retained in any one year, and the surplus over \$4000.00 in any one year cannot be applied by the

recorder of deeds to make up the difference between the \$4000.00 maximum allowed and the amount of fees actually received by him during another year of his term of office.

It is provided in Section 13187, R. S. Mo. 1939, and in Section 1 of House Bill No. 772 that a report each year shall be made by the recorder to the county court, stating the amount of the fees collected. Obviously, this report is made so that the amount, if any, due the county may be determined and paid to the county each year. If the Legislature had intended that a surplus of fees over \$4000.00, exclusive of the amount paid to necessary deputies and assistants, received in any one year, could be applied to make the fees amount to \$4000.00 each year of the term of office of the recorder, the Legislature would have provided that the recorder of deeds could retain out of the fees of his office \$16,000.00 for each term, exclusive of the pay of necessary deputies and assistants, and that any balance should be paid to the county.

In the case of Harrington v. City of St. Louis, 107 Mo. 327, a similar statute was construed regarding this point. The Supreme Court said in that case, 1. c. 329-330:

"The act of 1879 relates alone to the compensation of the sheriff of the city of St. Louis. By the first section it is made the duty of the sheriff to keep a full itemized account of all fees, commissions and emoluments accruing to him by virtue of his office, and of all expenses, including the pay of his deputies, incurred by him in the discharge of the duties of his office.' Section 2 provides in substance that he shall, at the end of each six months, file in the circuit court a statement of his receipts and expenses for such period of six months; and it is made the duty of the court to audit the account.

"The third section provides: 'Such sheriff, out of the fees, compensation and emoluments of his office, may, for each year of his term of office, receive and retain the sum of \$10,000, over and above all such expenses as shall be allowed to him in his settlements above provided for; and all fees, compensation and emoluments which shall be collected by any sheriff, or by his successor for him, in excess of the amount which such sheriff may receive and retain, shall be paid to the

treasurer of the city of St. Louis, for the use of said city.'

"There can be no doubt but the statements for each of the two official terms must be made the same as if the terms were held by different persons. This the circuit court held. But the court held that the sheriff could combine his accounts for the two years of the same term. The result of this ruling was to allow the sheriff to aggregate the receipts for the two years of the same term, then deduct the expenses for deputy hire, and retain for his own compensation \$20,000, the excess, if any, to be paid over to the city. In this ruling the court erred. The section of the constitution before quoted declares in plain terms that the fees of no such officer, exclusive of salaries actually paid to his deputies, shall exceed the sum of \$10,000, for any one year. This does not mean that the fees, over and above deputy hire, shall not exceed \$20,000 for two years. The law itself divides the official term into years for all the purposes of applying the limitation as to the amount of fees which the sheriff may retain. Each year of the official term stands by itself. It follows that the sheriff must render a separate account of receipts and expenses for each year. When the fees for the particular year reach the amount of \$10,000, with expenses added, the balance must be paid over to the city. The excess of one year cannot be carried into another year for the purpose of bringing the fees of that year up to \$10,000, with deputy hire added. It is not the object of this law to make the clear compensation of the sheriff \$10,000, per annum. His compensation for each year must come from the fees and emoluments of the office for that year, but when they reach the clear sum of \$10,000, the balance must be paid over to the city."

Section 13185, R. S. No. 1939, provides as follows:

"The recorder shall not be bound to make any record for which a fee may be allowed by law, unless such fee shall have been paid or ten-

dered by the party requiring the record to be made."

From the provisions of Section 13185, it is evident that no contention can be made by the recorder that part of the fees received in 1945 or 1946 were earned in prior years but not collected until 1945 and 1946. Therefore, the case of Allen v. Cowan, 96 Mo. 193, is not applicable to the facts in the present case.

The claim of the recorder that he is entitled to retain fees received in 1945 and 1946 in excess of the \$4000.00 maximum limit, exclusive of necessary pay for deputies and assistants, because of the fact that he allegedly rendered service to soldiers without charge in various years of his term, is without merit. The general rule regarding the compensation any public officer is entitled to is set out in Nodaway County v. Kidder, 129 S. W. (2d) 857, 1. c. 860:

"The general rule is that the rendition of services by a public officer is deemed to be gratuitous, unless a compensation therefor is provided by statute. If the statute provides compensation in a particular mode or manner, then the officer is confined to that manner and is entitled to no other or further compensation or to any different mode of securing same. Such statutes, too must be strictly construed as against the officer. State ex rel. Evans v. Gordon, 245 Mo. 12, 28, 149 S. W. 638; King v. Riverland Levee Dist., 218 Mo. App. 490, 493, 279 S. W. 195, 196; State ex rel. Wedeking v. McCracken, 60 Mo. App. 650, 656.

"It is well established that a public officer claiming compensation for official duties performed must point out the statute authorizing such payment. State ex rel. Buder v. Hackmann, 305 Mo. 342, 265 S. W. 532, 534; State ex rel. Linn County v. Adams, 172 Mo. 1, 7, 72 S. W. 655; Williams v. Chariton County, 85 Mo. 645."

In State v. Molte, 180 S. W. (2d) 740, 1. c. 741, the Supreme Court said:

" \* \* \* Extra compensation for extra services must be expressly authorized. See Nodaway County v. Kidder, 344 Mo. 795, 129 S. W. (2d) 857. \* \* \* "



The opinion of this office rendered to George Spencer, Prosecuting Attorney of Boone County, under date of July 5, 1946, covers specifically the services of the recorder of deeds in connection with "work done for soldiers," for which the county is liable and for which the county pays the recorder.

Under the rule above set out, and in view of the opinion of this office of July 5, 1946, it is clear that the county is not to pay any fees or to allow any fees to the recorder for alleged "free work done for soldiers" during the years 1942, 1943 and 1944.

We are enclosing a copy of an opinion of this office rendered under date of November 20, 1945, to Robert Niedner, Prosecuting Attorney of St. Charles County, regarding the payment of additional help in the recorder's office for recording service discharges. It will be noted that this opinion holds that the payment of such help is to be made out of the fees which the recorder receives for his services.

In the case of State ex rel. v. King, 136 Mo. 309, 1. c. 319, the Supreme Court said:

" \* \* \* Four thousand dollars was fixed as the amount the recorder was capable of earning at the established charges; and, when the fees for work required to be done exceed that sum, it is a fair presumption that assistance would be necessary. If necessary, the constitution and statute clearly intend that assistants should be employed and paid."

This statement by the court clearly shows the construction of the statute by the court to be that the payment of assistants in the office of recorder of deeds should be paid out of fees received by the recorder. We are unable to find any authority for the payment of any assistants to the recorder of deeds except out of fees received by him.

#### CONCLUSION

It is the opinion of this department that the County Court of Boone County cannot make an allowance to the Probate Court of that county of more than \$1800.00 per year for deputy, clerical,

Honorable Howard B. Lang - 10

assistants and stenographic help.

It is further the opinion of this department that the Recorder of Deeds of Boone County, whose term ended January, 1947, is liable to Boone County for fees received by him in 1945 and 1946 in excess of \$4000.00, exclusive of payments to necessary deputies and assistants for each year.

Respectfully submitted,

C. B. BURNS, Jr.  
Assistant Attorney General

APPROVED:

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J. E. TAYLOR  
Attorney General

CBB:HR

MAGISTRATES: Magistrate to act in temporary absence of police judge, but not entitled to additional compensation.

August 5, 1947

FILED

51

Honorable Howard B. Lang, Jr.  
Prosecuting Attorney  
Boone County  
Columbia, Missouri

Attention: Mr. J. Robert Tull,  
Assistant Prosecuting Attorney

Dear Sir:

This is in reply to your letter of July 31, 1947, requesting an official opinion from this department, which reads as follows:

"In accordance with our conversation of yesterday, I am writing you this letter, requesting an opinion as to whether or not the Magistrate of this county is the person qualified to serve as Police Judge during the sickness of that elected officer.

"I would appreciate it very much if, in your opinion, it is possible for the Mayor to appoint anyone other than the Magistrate to serve in this capacity. I am making this request since the Magistrate of this county may be too busy to handle this additional work over any extended period of time."

At the outset, we will call your attention to two opinions on this subject previously rendered by this department.

In an opinion to Honorable Robert M. Buerkle, Prosecuting Attorney of Cape Girardeau County, dated December 19, 1946, the question was presented as to whether or not one person could hold the offices of magistrate and police judge

at the same time. It was held that such an arrangement was in violation of Section 3 of the Magistrate Law, found on page 768, Laws of 1945, which prohibits magistrates from receiving additional compensation. This ruling contemplated permanent offices with compensation, and was based solely on the compensation factor.

In an opinion rendered to Honorable Edwin W. Mills, Prosecuting Attorney of St. Clair County, dated December 6, 1946, it was held that a magistrate could not hold the position of mayor of the city even though he received no compensation as mayor. This ruling also contemplated permanent offices, but was based on the fact that these two offices were inherently incompatible and within the rule that one person cannot hold two incompatible offices at the same time.

The questions presented in your request concern the situation where a police judge is sick or otherwise temporarily absent from his office. Your attention is directed to Section 6905, Mo. R.S.A., which reads in part as follows:

" \* \* \* If the police judge be absent, sick or disqualified from acting, the mayor shall designate a justice of the peace of the said city to act as police judge until such absence or disqualification shall cease: Provided, however, that should a vacancy happen in the office of police judge at a greater time than six months before a general municipal election, then a special election shall be held to fill such vacancy; and in case of vacancy in said office of police judge within less than six months of a general municipal election, the same shall be filled by some justice of the peace or other competent, eligible person of the city, to be appointed by the mayor."

Senate Bill No. 281 of the 63rd General Assembly, found at page 1079 of the Laws of 1945, provides that:

"Whenever, in any statute, the word 'justice' (referring to justice of the peace) or the words 'justice of the peace' appear, said word or words shall

hereafter be deemed to include and refer to 'magistrate,' unless there be something in the subject or context repugnant to such construction."

In view of the above provisions, the mayor of a city of the third class may designate a magistrate to act as police judge in the temporary absence, sickness or disqualification of the regular police judge. However, under the provisions of Section 3 of the Magistrate Law, supra, a magistrate so designated cannot receive compensation for such additional services. This conclusion does not conflict with those reached in the opinions previously discussed because there is no incompatibility between the two offices since appeals from the police court go directly to the circuit court and the magistrate will not receive compensation for his service as acting police judge.

Now with regard to your further question as to whether or not the mayor is authorized to appoint anyone other than a magistrate to serve as acting police judge, we again call your attention to Section 6905, supra. If the police judge be absent, sick or disqualified from acting, the mayor shall designate a justice of the peace (magistrate) to act. The only alternative is in the case of a vacancy in the office of the police judge within six months of a general municipal election, and then the vacancy may be filled either by the magistrate or some other eligible, competent person of the city, to be appointed by the mayor. Therefore, it is clear that only a magistrate may fill a temporary vacancy in said office, and this provision has been strictly construed in the case of *City of Cape Girardeau v. Goehring*, 12 S.W. (2nd) 761, where the court said at page 762:

"The first question presented is whether or not John I. Sample, who was acting as police judge at the time, had any jurisdiction or authority to act in the premises in any manner. Section 8246, R.S. of Mo. 1919, provides, among other things, that if the police judge be absent, sick, or disqualified from acting, the mayor shall designate a justice of the peace of the said city to act as police judge until such absence or disqualification shall cease. If the office

of the police judge is vacated, then any suitable person may be appointed to fill this office. In this case there was no vacancy in the office of police judge. The evidence clearly discloses that there was an absence from office of the police judge. In such case the appointing power has the authority, under the statute, to designate a justice of the peace, only, to act. In this case the record clearly discloses that no such action was taken and that Mr. Sample, who was not a justice of the peace, was appointed to perform the office of the police judge. This statute (section 8246, R.S. of Mo. 1919) applies to cities of the class in question."

We realize that this conclusion will result in a hardship on the magistrates in counties having only one magistrate, not only because of the time required in exercising the functions of the police court but that an added compensation is prohibited by statute. However, in view of the fact that this situation has arisen in other counties, and will undoubtedly again arise in the future, we submit that it is one for legislative consideration and action.

Conclusion.

Therefore, it is the opinion of this department that a magistrate of the county is the only person qualified to act in the temporary absence or sickness of the judge of the police court in cities of the third class. Magistrates acting in this capacity are not entitled to receive additional compensation.

Respectfully submitted,

APPROVED:

DAVID DONNELLY  
Assistant Attorney General

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J. E. TAYLOR  
Attorney General

DD:ml

LOTTERIES: Prize awarded by chance to holder of coupon given with purchase of merchandise.



October 23, 1947

Mr. Howard B. Lang, Jr.  
Prosecuting Attorney  
Boone County  
Columbia, Missouri

Dear Sir:

This department is in receipt of your request for an official opinion which reads as follows:

"I would like an opinion upon the legality of the scheme known as 'Appreciation Day' which is described in the enclosed pamphlet."

The scheme known as "Appreciation Day" as described in the pamphlet which you enclosed is as follows:

The merchants of a community contribute each week to a fund known as the Community Treasure Chest. These merchants, with each purchase by a customer of twenty-five (.25¢) cents or more, give to the customer a percentage coupon, the percentage being based upon the size of the purchase. The customer's name and address is placed upon the back of the coupon which is placed in a box. Once a week a drawing is held and a coupon is selected from the box. If the person whose name is selected is present he is asked an allotted number of questions according to the amount of his percentage coupon. If the person correctly answers any or all of the questions then he receives a prize in proportion to the amount of his percentage coupon and the correct answers. If he fails to answer any of the questions the fund goes over until the next week. If the person is not present then no prize is awarded and the amount of the fund which would have been awarded is added to the prize for the next week.

Section 39, Article III of the Constitution of Missouri, 1945, provides, in part, as follows:

"The General Assembly shall not have power:

\* \* \* \* \*

"(9) Authorization of Lotteries or

Gift Enterprises.- -To authorize lotteries or gift enterprises for any purpose, and shall enact laws to prohibit the sale of lottery or gift enterprise tickets, or tickets in any scheme in the nature of a lottery; (Sec. 10, Art. XIV, Const. of 1875)"

Section 4704, R.S. Mo. 1939, provides as follows:

"Establishing lottery-penalty

"If any person shall make or establish, or aid or assist in making or establishing, any lottery, gift enterprise, policy or scheme of drawing in the nature of a lottery as a business or avocation in this state, or shall advertise or make public, or cause to be advertised or made public, by means of any newspaper, pamphlet, circular, or other written or printed notice thereof, printed or circulated in this state, any such lottery, gift enterprise, policy or scheme or drawing in the nature of a lottery, whether the same is being or is to be conducted, held or drawn within or without this state, he shall be deemed guilty of a felony, and, upon conviction, shall be punished by imprisonment in the penitentiary for not less than two nor more than five years, or by imprisonment in the county jail or workhouse for not less than six nor more than twelve months."

It is well-settled in this state that the elements of a lottery are (1) consideration; (2) prize; (3) chance. State v. Emerson, 318 Mo. 633, 1 S.W.(2d) 109; State ex inf. McKittrick v. Globe Democrat Pub. Co., 341 Mo. 862, 110 S.W. (2d) 705. The fact that there is a prize present in the scheme described above cannot be doubted.

As to the element of consideration, it is equally well-settled that a scheme whereby a merchant gives a ticket for a drawing with each purchase is a lottery because the element of consideration is present.

In the case of State v. Emerson, 318 Mo. 633, 1 S.W.(2d) 109, the Supreme Court had before it a scheme or device whereby a furniture company sold contracts for \$55.00 each to be paid on equal installments of \$1.00. Each week a drawing was held and the holder of the winning number paid received \$55.00 worth of



furniture without further payment. The persons who did not win any of the drawings still received \$55.00 worth of furniture in payment of a like amount. The court held that the payment of the weekly installments was consideration even though the person not winning in the weekly drawing received a full value for the money paid in.

In State v. McEwan, 343 Mo. 213, 120 S.W.(2d) 1098, the legality of "Bank Night" was before the Supreme Court. The court said: (l.c. 1102)

"In 38 C.J. 292, Sec. 7, it is said:  
'Whatever may be the nature of the consideration required it may be given either directly or indirectly. The benefit to the person offering the prize does not need to be directly dependent upon the furnishing of a consideration.'

"Can it be denied that the requirement in the scheme, that all persons participating in 'bank night' must be in attendance, is not a revenue producer for the theater?"

Courts of other states have held that a ticket or chance given with each purchase of merchandise constitutes consideration within the meaning of the lottery law. Featherstone v. Independent Service Station Assoc. (Tex. Civ. App.) 10 S.W.(2d) 124; Retail Section of Chamber of Commerce v. Kieck, 128 Neb. 13, 257 N.W. 493; People v. Bloom, 227 N.Y.S. 225(reversed on other grounds) 248 N.Y. 582, 162 N.E. 533; Market Plumbing and Heating Supply Co. v. Spangenberg, 112 N.J.L. 46, 169 A. 660.

The question next presents itself as to whether the element of chance is present in the scheme "Appreciation Day".

Judge Ellison in State ex inf. McKittrick v. Globe Democrat Pub. Co., 341 Mo. 862, 110 S.W.(2d) 705, discusses extensively the question as to what constitutes chance in a lottery and this case is perhaps the leading case in the United States upon this question. He points out the rule in the United States and in Missouri which is that chance need be only the dominant factor and thereby adopting the "dominant chance" rule as opposed to the "pure chance doctrine" which prevails in England and Canada. This dominant chance rule is explained at l.c. 717 as follows:

"\* \* \* But we draw the conclusion

from them that where a contest is multiple or serial, and requires the solution of a number of problems to win the prize, the fact that skill alone will bring contestants to a correct solution of a greater part of the problems does not make the contest any the less a lottery if chance enters into the solution of another lesser part of the problems and thereby proximately influences the final result. In other words, the rule that chance must be the dominant factor is to be taken in a qualitative of causative sense rather than in a quantitative sense. \* \* \* "

In the "Appreciation Day" scheme a person is selected by a drawing each week. This choice is determined entirely by chance and the fact that in order to win the prize certain questions must be answered does not in any way take away the inherent evil in the scheme. The answering of the questions is merely an ancillary or incidental element as compared to the selection of the name from the box which contains all of the coupon holders. It is our opinion that chance is a dominant factor in the scheme mentioned.

In view of what has been said above it will be seen that "Appreciation Day" contains all the essential elements of a lottery that is, consideration, prize and chance and, therefore, such scheme is illegal in Missouri.

#### CONCLUSION

It is, therefore, the opinion of this department that a scheme whereby the merchants of a community contribute to a fund from which a prize is paid each week to the holder of the coupon drawn from a box, which coupons are obtained with each purchase from the merchants contributing to the fund, is a lottery even though the person whose name is drawn must answer certain questions in order to obtain the prize.

Respectfully submitted,

ARTHUR M. O'KEEFE  
Assistant Attorney General

APPROVED:

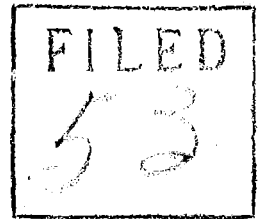
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J.E.TAYLOR  
Attorney General

*W. L. Smith*

ELECTIONS: Failure to hold township elections on the date as provided by statute does not permit the holding of an election on a subsequent date not provided by law. The present incumbent officers continue to hold office and discharge their duties thereunder until their successors are duly elected or appointed and qualified.

April 24, 1947



Honorable Clinton Lindley  
Prosecuting Attorney  
Vernon County  
Nevada, Missouri

Dear Sir:

This is in reply to your letter dated March 29, 1947, in which you requested an opinion relative to the problem involved when a certain township fails or neglects to hold an election as provided for in Section 13944, R.S. Mo. 1939. Said letter reads as follows:

"In my official capacity as Prosecuting Attorney of Vernon County, Missouri, I would like an opinion from your office on the following set of facts:

"In Vernon County, Missouri, a County under Township organization, the Township Officials of Washington Township failed or neglected to provide for facilities for the Township election on March 25, 1947, and consequently no election was held or officers elected.

"The question has arisen as to what procedure should be taken for the election or appointment of new officers.

"Will you please advise me of your opinion as to the proper procedure?"

Section 13944, R.S. Mo. 1939, provides for township elections in all counties which have adopted township organization law, and reads as follows:

"The citizens of the several townships in all counties having adopted the township organization law of this state, who are qualified by the Constitution and

laws of this state to vote at general elections, shall assemble biennially on the last Tuesday in March at their usual place of voting, or at such place in their respective townships as they may have previously agreed upon, for the purpose of electing township officers and such other officers and transacting such other business as may be necessary."

It is to be noted then that the time when the township election in your case should have been held, in accordance with the statute, was on March 25, 1947. The township officials having failed or neglected to hold such election at that time, what consequences naturally follow?

The Legislature, in Article 4, Chapter 101, R.S. Mo. 1939, has provided for and set out how township elections are to be held. By so doing, the Legislature has delegated certain authority and imposed specific duties on those officials entrusted with ordering, calling and conducting an election. Therefore, by such specific delegated authority having been granted to these public officials by the Legislature, we feel that the following statement from 43 Am. Jur., page 68, is applicable: "In general, the powers and duties of officers are prescribed by the constitution or by statute, or both, and they are measured by the terms and necessary implication of the grant, and must be executed in the manner directed and by the officer specified. If broader powers are desirable, they must be conferred by the proper authority. \* \* \*" Section 13944, R.S. Mo. 1939, supra, says that the citizens of the township, qualified to vote, "shall assemble biennially on the last Tuesday in March at their usual place of voting, or at such place in their respective townships as they may have previously agreed upon, for the purpose of electing township officers \* \* \*." In State ex rel. Stevens v. Wurdeman, 295 Mo. 566, the court said at l.c. 586:

"\* \* \* The statute says the defendant 'shall be entitled to be discharged' save in the two excepted situations, supra. Usually the use of the word 'shall' indicates a mandate, and unless there are other things in a statute it indicates a mandatory statute. \* \* \* \*"

Applying the above to the instant case, we find that by Article 4, Chapter 101, R.S. Mo. 1939, there is a specific provision for the election to be held, and to be held on a certain day; and there is

enumerated the various officials and their duties in carrying through the election at this designated time. We feel that such a statute in this case is subject to a mandatory construction as regards the time for holding the election.

The case of *The State ex rel. McHenry v. Jenkins*, 43 Mo. 261, involved the question of dispute as to who was entitled to the office of clerk of the county. The incumbent had been elected in 1864 for four years. The office had been declared vacant by an ordinance of 1865, and the present incumbent had been appointed for the remainder of the term. There was a failure to hold the election in 1866 as provided in the Constitution, and there was an attempt to remedy this by holding one in 1868. The court said at l.c. 265:

"In relation to relator's second claim, that the omission to hold an election in 1866 can be supplied by one in 1868, we can only say that it is a valid one if the law provides for any such election. But he has failed to show us any such provision, and it would be difficult to give legal validity to a volunteer election. No election can be had unless provided for by law. As the law makes no provision for the election of clerks in 1868, such election is wholly void and of no effect. This position has never been questioned. In *The State v. Robinson*, 1 Kansas, 17, a question was raised as to the validity of an election for governor, and it was held that the election under consideration was not provided for by law, that the person elected could not take the chair, and that the previous governor should hold over until the next general election. No case has been known where a volunteer election has been held valid, even though the term of the incumbent had expired."  
(Underscoring ours.)

Applying this holding to our instant case, we find that there is no law providing for an election at any time other than "biennially on the last Tuesday in March."

The court, in the *Jenkins* case, supra, said at l.c. 265:

"But, as there was no such election, is there a vacancy? Or if not, who is the present

clerk? By the terms of the act creating the Kansas City Common Pleas, as well as by the constitutional provision, the clerk shall hold his term until the election and qualification of his successor. Thus there is no vacancy, and Mr. Vincent holds over."

Section 12, Article VII of the 1945 Constitution provides:

"Tenure of Office.--Except as provided in this Constitution, and subject to the right of resignation, all officers shall hold office for the term thereof, and until their successors are duly elected or appointed and qualified."

In State ex rel. v. Brown and Barnett, 220 Mo. App. 468, the court said at l.c. 471:

"The law is well settled that where a public officer is elected or appointed to hold office for a definite period, and until his successor is appointed or elected and qualified, failure to appoint or elect a successor at the end of such period does not work a vacancy. (State ex rel. Lusk, 18 Mo. 333; State ex rel. Stevenson v. Smith, 87 Mo. 158.) It follows that the incumbent properly holds until his successor is elected or appointed and qualified, and it is then only that his term expires. (State ex rel. Robinson v. Thompson, 38 Mo. 192; State ex rel. v. Ranson, 73 Mo. 597.)"

Section 13962, R. S. Mo. 1939, reads as follows:

"Whenever any township shall fail to elect the proper number of officers to which such township may be entitled, or when any person elected or appointed shall fail to qualify, or when any vacancy shall happen in any township office from any cause, it shall be lawful for the township board to fill such vacancy by appointment, and the person so appointed shall hold the office and discharge

all the duties of the same during such unexpired term, and until his successor is elected or appointed and qualified, and shall be subject to the same penalties as if they had been duly elected: Provided, that any vacancy in the office of justice of the peace or in the township board shall be filled by appointment of the county court."

This provision, however, cannot be directly applicable to the case as you present it, since there is at the present, according to the cases above quoted, no vacancies in any of the township offices, including the township board. As we observed in the Brown and Barnett case, supra, until the public officer's "successor is appointed or elected and qualified, failure to appoint or elect a successor at the end of such period does not work a vacancy."

#### CONCLUSION

It is, therefore, the opinion of this department that in the case as presented by your letter where there is a failure to hold the election on the day provided for by statute, and where there is no provision for holding a substituted or subsequent election, the present incumbent officers continue to hold office and discharge their duties thereunder until their successors are duly elected or appointed and qualified. Such time as their successors might be elected would be at the next election, as provided for in Section 13944, R.S. Mo. 1939; and such time as their successors might be appointed would be in case a vacancy exists and appointment is made as provided for in Section 13962, R.S. Mo. 1939.

Respectfully submitted,

APPROVED:

Wm. C. COCKRILL  
Assistant Attorney General

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J. E. TAYLOR  
Attorney General

WCC:LR

MOTOR VEHICLES: Reciprocity existing between the States of  
Missouri and Minnesota.

April 17, 1947



4/24

Honorable William C. Lochmoeller  
Prosecuting Attorney  
City of St. Louis  
St. Louis, Missouri

Dear Sir:

Reference is made to your letter of recent date, requesting an official opinion of this office, and reading as follows:

"A question has arisen concerning the requirement of automotive licenses under the system of reciprocity mentioned in Section 7768 of the Motor Vehicle Laws, as published in 1940, and inasmuch as you will be asked for an opinion by the Merchants Transfer Company, with offices at 327 South Fourth Street, we think it best to communicate the facts to you and ask that you favor us with the benefit of your assistance.

"This concern is a Minnesota corporation and has a Public Service Commission permit by virtue of which they travel our highways. They operate in the City of St. Louis, at the address given above, a terminal, and the question at hand has arisen by reason of the fact that the operator of one of their trucks was arrested under date of February 27, 1947, while operating one of the units of the Company bearing 1947 Minnesota license plates.

"Section 7768 establishes a system of reciprocity which is, however, qualified by the Minnesota Statute which like ours grants,  
1 - full reciprocity, except for motor vehicles engaged in transporting persons or property for hire if they go beyond the cor-



porate limits of a border municipality; also except trucks and tractor trailer units used for intra-state hauling.'

"To reach St. Louis these trucks use a route which takes them down through the northern part of the State by way of Wentzville, thence to the City, and it is my humble opinion that in view of the Minnesota Statute of Reciprocity they require Missouri plates. The manager of their local office, however, points to that section of the Missouri Reciprocity Statute which reads as follows:

"Full reciprocity as to license plates to all motor vehicles. Vehicles operated for hire must obtain permit from Public Service Commission, Jefferson City, Missouri'. As I understand it, that Section merely provides for a certificate of convenience and necessity, but in no wise impairs the licensing regulations which fundamentally are designed to raise revenue, which in turn is apportioned for the maintenance of streets and highways. This concern operates a large number of automotive units which, by reason of their size and tonnage, do our highways no little harm, and yet if their theory be correct they are immune from bearing their proportionate cost of the upkeep.

"This is the first instance of its kind that has been directed to our attention, and before we cause an investigation to be made to determine if there are others, we desire the benefit of your counsel and guidance."

You have referred to Section 7768 of the Motor Vehicle Laws as being that pertinent to the matter under consideration. We note that the section numbering mentioned was that found in the Revised Statutes of 1929, the present statute being Section 8375, R. S. Mo. 1939.

The section which you have referred to is known as the Missouri Reciprocal Statute and reads as follows:

"A nonresident owner, except as otherwise herein provided, owning any motor vehicle which has been duly registered for the cur-

rent year in the state, country or other place of which the owner is a resident and which at all times when operated in the state has displayed upon it the number plate or plates issued for such vehicle in the place of residence of such owner may operate or permit the operation of such vehicle within this state without registering such vehicle or paying any fee to this state, provided that the provisions of this section shall be operative as to a vehicle owned by a nonresident of this state only to the extent that under the laws of the state, country or other place of residence of such nonresident owner like exemptions are granted to vehicles registered under the laws of and owned by residents of this state." (Emphasis ours.)

You will note that the exemption contained in the statute quoted is granted only to the extent that the state of domicile of nonresidents grants exemption to residents of Missouri. It, therefore, becomes pertinent to determine what reciprocal exemptions are granted residents of Missouri under applicable Minnesota statutes.

These statutes are found as Sections 168.18 to 168.23, inclusive, Minnesota Statutes, 1945.

Section 168.18 extends reciprocal permission to a nonresident auto owner to operate a motor vehicle upon the public highways of the State of Minnesota upon such nonresident having complied with the registration laws of the state of his domicile. Three conditions are attached to the grant of such exemption from the Minnesota registration laws: (1) That similar exemptions and privileges are granted to motor vehicles registered under the laws of and owned by residents of Minnesota, (2) that any such motor vehicle, when so operated in the State of Minnesota, display all license number plates or similar insignia required by the laws of the state of domicile, and (3) that the nonresident motor vehicle owner first file with the registrar of motor vehicles of Minnesota a verified statement disclosing information relative to the ownership and description of the motor vehicle, together with an agreement that, by the use of the highways of the State of Minnesota, such nonresident consents that service by mail, made in accordance with the terms of the statute, shall amount to personal service upon such nonresident in the event of litigation arising as a result of the operation of such motor vehicle within the State of Minnesota.

Section 168.19 authorizes the registrar of the State of Minnesota to issue to such nonresident a certificate disclosing that such nonresident is entitled to operate his motor vehicle upon the highways of the State of Minnesota.

Section 168.20 provides penalties for fraudulent registration.

Section 168.21 authorizes the registrar of motor vehicles of the State of Minnesota to promulgate such rules and regulations as may be reasonably necessary to carry out the provisions of the act.

Section 168.22 subordinates the reciprocity provisions of the Minnesota statutes to all laws, treaties, agreements and policies existing between Canadian provinces and the State of Minnesota.

Section 168.23 contains the limitations generally applicable to the grant of reciprocity to nonresident owners. We deem it pertinent to set forth this section verbatim:

"Sections 168.18 to 168.23 shall not apply to a passenger motor vehicle owned by a resident of any state, District of Columbia or any Canadian province temporarily residing in this state while regularly employed therein under contract for a term of six months or more.

"Every non-resident, including any foreign corporation carrying on business except as herein provided within this state and owning and operating in such business any motor vehicle in intrastate commerce within this state shall be required to register each such vehicle and pay the same tax and penalties, if any, therefor as is required with reference to like vehicles owned by residents of Minnesota."

"The reciprocity privileges provided by sections 168.18 to 168.23 shall apply also to motor vehicles exclusively used as school buses and not for hire." (Emphasis ours.)

You will note that the limitations found in the quoted statute, in so far as they are pertinent to the matter under discus-

sion, do require the registration and payment of license fees on motor vehicles used in Minnesota in intrastate commerce by nonresidents of that state. Therefore, under the terms of the Missouri Reciprocity Statute, similar requirements would exist with respect to motor vehicles used in intrastate commerce within Missouri and owned by residents of Minnesota.

Referring to your letter of inquiry, we note that the Minnesota corporation mentioned therein operates a terminal in the City of St. Louis, and we also note a further reference to the route of the motor vehicles in and out of the City of St. Louis as being through the City of Wentzville. We are unable to determine from your letter of inquiry whether, by these references, it is meant that the motor vehicles, or some number of them, are engaged in intrastate commerce within the State of Missouri. Such being the case, our conclusion must necessarily be in the alternative.

#### CONCLUSION

In the premises, we are of the opinion that under the Missouri reciprocal registration and licensing statutes, motor vehicles owned by a resident of the State of Minnesota, if used solely in interstate commerce to and from the State of Missouri, are exempt from the Missouri registration and licensing laws, provided that such motor vehicles have been duly registered and licensed within the State of Minnesota.

We are further of the opinion that under the Missouri reciprocal registration and licensing statutes, motor vehicles owned by a resident of the State of Minnesota, if used in any manner in intrastate commerce within the State of Missouri, are subject to the Missouri registration and licensing laws, even though such motor vehicles may be duly registered and licensed under the laws of the State of Minnesota.

Respectfully submitted,

WILL F. BERRY, Jr.  
Assistant Attorney General

APPROVED:

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J. E. TAYLOR  
Attorney General

WFB:HR

SCHOOLS: Real estate owned by William Jewell College and used exclusively for educational purposes is tax exempt.  
TAXATION: County court authorized to rebate taxes assessed against property owned by said school.

October 28, 1947



Honorable Bart M. Lockwood  
Assistant Prosecuting Attorney  
Buchanan County  
St. Joseph, Missouri

Dear Sir:

This will acknowledge receipt of your request for an opinion which reads:

"In 1941 the Safeway Stores built a grocery store at 8th & Messanie Sts. in this city and after completing it and opening a grocery store therein sold the premises to the trustees of William Jewell College as an investment. It was placed on the assessment roll of the county by the assessor at a valuation of Thirty Thousand Dollars and assessed regularly each year by the City and County so there are delinquent taxes thereon ever since amounting to between \$1500 and \$2000. due the City and County and State.

"William Jewell College has filed a petition, (Copy enclosed.) with the County Court asking abatement of the State and County taxes so assessed thereon claiming that under their charter, the Constitution and laws of Missouri that said lands are exempt from taxation.

"As the state taxes are affected and thinking that your office has had this matter before them in like situations we would appreciate your opinion on these two questions herein involved, to-wit:

"1. Are Lots Five and No. 26'feet of Lot Six Block One Patee's Addition in St. Joseph, Buchanan County, Missouri, owned by the Trustees of William Jewell College upon which the Safeway Stores operate a

grocery store, exempt from taxation?

"2. Has the County Court of Buchanan County the power or authority (Under Sec. 24 Laws 1945 page 1789 or any other law) to order such abatement or grant the exemptions claimed?"

It has long been held by the courts in this state that land owned by William Jewell College is exempt from taxation. An attempt was made to make certain land taxable under the claim that the charter of said school did not specifically exempt from taxation land owned by said school, but that it was tax exempt as a result of an act of the Legislature passed in 1851, which law was enacted subsequent to the granting of the charter to said school, and that the Legislature could thereby repeal any such legislative grant of immunity and that said Act of 1851 was repealed by the Constitutions of 1865 and 1875 and by subsequently enacted statutes. In *Trustees of William Jewell College vs. Beavers, Collector of Revenue of Worth County, Missouri*, 171 S.W. (2d) 604, 351 Mo. 87, the court held that the tax exemption clause in the Act of 1851, pertaining to said college, had been construed as a part of the charter of said college and it was thereby accepted as such. In so holding, the Supreme Court said, l.c. 94:

"In *State ex rel. Waller v. Trustees of William Jewell College*, 234 Mo. 299, 136 S.W. 397, this Court en Banc did construe these two sections together. The principal question there was whether the tax exemption went beyond real estate owned and included all property; although this same claim of repeal of this exemption by the 1865 and 1875 Constitutions was also made and that would have subjected all property to taxation. This court therein said of Section 13 of the 1849 Act, that it was 'a legislative declaration . . . to the effect that the property of this corporation was to be devoted to a public purpose; that, in no other charter of that period, are the funds of the institution so completely impounded for public purposes as in the charter before us'; that 'it has always been the law that property used for state, county, municipal and other public purposes should not be taxed'; and that

'there would have been no special reason for limiting the use of the property of this corporation strictly to educational purposes, except upon the theory that there was a public purpose and some immunities might be expected from the state.' The court then held that 'the original act authorized the gathering together of an endowment for the college'; that 'the fund thus collected was limited to a use which the State not only recognized as a public use, but one which the State should foster and aid' (under then existing constitutional provisions); and that 'when all the surroundings are considered, the public policy of the State considered, these two acts considered, and other acts about the same time are considered, it is evident that there was a legislative intent to relieve the property constituting the endowment fund of this corporation from the burdens of taxation.'

"As to the contention made in the Waller case, that the exemption had been repealed by subsequent constitutional and statutory provisions, this court therein held that 'the question, however, has been fully settled by the adjudications of this court upon similar statutes, and we shall not re-open nor re-argue it.' This court then cited *St. Vincent's College v. Schaefer*, 104 Mo. 261, 16 S.W. 395; *State ex rel. v. Westminster College*, 175 Mo. 52, 74 S.W. 990. Neither of the concurring opinions nor the dissenting opinion questioned this ruling of the majority. In the *St. Vincent's College* case, the original charter act was adopted in 1843 while the tax exemption was enacted in 1853 and it was given the same effect by this court as if it were a part of the charter, which could only be true if the later act did become a part of the charter. This case has never been overruled or even questioned. \* \* \* "

Furthermore, the court said on motion for rehearing, l.c. 97:

"This contention was not fully discussed in the Divisional opinion because defendant's principal contention in the trial court, and before Division One, was that the Act of 1851 was no part of plaintiff's charter and therefore the tax exemption was not contractual at all. This latter point is also reargued in the motion for rehearing. We held that it was 'reasonable to consider the two acts together as constituting plaintiff's entire charter and its acceptance as such,' and we adhere to that ruling."

The foregoing holding of the court is supported by the decision rendered in *Curators of Central College vs. Rose*, 182 S.W. (2d) 145, 1.c. 148, wherein the court stated its opinion as to what the foregoing decision held and said:

" \* \* \* We think it is apparent from a reading of the opinion in the case of *William Jewell College v. Beavers*, supra, that the quoted portion of the opinion refers to the act (1) as a part of the charter of William Jewell College and (2) to the rights thereunder vested in said college. \* \* \*

" \* \* \* After the adoption of the said constitutional provisions, that part of the Act of 1851, supra, granting immunity from taxation generally (on lands granted or devised to institutions of learning generally) was void, and only that part of said act which constituted a part of the charter of William Jewell College, remained in force. *State ex rel. Morgan v. Hemenway*, 272 Mo. 187, 198 S.W. 825, 828; *St. Joseph & I.R. Co. v. Cudmore*, 103 Mo. 634, 15 S.W. 535; *St. Joseph & I.R. Co. v. Chambaugh*, 106 Mo. 557, 570, 17 S.W. 581; *Deal v. Mississippi Co.*, 107 Mo. 464, 468, 18 S.W. 24, 14 L.R.A. 622. \* \* \*

In view of the foregoing decisions of the Supreme Court, there is no longer any question as to whether land owned by said William Jewell College is tax exempt. It definitely has held same as not



taxable; that the constitutional provisions of 1865 and 1875 and subsequently enacted legislation exempting said property from taxation does not affect land owned by said college; that the state entered into a contract when it granted a charter to said school in 1849 and that the Act of 1851, making property of said school exempt from taxation, should be construed as a part of said charter and to now tax such property would be to impair the obligations of a contract in violation of the Constitution of the United States and this state.

The only remaining question is, can the county court abate such property taxes for 1942 to 1946 inclusive, assessed against William Jewell College:

The county courts in this state possess only limited jurisdiction, and outside of the management of the county fiscal affairs, possess no powers except those conferred by statute. See *Missouri Electric Power Co. vs. City of Mountain Grove*, 176 S.W. (2d) 612, 352 Mo. 262.

We find the following statutes dealing with the powers of the county court. Section 11114, R. S. Mo. 1939, authorizes the county court, at the term of county court at which the several delinquent lists are required by law to be returned and certified, to examine same and, if the court finds same are not taxable, then the court should correct such error by the best means in its power, and cause the list so corrected to be certified and filed in the office of the clerk of the county court. Section 11114, supra, reads:

"At the term of the county court at which the several delinquent lists are required by law to be returned and certified, the said court shall examine and compare the list of lands and town lots on which the taxes remain due and unpaid; and if any such lands or town lots have been assessed more than once, or if any of said lands or town lots are not subject to taxation, or if the legal subdivision be incorrectly described, in all such cases the said court shall correct such error by the best means in their power, and cause the list so corrected to be certified and filed in the office of the clerk of the county court; and shall also cause the amount of the

state, county and municipal taxes to be entered on record, and the amount of the state taxes to be certified to the state auditor, and amount of municipal taxes to be certified in St. Louis city to the mayor of the city of St. Louis, to the credit of said collector."

In addition to the foregoing statutory authority granted the county court, we are inclined to believe that under Section 11118, R. S. Mo. 1939, the county court was authorized to abate said taxes. However, that provision was repealed by the 63rd General Assembly and enacted in lieu thereof H.C.S.H.B. No. 537, pages 1847 to 1852, inclusive, Laws of Missouri, 1945. However, no provision similar to Section 11118, supra, was enacted by the 63rd General Assembly. That body did, however, enact a provision which we believe authorizes the county court to abate said taxes. Section 24, pages 1789-1790, Laws of Missouri, 1945, authorizes the county court to hear and determine allegations of erroneous assessments or mistakes or defects in descriptions of lands at any term of the court before said taxes are paid when any person shall by affidavit show good cause for not having appeared before the board of equalization. While Section 24, supra, does not specifically grant the county court power to rectify any assessment, it, certainly follows that it would at least by implication have such power to correct any such erroneous assessment it might find after said hearing. It would have been useless to authorize a hearing for the purpose of determining if an erroneous assessment had been made unless the court would have such power to correct same. Section 25 of the same act supports this contention and clearly indicates that it was the legislative intent for the county court to make any such correction by requiring the county clerk, upon order of the county court, to immediately correct the tax book, and further, prescribe what he shall do if such orders shall change the value of property or the amount of taxes. Said Sections 24 and 25 read as follows:

"Section 24. The county court of each county may hear and determine allegations of erroneous assessment, or mistakes or defects in descriptions of lands, at any term of said court before the taxes shall be paid, on application of any person or persons who shall, by affidavit, show good cause for not having attended the county board of equalization or court of appeals for the purpose of correcting such errors

or defects or mistakes. Where any lot of land or any portion thereof has been erroneously assessed twice for the same year, the county court shall have the power and it is hereby made its duty, to release the owner or claimant thereof upon the payment of the proper taxes. Valuations placed on property by the assessor or the board of equalization shall not be deemed to be erroneous assessments under this section."

"Section 25. The clerk of the county court shall immediately correct the tax book, and the copy thereof furnished for the use of the collector, under any order which may be made by said court in pursuance of the foregoing section; and if, by such correction, any alteration is made in the value of the property or the amount of the taxes, he shall certify the same to the state auditor, who shall, on the settlement, allow the collector credit for any sum or sums to which such correction may entitle him."

Erroneous assessment has been defined as follows in In re Blatt, 67 P. (2d) 293, l.c. 301, wherein the court said:

"Speaking through Judge Lewis, the Circuit Court of Appeals of this, the Tenth Circuit, said in denying the relief prayed for: 'The Colorado statute (section 7447), on which plaintiff relies, permits recovery only when the taxes paid are thereafter "found to be erroneous or illegal."' Judge Lewis quotes with approval from the Clay County Case to the effect that an 'excessive assessment' is not an 'erroneous assessment.' Judge Lewis also quoted from the case of Stanley v. Supervisors of Albany County, 121 U.S. 535, 7 S.Ct. 1234, 30 L.Ed. 1000, as follows: 'It (the method of assessment as to banks complained of) must sometimes lead also to overvaluation of the shares; but, if so, no ground is thereby furnished for the recovery of the taxes collected thereon. It is only where the assessment is wholly void, or void with respect to separable portions of the property, the

amount collected on which is ascertainable, or where the assessment has been set aside as invalid, that an action at law will lie for the taxes paid, or for a portion thereof. Overvaluation of property is not a ground of action at law for the excess of taxes paid beyond what should have been levied upon a just valuation. The courts cannot, in such cases, take upon themselves the functions of a revising or equalizing board.' Judge Lewis concludes as follows: 'Moreover, an error as to valuation of property for taxation does not go to the question of jurisdiction of the taxing officer, and even if excessive it does not render the tax illegal and void, which is necessary in order to recover in an action at law. Stanley v. Supervisors of Albany County, supra.'

See also Flournoy vs. First National Bank, 3 S.W. (2d) 244, l.c. 252.

In view of the foregoing decisions, we are convinced that the foregoing tax in question is the result of an erroneous assessment for the reason that such property owned by William Jewell College is exempt from taxation and therefore, the assessor was not authorized to assess such property, and in doing so, he exceeded his jurisdiction and said assessment is void. Under any circumstances, said taxes could not be collected, neither could such property be sold for taxes. The school could enjoin the collector from selling said property if an attempt should be made to sell same for delinquent taxes.

#### CONCLUSION

It is the opinion of this department that the property in question is exempt from taxation and therefore, the taxes heretofore assessed against said property are erroneous assessments and the county court may so find and abate said taxes under Section 11114, R. S. Mo. 1939, and Section 24, pages 1789-1790, Laws of Missouri, 1945.

Respectfully submitted,

APPROVED:

AUBREY R. HAMMETT, Jr.  
Assistant Attorney General

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J. E. TAYLOR  
Attorney General

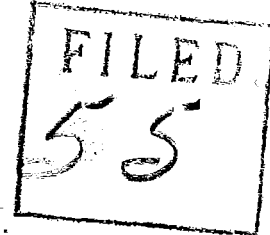
ARH:VLM

TAXATION AND REVENUE:

A penalty of 10% per annum or 1% a month or fraction thereof, attaches to delinquent taxes as of January 1, when such delinquent taxes remain delinquent as of February 1, when the collector starts making his delinquent tax book.

*Delinquent date changed to Jan 1  
by Laws 1947 vol 2 p 425.*  
January 24, 1947

C  
O  
P  
Y



Mr. Chester R. Lyle  
County Clerk  
Nodaway County  
Maryville, Missouri

Dear Sir:

This will acknowledge your recent request for an opinion, based on the following facts:

"Please give us your opinion on the following questions:

"What changes have been made in counties with township organization in regard to penalty on taxes?

"Does the penalty go on January 1st or February 1st and what is the penalty?"

The township collector, in making his return of delinquent or unpaid taxes, follows the general law as to the taxing or adding of penalties, there being no special provision as to such in counties having township organization. Section 14000, Mo. R. S. A., provides:

"The township collector of each township shall, at the term of the county court to be held on the first Monday in March of each year, make a final settlement of his accounts with the county court for state, county, school and township taxes and produce receipts from the proper officers for all school and township taxes collected by him, less his commission on same, at which time he shall pay over to the county treasurer and ex officio collector all moneys remaining in his hands,

collected by him on state and county taxes, and shall at the same time make his return of all delinquent or unpaid taxes, as required by law, \* \* \* \*"

Under the general law both personal and land taxes become delinquent on January 1, annually. Section 11108, Mo. R.S.A., provides:

"All real estate upon which the taxes remain unpaid on the first day of January, annually, shall be deemed delinquent, and the said county collector shall proceed to enforce the lien of the state thereon, as required by this chapter, \* \* \* \*"

Section 11112, Mo. R. S. A., as amended by House Committee Substitute for House Bill No. 537, provides:

"\* \* \* \* \*For the purpose of this chapter, personal tax bills shall become delinquent on the first day of January following the day when said bills are placed in the hands of the collector, and suits thereon may be instituted on and after the first day of February following, and within five years from said day. \* \* \* \* \*"

The collector is required to make lists of delinquent personal and real estate taxes under Section 11110, Mo. R.S.A., as amended by House Bill No. 537. Said section provides:

"Whenever any collector shall be unable to collect any taxes specified on the tax book, having diligently endeavored and used all lawful means to collect the same, he shall make lists thereof, one to be called the 'tangible personal property delinquent list', in which shall be stated the names of all persons owing taxes on tangible personal property, where taxes cannot be collected, alphabetically arranged, with the amount due from each, and the other to be called the 'land delinquent list', in which shall be stated

the taxes on lands and town lots where taxes have not been collected, with a full description of said lands and lots, and the amount of taxes due thereon, set opposite each tract of land or town lot;  
\* \* \*"

The question then arises as to when the penalty on delinquent taxes attaches. Under Section 11085, Mo. R.S.A., before it was amended by the 63rd General Assembly, the penalty was added January 1, and taxes paid any time thereafter were subject thereto. Said Section 11085 was amended by House Bill No. 765, and the pertinent part thereof is as follows:

"If any taxpayer shall fail or neglect to pay such collector his taxes at the time and place required by such notices, then it shall be the duty of the collector after the first day of February then next ensuing, to collect and account for, as other taxes, an additional tax, as penalty, the amount provided for in Section 11124.  
\* \* \*"

(Note: The notice mentioned in Section 11085 is provided for in Section 11097, Mo. R.S.A.)

Section 11124, Mo. R.S.A., referred to in Section 11085, House Bill No. 765, supra, was amended by House Bill No. 766, and, as amended, reads as follows:

"Between the first of February and the first of July in the year 1947 and annually thereafter, the county collector shall make out and record, in a book to be provided for that purpose, a list of lands and lots, returned and remaining delinquent for taxes, including therein the delinquent taxes of all cities and incorporated towns having authority to levy and collect taxes under their respective charters or under any law of this state returned delinquent to the county collector, separately stated, describing such lands or lots as the same are described in the tax books and said delinquent returns, as corrected under sections

11110 and 11114, and charging them with the amount of delinquent tax and naming the years delinquent, separately stated, and in addition thereto a penalty of ten per centum on such tax delinquent for the preceding year and an additional annual ten per centum on taxes for each year prior to the preceding year, and shall certify to the correctness thereof, with the date when the same was recorded, and sign the same by himself, or deputy, officially: Provided, however, if taxes are paid on land or lots delinquent for the preceding year at any time prior to sale thereof as in this law provided, the per centum of penalty added shall not exceed one per centum per month or fractional part thereof or ten per centum annually. It shall be the duty of the county clerk and county collector to compare the collector's record of such list of delinquent lands and lots as corrected with the corrected 'delinquent land list' made pursuant to sections 11110 and 11114, and the county clerk shall certify in the 'delinquent land list' on file in his office that same has been properly recorded in the collector's office and shall attach a certificate at the end of the record of such list of delinquent lands and lots in the collector's office that such record contains a true copy of the 'delinquent land list' on file in his office. And where the words 'back tax book' are now used in laws pertaining to the collection of taxes on delinquent lands, real estate and lots, the record of the list of delinquent lands and lots in the collector's office under the provisions of this law shall be held to be (where applicable and except as to city or town 'back tax book') such 'back tax book', and the recording of same by the collector and certification by the county clerk as herein provided, shall be construed as a making of such 'back tax book' of delinquent real estate, lands and lots. Said collector shall be charged with the taxes, penalty and interest shown on such record of the list of delinquent lands and lots." (Emphasis ours)



It is our conclusion that the penalty, even though not added to the tax until February 1, is effective as of January 1, and must be added as of that date to the delinquent taxes if such delinquent taxes have not been paid before February 1, when the collector starts making his delinquent tax book. This conclusion is based upon the fact that taxes are delinquent as of January 1, and that Section 11124, supra, provides that after February 1 the collector shall make a book of taxes remaining delinquent and that in addition to charging the delinquent taxes he shall add a penalty to such delinquent taxes. We think this act merely creates a thirty day grace period, during which period the taxpayer can save the penalty by paying his delinquent tax before the collector starts making his book on February 1, but if his tax remains delinquent as of that date he must pay a penalty from the time they became delinquent, which would be January 1.

This reasoning is also supported by a constitutional provision and a statute and both require taxes to be levied and collected during the calendar year. Section 3 of Article X of the 1945 Constitution provides:

"\* \* \* \* All taxes shall be levied and collected by general laws and shall be payable during the fiscal or calendar year in which the property is assessed.  
\* \* \* \*"

Section 4 of House Committee Substitute for House Bill no. 471, which also requires the taxes to be levied and collected during the calendar year, is as follows:

"Every person owning or holding real property or tangible personal property on the first day of January including all such property purchased on that day, shall be liable for taxes thereon during the same calendar year."

If it were held that the penalty was to be charged or added from February 1 to the next February 1, this would, in effect, be holding the tax year to be from February 1 to February 1, in violation of both the constitutional and statutory provisions quoted hereinbefore.

The amount of the penalty on delinquent taxes provided for in Section 11124, as amended by House Bill No. 766, supra, is ten per cent per annum or one per cent per month or fraction thereof.

Mr. Chester R. Lyle

-6-

You ask what changes have been made in the law in regard to the penalty. The only change is that the penalty does not attach immediately as of January 1, as it did before, but attaches as of January 1 on February 1, if the tax remains delinquent at that time.

Conclusion.

It is the opinion of this department that taxes due for any calendar year become delinquent on the first day of January of the next ensuing year; that the penalty is added as of January 1, if such delinquent taxes remain delinquent as of February 1, when the collector starts making his delinquent tax book; and that the amount of the penalty is ten per cent per annum or one per cent per month or fraction thereof.

Respectfully submitted,

W. BRADY DUNCAN  
Assistant Attorney General

APPROVED:

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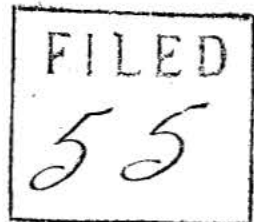
J. E. TAYLOR  
Attorney General

WBD:mw

LABOR LAW: A female employee engaged in a clerical capacity in one of the Cities Service Oil Company may work only nine hours a day for six days a week.

*See opinion  
43-90*

April 15, 1947



*4/18*

Mr. Carl E. Luckow  
Assistant Director  
Division of Industrial Inspection  
Jefferson City, Missouri

Dear Sir:

We hereby acknowledge receipt of your letter of recent date requesting an opinion of this department on a question referred to you by the Cities Service Oil Company which is as follows:

"I would appreciate receiving your definition of the words 'Mercantile Establishments' as used in Sec. 7815 Laws of Missouri, 1913.

"Would a female employee engaged in a clerical capacity in one of our accounting offices be prohibited from working more than 9 hours in one day on one or two occasions per month?"

Section 7815, Laws of Missouri, 1913, referred to above, is Section 10171, R. S. Mo. 1939, and reads in part as follows:

"No female shall be employed, permitted, or suffered to work, manual or physical, in any manufacturing, mechanical, or mercantile establishment, or factory, workshop, laundry, bakery, restaurant, or any place of amusement, or to do any stenographic or clerical work of any character in any of the divers kinds of establishments and places of industry, hereinabove described,

or by any person, firm or corporation engaged in any express or transportation or public utility business, or by any common carrier, or by any public institution, incorporated or unincorporated, in this state, more than nine hours during any one day, or more than fifty-four hours during any one week: \* \* \*

It is clear that the Cities Service Oil Company is a mercantile establishment. In the case of *In re Pacific Coast Warehouse Co.*, 123 Fed. 749, the following definition was adopted by the court, at l. c. 750:

"\* \* \* The word 'mercantile,' in its ordinary acceptation, pertains to the business of merchants, and has 'to do with trade, or the buying and selling of commodities.' A merchant is one who traffics, or who buys and sells goods or commodities. \* \* \* The term 'mercantile pursuits' necessarily carries with it the idea of traffic, the buying of something from another or the selling of something to another, and is allied to trade. \* \* \*"

The Cities Service Oil Company sells all types of petroleum products and is therefore in the mercantile business.

This leaves the sole question of whether or not a person employed in the accounting department of the Cities Service Oil Company should be considered to be employed in a mercantile establishment. It is fundamental that the legislative intent should be ascertained, if possible, when construing statutes. In upholding the constitutionality of minimum hour laws for females the courts have been uniform in stating that the purpose of this type of a law is to protect the public welfare. In the case of *Muller v. Oregon*, 208 U. S. 412, 52 L. Ed. 551, a statute of Oregon that provided for minimum working hours for females was under consideration. In commenting upon the intent of the legislatures in passing these types of laws, the court stated at l. c. 556:

"That woman's physical structure and the performance of maternal functions

place her at a disadvantage in the struggle for subsistence is obvious. This is especially true when the burdens of motherhood are upon her. Even when they are not, by abundant testimony of the medical fraternity continuance for a long time on her feet at work, repeating this from day to day, tends to injurious effects upon the body, and, as healthy mothers are essential to vigorous offspring, the physical well-being of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race."

With this stated purpose in mind we believe it is necessary to give to the statute a broad and liberal construction.

In the case of *Spielmann v. Industrial Commission et al.*, 295 N. W. 1, a statute of Wisconsin was under consideration in which it was necessary to define the meaning of the word "establishment." The facts show that an auto corporation owned a body plant in Milwaukee and an assembly plant at Kenosha and Racine. It was contended that a work stoppage in one plant, due to a strike, would not prevent the workers in the other plants from receiving unemployment compensation when it became necessary to close up these other plants. The Wisconsin statute prohibited the payment of unemployment compensation when the work stoppage was the result of a strike in an establishment. The Industrial Commission of Wisconsin held that all three plants was a single establishment within the meaning of the statute. In commenting upon this ruling, the Supreme Court of Wisconsin stated at l. c. 5:

"It is suggested that the use of the word 'in' instead of 'by' in the clause 'establishment in which he is or was employed' indicates that the word establishment was used in the sense of a definite place. Perhaps the use of 'by' would have more emphasized the fact that the word 'establishment' was used in a comprehensive rather than a restricted sense, but we consider that the use of 'in' does not preclude the meaning given to par. (a) of the statute by the Commission. Legislatures can not be conclusively

presumed to have used such fine discrimination in their use of prepositions. The meaning of the word 'establishment' is to be drawn from the whole act rather than from so insignificant a thing as a single preposition. We consider that the conclusion of the Commission must be sustained."

In the case of Commonwealth v. John T. Connor Co., 222 Mass. 299, the court had a statute similar to the Missouri statute under consideration. The evidence showed that the employer hired one Elsie Finn as a cashier and bookkeeper in his grocer store. She was in no way connected with the sale of goods and was set off by herself in a cage. The court held that her employment was subject to the minimum hour statute. We believe the situation that is before us for consideration is analogous to the two outlined above. Even though the female employee is working in the accounting offices she is actually being employed in the Cities Service Oil Company, a mercantile establishment.

#### Conclusion

Therefore, it is the opinion of this department that a female employee engaged in a clerical capacity in one of the accounting offices of the Cities Service Oil Company, would be prohibited from working more than nine hours in one day as provided by Section 10171, R. S. No. 1939.

Respectfully submitted,

PERSHING WILSON  
Assistant Attorney General

APPROVED:

J. E. TAYLOR  
Attorney General

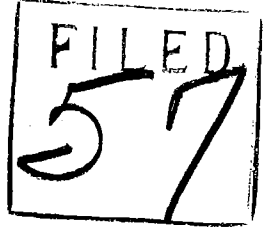
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PROBATE COURT:  
PROSECUTING ATTORNEY:

In re: Costs paid by county in indigent insane hearings; accrued fees due probate judge; duties of prosecuting attorney in indigent insane hearing; prosecuting attorney cannot be appointed appraiser in assessing inheritance tax.

January 16, 1947

Filed No. 57



Honorable Gordon J. Massey  
Prosecuting Attorney  
Christian County  
Ozark, Missouri

Dear Sir:

This will acknowledge receipt of your letter, in which you requested an answer to four questions presented therein. Your letter reads in part as follows:

"There are some questions I would like to have answered.

"Does the county pay the costs of a hearing held to determine if a poor person is insane. I mean the costs due the Magistrate acting as probate judge so that he in turn can pay same to the state.

"In estates that are pending in probate court where fees are already earned but not paid, shall the probate judge pay such accrued fees to the county or to the state.

"Please advise who is to present the facts in a hearing when it is sought to declare a poor person insane? Does the prosecuting attorney have any duty to perform.

"Can the prosecuting attorney be appointed appraiser in assessing inheritance tax?"

The first question presented is whether the county pays the costs of a hearing held to determine if a poor person is insane. Section 453, R. S. Mo. 1939, provides:

"When any person shall be found to be insane according to the preceding provisions, the costs of the proceedings shall be paid out of his estate, or, if that be insufficient, by the county."

Said Section 453 is the same provision as Section 454, R.S.Mo. 1929, to which the Supreme Court of Missouri referred in the case of Van Loo v. Osage County, 346 Mo. 358, when they said at l.c. 366:

"As appears, supra, from Sec. 454, R.S. 1929, and from the Cox case, when a person is adjudged insane in the probate court, and the costs cannot be paid out of the estate of such insane person, then the county is liable for such costs, \* \* \* \* \*

The Osage County case, supra, was decided when the county courts had the exclusive authority to admit an insane poor person to an insane hospital. Since that case Senate Bill No. 284, Section 9328, gives to the probate courts power to send to a state hospital the insane poor of their respective counties. However, simply because such hearings are held in a probate court instead of the county court is no reason to believe that the respective county is no longer liable for such costs.

The next question presented is whether in estates that are pending in probate court where the fees are already earned but not paid, the probate judge pays such accrued fees to the county or to the state. In answering this question I am inclosing a copy of an opinion rendered by this office to Honorable Hugh P. Williamson, Prosecuting Attorney of Callaway County, Fulton, Missouri, under date of June 18, 1946, which held that the probate judge was entitled to fees which accrued last year of term prior to January 1, 1947, but were not collected until after that date.

The third question presented is who presents the facts in a hearing when it is sought to declare a poor person insane and whether the prosecuting attorney has any duty to perform. From an observation of Senate Bill No. 284, it is to be noted that any citizen of the county in which the alleged insane person is a resident may file a written verified statement with the judge or clerk of the probate court. Thereupon the clerk shall cause the alleged insane person to be notified of the proceeding. Section 12944, RSMo 1939, in setting out the duties of the prosecuting attorney, provides:

"He shall prosecute or defend, as the case may require, all civil suits in which the county is interested, represent generally the county in all matters of law, investigate



all claims against the county, draw all contracts relating to the business of the county, and shall give his opinion, without fee, in matters of law in which the county is interested, and in writing when demanded, to the county court, or any judge thereof, except in counties in which there may be a county counselor. \* \* \* \* \*

An indigent insane hearing held before the probate court is a proceeding in which the county has an interest; the county is liable for the costs; the hearing is dealing with the resident of the county, and is conducted by county officers. The Kansas City Court of Appeals said in the case of *Ex parte Trant*, 175 S.W. (2d) 161, 1.c. 164:

"\* \* \* \* A lunacy proceeding is a civil, as distinguished from a criminal proceeding; it is a proceeding in personam by the state; the public is interested in the welfare of the person alleged to be insane; \* \* \* \* \*

Thus it will be seen that the prosecuting attorney, when necessary, should advise and supervise the proceeding, even though in certain cases the informant in the proceeding may be a private citizen.

The fourth question presented by your letter raises the question whether the prosecuting attorney can be appointed appraiser in assessing inheritance tax. Section 12944, R.S. Mo. 1939, in setting out the duties of the prosecuting attorney, provides:

"He shall prosecute or defend, as the case may require, all civil suits in which the county is interested, represent generally the county in all matters of law, investigate all claims against the county, draw all contracts relating to the business of the county, and shall give his opinion, without fee, in matters of law in which the county is interested, and in writing when demanded, to the county court, or any judge thereof, except in counties in which there may be a county counselor. \* \* \* \* \*

House Bill No. 651, Section 585, provides that the probate court shall have jurisdiction to determine the amount of

tax provided under the inheritance tax law to determine any question that may arise in connection therewith. It further provides that the court may on its own motion or on the application of any interested person, including the Director of Revenue, the prosecuting attorney or the attorney-general, appoint some qualified taxpaying citizen of the county as appraiser. Section 589, R.S. Mo. 1939, provides that if an appraiser be appointed he is entitled to five dollars per day for the time he is actually engaged in the performance of his duties. Section 587, House Bill No. 651, provides:

"Any interested person, including the Director of Revenue, attorney-general or prosecuting attorney of the county may file exceptions to the report of the appraiser within thirty days after the date same is filed, specifically pointing out his or their objection thereto, and such exception shall be determined by the court in a summary manner. \* \* \* \* \*

Section 590, House Bill No. 651, provides:

"The prosecuting attorney shall represent the state at all hearings, proceedings and trials under the provisions of this law in the probate and circuit courts, and the attorney-general shall, at the request of the Director of Revenue, assist the prosecuting attorney in any such hearing, proceeding or trial and shall appear for and represent the state in any appeal or proceeding in the supreme or appellate courts of the state, and in any case in the federal courts."

Thus from a reading of these inheritance tax statutes, and keeping in mind the general duties of the prosecuting attorney as set out in Section 12944, R.S. Mo. 1939, it can readily be seen that the prosecuting attorney, in carrying out the duties of his office, could be involved in subsequent proceedings relative to the inheritance tax and the appraisal thereof. Consequently, it is obvious that the prosecuting attorney, were he appointed appraiser in assessing the inheritance tax, would at the same time be representing conflicting interests. Universal recognition is accorded the principle that generally a lawyer should not represent conflicting interests.

Section 12948, R.S. Mo. 1939, provides:

"If the prosecuting attorney and assistant prosecuting attorney be interested or shall have been employed as counsel in any case where such employment is inconsistent with the duties of his office, or shall be related to the defendant in any criminal prosecution, either by blood or by marriage, the court having criminal jurisdiction may appoint some other attorney to prosecute or defend the cause."

Said Section 12948, supra, appears to apply to criminal cases, but it is expressive of the policy of the law that a prosecuting attorney should not accept employment to advise or represent in any case where such employment is inconsistent with the duties of his office.

CONCLUSION

Therefore, it is the opinion of this department that:  
(I) The county does pay the costs of the hearing held to determine if a poor person is insane. (III) The prosecuting attorney, if not called upon to actually present the facts in a hearing when it is sought to declare a poor person insane, does, when necessary, supervise and advise the presentation of the facts in such hearing. (IV) The prosecuting attorney cannot be appointed appraiser in assessing inheritance tax. Question II, relative to fees in probate courts, is answered by an opinion rendered by this office, a copy of which is enclosed, which held that a probate judge was entitled to fees which accrued prior to January 1, 1947, but not collected until after that date.

Respectfully submitted,

WILLIAM C. COCKRILL  
Assistant Attorney General

APPROVED:

J. E. TAYLOR  
Attorney General

WCC:LR  
Enc.

MAGISTRATE COURTS: Fees in criminal cases.

February 10, 1947

Honorable Gordon J. Massey  
Prosecuting Attorney  
Christian County  
Ozark, Missouri



Dear Sir:

We are in receipt of your request for our opinion concerning the fees to be charged by the newly created magistrate courts in criminal cases.

Magistrate courts were created by Senate Bill No. 207, enacted by the 63rd General Assembly (now Chapter 11A, Mo. R.S.A.), and their jurisdiction in civil cases is clearly defined in that enactment. By its terms Senate Bill No. 207 relates only to civil cases, and the costs to be recovered by such courts in criminal cases are not referred to therein.

Senate Bill No. 193, enacted by the 63rd General Assembly (Article 4A, Chapter 30, Mo. R.S.A.), defines the powers of the magistrate courts with reference to misdemeanors. Section 3856.1, Mo. R.S.A., is as follows:

"Magistrates shall have concurrent original jurisdiction with the circuit court, co-extensive with their respective counties in all cases of misdemeanor, \* \* \*"

Section 3856.29, Mo. R.S.A., provides:

"All proceedings upon the trial of misdemeanors before magistrate shall be governed by the practice in criminal cases in circuit courts, so far as the same may be applicable, \* \* \*"

Senate Bill No. 350, enacted by the 63rd General Assembly, and effective on January 1, 1947, except in counties

having township organization, in which incumbent justices of the peace hold office after January 1, 1947, repealed all the general provisions of our statutes relating to jurisdiction of justices of the peace in misdemeanors, and except in counties with township organization, where the effective date is delayed, justice of the peace courts have no legal existence.

Senate Bill No. 352, enacted by the 63rd General Assembly, and effective January 1, 1947, and Senate Bill No. 281, also effective January 1, 1947, effectively transferred to magistrates the powers formerly held by justices of the peace in preliminary examinations of those charged with the commission of a felony.

Your inquiry suggests that magistrates may yet be governed by Sections 13400 and 13401, R.S.Mo. 1939, in the fees to be charged for their services in criminal causes. We find, however, that those sections were repealed by Senate Bill No. 334, effective January 1, 1947, except as to those justices of the peace whose terms expire at a later date.

Senate Bill No. 333, enacted by the 63rd General Assembly (Section 13403.1, Mo. R.S.A.), and effective January 1, 1947, fixes the fees for certain services of the clerk of the magistrate court, and is as follows:

"There shall be charged and collected by the clerks of the magistrate courts fees for certain of their services, as follows:

"For issuing each execution. . . . . \$0.35

"For each renewal of execution. . . . . .25

"For making certified copies on appeals or certiorari, for each 100 words. . . . . .10

"For writing depositions, when required to do so, for every 100 words. . . . . .15

"For writing and certifying evidence of witnesses in the cases of homicide, for every 100 words and figures. . . . . .15

"For copies of records, pleadings or  
instruments on file in the of-  
fice of such clerks, for every  
100 words and figures. . . . .10

"All such fees shall be charged on behalf  
of the State or county paying salary of such  
clerk and shall be paid and accounted for in  
the same manner as magistrate fees."

Section 13409, R.S. Mo. 1939, applies to all courts in  
this state having criminal jurisdiction, and the maigstrate  
courts are now within that classification, as pointed out  
above. The latter section is not set out herein because of  
its length, but with Senate Bill No. 333, above, it covers all  
possible charges which may be incurred by magistrate courts and  
the clerks thereof.

CONCLUSION

It is, therefore, our conclusion that costs in criminal  
cases in magistrate courts in Missouri are governed by Section  
13409, R.S. Mo. 1939, and Senate Bill No. 333 (Section 13403.1,  
Mo. R.S.A.), enacted by the 63rd General Assembly.

Respectfully submitted,

ROBERT L. HYDER  
Assistant Attorney General

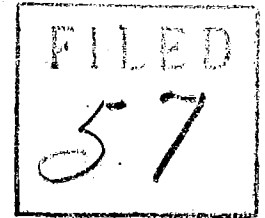
APPROVED:

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J. E. TAYLOR  
Attorney General

RLH:HR

COUNTY OFFICERS: Mode of determining compensation for judges of the county courts in third class counties.



February 18, 1947

Honorable G. Logan Marr.  
Prosecuting Attorney  
Morgan County  
Versailles, Missouri

Dear Sir:

Reference is made to your inquiry of recent date, requesting an official opinion of this office, and reading as follows:

"Our county court has requested an opinion as to the meaning of the days meant in H.B. No. 779.

"1. Does that mean the first five consecutive days of the month, that the court meets, to transact business?

"2. Or does the statute mean, the first five days of the month, that the court meets, and might not be the first five consecutive days of the month?

"3. And if two of the members of the court held court and having constituted a quorum, and they met five days, the first five meeting days of the month, and for which they would be entitled to the \$10.00 per day for the first five days they met,

"Now the third member, he attends court, with the other two, but, is he entitled to \$10.00 for the first five days of court he attends, after he has returned from his absence? In other words, does that \$10.00 apply to the court so meeting the first five days of the month they meet, and not the fact that each member in court gets \$10.00, for each five days the member of the court is in session?"

We note that you have referred to House Bill No. 779. For your information, House Bill No. 779 of the 63rd General Assembly fixes the compensation for judges of the county court in counties of the fourth class. According to the classification adopted by the 63rd General Assembly, pursuant to constitutional provisions, Morgan County has been placed in the third class, and therefore the Act mentioned by you is not applicable.

However, we have made further examination of the legislative enactments of the 63rd General Assembly and find that House Bill No. 778 deals with the compensation of judges of the county court in counties of the third class.

Section 1 of the Act mentioned reads, in part, as follows:

"In all counties of the third class in this state, the judges of the county court shall receive for their services the sum of ten dollars per day for each of the first five days in any month that they are necessarily engaged in holding court and shall receive five dollars per day for each additional day in any month that they may be necessarily engaged in holding court, \* \* \*"

Your first two inquiries bring up the question of whether or not the ten dollar per day allowance may be made to the respective judges of the county court only if the court meets the first five consecutive days in any month.

We do not believe that it is necessary that court be held on the first five consecutive days of the month to entitle the judges thereof to the ten dollar per day compensation. You will note that the Act reads, "\* \* \* shall receive \* \* \* ten dollars per day for each of the first five days in any month that they are necessarily engaged in holding court \* \* \*." It is our thought that the portion of the quoted sentence which has been underscored is a qualification of the portion preceding it; in other words, that the ten dollar per day compensation is allowable for the first five days spent in holding court, without regard to the portion of the month that such court is held.

The terms of the county court are fixed by statute, namely, Section 2485, R. S. No. 1939, as the first Monday in February, May, August and November. These are designated regular terms and may be varied by the county court if it seems expedient to do so, upon giving notice of such change. Further, under the



provisions of Section 2489, R. S. Mo. 1939, the county court may hold adjourned terms at such times as it becomes necessary for the transaction of county business.

It is noted that under these two statutes the county court is endowed with a broad discretion as to the exact time of holding court, the test in each instance being that such court be held for the proper discharge of its duties. With these provisions in mind, it seems to us that the provision for additional compensation for the first five days of court necessarily held, which is found in the above quoted portion of House Bill No. 778 of the 63rd General Assembly, was designed to compensate the respective judges for the first five days that it is deemed necessary in any month to meet to transact county business.

Your third inquiry brings up the question of whether or not a member of the county court who fails to attend one or more of the first five days of county court in any one month is entitled to be compensated at the rate of ten dollars per day for the first five days of court which he does thereafter attend in any one month.

Under the provisions of Section 2493, R. S. Mo. 1939, a majority of the judges of the county court constitutes a quorum. Therefore, under the provisions of this statute, the business of the court may be transacted by the two members meeting. In view of the conclusion that we have reached with respect to the first and second questions which you have proposed, we are led to the belief that the compensation of ten dollars per day is limited to those judges who attend the first five meetings of the court in any month. Should one of the judges fail to attend one or more of such first five days of court, he may be compensated at the rate of ten dollars per day for only such of the first five days he actually attends in any month; thereafter the compensation of all judges shall be at the rate of five dollars per day, as provided in the Act.

#### CONCLUSION

In the premises, we are of the opinion (1) that the judges of the county court in counties of the third class are each entitled to ten dollars per day for attendance at the first five sessions of court held in any one month, and (2) that such com-

Honorable G. Logan Marr - 4

pensation of ten dollars per day may be paid only for attendance at such first five days in any one month.

Respectfully submitted,

WILL F. BERRY, Jr.  
Assistant Attorney General

APPROVED:

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J. E. TAYLOR  
Attorney General

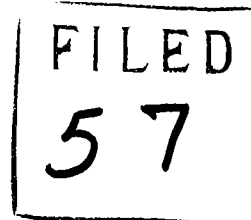
WFB:HR

COUNTY OFFICERS:

Tenure of county treasurers elected  
at general election on November 5,  
1946.

February 26, 1947

Honorable G. Logan Marr  
Prosecuting Attorney  
Morgan County  
Versailles, Missouri



Dear Sir:

Reference is made to your inquiry of recent date, requesting an official opinion of this office, and reading as follows:

"The facts show that our County Treasurer was elected in November, 1946. HB No. 729 seems to indicate that county treasurers are elected for four years. Our representative from this county has been advised in the legislature by the legal experts there that our treasurer here is elected for four years.

"Now, after reading that HB clear through, it seems that the county treasurer whose term ends December 31, 1948, holds only two years; but what about the county treasurer who was elected in November, 1946. When does his term end?

"The county clerk has informed me that the election certificate issued to the county treasurer was to go into effect as of January 1, 1947, and for two years only; this certificate was signed by the presiding judge of the county court, and as the chairman of the election board, if Morgan County, Mo., has such an official.

"Therefore, I want an opinion as to whether this county treasurer was elected two years or four years under HB 279."

House Bill No. 729 of the 63rd General Assembly, referred to in your request, repealed Sections 13789 to 13792, inclusive,

of Article 8, Chapter 100, R. S. Mo. 1939. The Act further provides for the election of county treasurers, through the enactment of Section 13789, reading as follows:

"There is hereby created in all the counties of this state the office of County Treasurer. At the general election in the year 1946 and every four years thereafter, there shall be elected by the qualified electors in all counties of this state a county treasurer who shall be commissioned by the county court of his county and who shall enter upon the discharge of the duties of his office on the first day of January next succeeding his election, and shall hold his office for a term of four years and until his successor is elected and qualified, unless sooner removed from office; provided, however, that in those counties wherein the present treasurer's term ends on December 31, 1948, the qualified electors of such counties shall elect a county treasurer at the November election in 1948 and the treasurers so elected shall serve a two-year term but thereafter the term of said treasurers shall be four years; and provided that in counties which have adopted the township alternative form of county government the treasurer's term shall extend until the first day of April next after the election of his successor; provided, further, that the terms of all persons holding the office of county treasurer to which they have been elected or appointed at the time this act shall take effect shall not be vacated or otherwise affected thereby."  
(Emphasis ours.)

It is a fundamental rule of statutory construction that if the language contained in a statute is clear and unambiguous, no need for judicial interpretation arises. The rule has been so declared by the Supreme Court of Missouri, in Banc, in *Nordberg v. Montgomery*, 173 S. W. (2d) 387, 1. c. 390, from which we quote:

"We think the language of the Statute is plain and unambiguous, and the intent of the Legislature is clear, as we have already found. 'Rules for the interpretation of statutes are only intended to aid in ascertaining the legislative intent, "and not for the purpose of controlling the intention or of confining the op-

eration of the statute within narrower limits than was intended by the lawmaker." Sutherland on Statutory Const., sec. 279. If the intention is clearly expressed, and the language used is without ambiguity, all technical rules of interpretation should be rejected.' State ex rel. Wabash Ry. Co. et al. v. Shain, 341 Mo. 19, 106 S. W. 2d 898, loc. cit. 899, 900."

Giving due regard to this rule, and considering the clear and unambiguous language contained in the statute quoted, supra, with particular reference to the portion thereof which has been emphasized by underscoring, we reach the conclusion that the county treasurers who were elected at the general election on November 5, 1946, are to hold their respective offices for four year terms, commencing on the first day of January, 1947.

It is quite probable that the confusion with respect to the tenure of such county treasurers has arisen as a result of the proviso contained in the quoted statute. We refer particularly to that portion of the proviso relating to incumbent treasurers whose present terms will expire on December 31, 1948.

This situation has arisen as a result of action taken by the 57th General Assembly, which had the effect of abolishing the office of county treasurer in certain counties from and after the first day of January, 1937. This Act was repealed by further action taken by the 59th General Assembly, by virtue of which the office was restored. However, in the restoration a situation was created in which the county treasurers in the counties affected thereby have since been elected to the elections differing from those in the remainder of the counties. Therefore, at the time of the passage and approval of House Bill No. 729 of the 63rd General Assembly, there were, in certain counties, county treasurers whose terms of office will not end until December 31, 1948.

At the time of the enactment of House Bill No. 729 of the 63rd General Assembly, it was not within the power of that body to affect the tenure of the county treasurers holding office under the conditions mentioned, by virtue of the following constitutional provision, found as Section 3 of the Schedule appended to the Constitution of Missouri of 1945:

"The terms of all persons holding public office to which they have been elected or appointed

at the time this Constitution shall take effect shall not be vacated or otherwise affected thereby."

What has been said hereinbefore is also equally applicable to the further proviso found in House Bill No. 729 of the 63rd General Assembly relating to counties in which the township form of county government is in force.

#### CONCLUSION

In the premises, we are of the opinion that county treasurers who, under existent laws, and particularly under the provisions of House Bill No. 729 of the 63rd General Assembly, were elected to that office at the general election held on November 5, 1946, have a tenure in office of four years, and until their respective successors are elected and qualified, such term commencing on the first day of January, 1947.

Respectfully submitted,

WILL F. BERRY, Jr.  
Assistant Attorney General

APPROVED:

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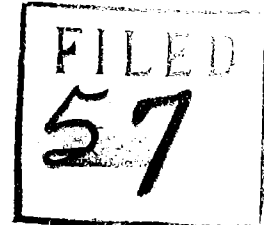
J. E. TAYLOR  
Attorney General

MAGISTRATES — State of Missouri is not required to deposit \$5.00 when commencing a suit in the magistrate court; a magistrate shall not require plaintiff to provide security for costs in all proceedings; a \$5.00 magistrate fee is not to be apportioned for the purpose of paying costs of any proceeding.

March 26, 1947

OPINION NO. 57

Honorable G. Logan Marr  
Prosecuting Attorney  
Morgan County  
Versailles, Missouri



Dear Sir:

We hereby acknowledge receipt of your letter of recent date requesting an opinion of this department, which, for the sake of brevity, we have restated as follows:

- (1) Does the State of Missouri have to deposit the \$5.00 magistrate fee when filing a proceeding in the magistrate court?
- (2) May the magistrate require that a plaintiff provide security for costs in all proceedings?
- (3) Is the \$5.00 magistrate fee that must be paid upon the commencement of a civil proceeding in the magistrate court a cost deposit to be apportioned among the costs of the proceeding?

Section 23 of Senate Bill 207 of the 63rd General Assembly provides in part as follows:

"Upon the commencement of any proceedings in the magistrate court the party commencing the same shall pay to the clerk of said court a magistrate fee of five dollars (\$5.00). The fees herein provided shall be charged against the losing party, and if recovered from said party the same shall be repaid to the party making the deposit of such fee. Except as

provided in Section 23a of this act, it shall be the duty of each clerk of the magistrate court, with the approval of the magistrate to charge upon behalf of the State every fee that accrues in his office and to receive the same, and at the end of each month, pay over to the director of revenue all monies collected by him as fees, taking two receipts therefor, \* \* \* \* \*

It is noted that this is a general provision and does not specifically provide that the state shall pay the \$5.00 fee. If this \$5.00 were paid by the state when filing a proceeding in the magistrate court it would go back to the state and be deposited in the magistrate fund. This would merely be going through an absurd proceeding - taking money from the state and immediately giving it back.

The general rule, that the state is not liable for costs unless specifically named, is stated in 59 C. J. page 332, Sec. 503, which reads in part as follows:

"While a state may be excused from the payment of costs because of express statutory exemption, it is a general and well established rule, apart from statute, that costs are not recoverable from a state, in her own courts, whether she has brought suit as plaintiff or has properly been sued as defendant; or whether she is successful or defeated; and if a state has paid costs for which it is not liable, it may recover the amount paid from the party who is liable. Costs, however, may be awarded against a state when it is expressly permitted by statute; but only in a case coming clearly within the terms of the statute, and general statutes providing for taxation of costs in favor of the prevailing party or against the unsuccessful party do not authorize an award for costs against a state."

This rule has been followed by the Supreme Court of this state in the case of Murphy et al., v. Limpp, 147 S. W. (2d) 420, which was a case brought by the members of the Unemployment Compens-



sation Commission against one Rufus H. Limpp for the purpose of collecting contributions under the provisions of the Unemployment Compensation law. Judgment was rendered for the defendant and the lower court assessed costs incurred against the plaintiff, the Unemployment Compensation Commission. After citing the above quotation from Corpus Juris, they stated that in the absence of a statutory provision the costs cannot be assessed against the state. For other cases affirming this doctrine, see Hartwig-Dischinger Realty Co. v. Unemployment Compensation Commission, 168 S. W. (2d) 78, 350 Mo. 690; State ex rel. State Social Security Commission v. Butler's Estate, 181 S. W. (2d) 768, 353 Mo. 14.

The second question presented by your request is whether or not the magistrate may require a cost deposit upon the filing of a civil suit. It is well settled that courts of record have the inherent power to make rules of procedure and practice with reference to matters that have not been provided for by statutory or constitutional provisions.

Section 1401, R. S. Mo. 1939, provides that only in specific cases can the defendant be required to put up security for costs. Section 1402, R. S. Mo. 1939, provides that after the commencement of any suit that the officers of the court and the defendant may file a motion requiring plaintiff to give security for the costs and that the court shall allow the motion when certain named circumstances exist. Section 33 of Senate Bill 207 of the 63rd General Assembly, which specifically provides the rules of procedure to be followed in magistrate courts, also names certain circumstances where the magistrate may require security for costs. It can readily be seen that the General Assembly has enacted rules of procedure governing the instances when it is necessary to deposit security for costs in filing a suit. This raises the question of whether or not the magistrate may make rules of procedure that go beyond the limits provided by a statute. The courts of the different states are divided on this question but Missouri follows the majority which holds that rules of the court cannot broaden or go beyond a statutory provision.

In the case of State ex rel. Plummer v. Gideon, 119 Mo. 94, relator brought mandamus to require the judge of a circuit court to allow him to subpoena 28 witnesses after the judge had ruled that they could subpoena only 15 witnesses in conformance with a regulation set up by a rule of the court. Relator

relied on a statute and a section of the Constitution which gave defendant the unlimited right to subpoena witnesses when indicted for a criminal offense. The court, in holding that this rule was void, stated at l. c. 98 and 100:

"It has been uniformly held by this court that if a rule of court went beyond, or contradicted a statute of the state, it would not be enforced here. \* \* \*" (Underscoring ours.)

"It is sufficient to add that this rule imposes harder terms than the statute does, and for that reason it cannot be enforced. The conclusion we have reached accords not only with our own decisions, but with those of many other courts of last resort in the several states. \* \* \* \* \*" (Underscoring ours.)

Also in the case of state ex rel. Hoffman v. Withrow, 135 Mo. 376, the rule of the court was in question which attempted to require the filing of a bill of exceptions in less time than was required by statute. Holding this was beyond a rule-making power, the Supreme Court stated at l. c. 382:

"That such a rule, if observed, would relieve the court of much labor and greatly facilitate business therein is, doubtless, true, but it seems quite clear to us, that it had no power to adopt such a rule or to enforce its observance. In Works on Courts and Their Jurisdiction, page 177, it is said: 'A court can not make and enforce a rule that will deprive a party of a right given him by law or granting the right upon terms more onerous than those fixed by law.' \* \* \* \* \*"

We believe that this is the type of a situation that is before us for consideration. The General Assembly has stated that in only specific situations may the courts require security for costs, and now the court has attempted to broaden this statutory provision by saying that at all times the plaintiff must deposit security for costs. A rule of this type, we believe, is not within the inherent power of the magistrate courts.

You have also presented a question of whether or not the \$5.00 deposit required by Section 23 of Senate Bill 207 of the 63rd General Assembly should be used to pay the costs in the proceeding for which it is deposited. Section 23 of Senate Bill 207, supra, specifically states that this is a magistrate fee and is to be paid over to the Department of Revenue. It is clear, then, it cannot be used for any of the other fees in the proceeding.

Conclusion

Therefore, it is the opinion of this department that (1) the State of Missouri is not required to deposit the \$5.00 magistrate fee on the commencement of a proceeding in a magistrate court; (2) the magistrate is not authorized to make a rule requiring the plaintiff to provide security for costs in all proceedings; and (3) the \$5.00 magistrate fee is to be paid over to the Department of Revenue and is not to be apportioned for the payment of the costs of the proceeding.

Respectfully submitted,

PERSHING WILSON  
Assistant Attorney General

APPROVED:

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J. E. TAYLOR  
Attorney General

PW:EG

*W. Smith*  
COLLECTORS: Collector who voluntarily pays part of his compensation to the county and makes final settlement, cannot thereafter recover the same.

April 24, 1947

FILED

57

*4/25*  
Mr. G. Logan Marr  
Prosecuting Attorney  
Morgan County  
Versailles, Missouri

Dear Sir:

This acknowledges your request, which is as follows:

"The County Court of Morgan County, Mo., requests an opinion on the question of whether the court can make a refund of \$160.00, to Mr. O. C. Roark, the former collector of Morgan County, Mo., who overpaid the county that much money. The facts disclose that Mr. Roark as county collector in Morgan County, in March 1947, filed and submitted to the county court his final financial collector's settlement, and the same was duly approved, and Mr. Roark was given his quletus on the approval of the same. Some time afterwards in the last few days, an assistant state auditor in checking over the same, discovered that Mr. Roark had overpaid the county of Morgan \$160.00. This money was paid over to the treasurer of Morgan County, Mo., and by Mr. Roark, and the treasurer apportioned some out to the school funds, the road funds, and other funds, and some of the money of course has been spent by these different political subdivisions, and probably cannot be reclaimed.

"Mr. Roark suggested that the county court approve his request for a refund because it was his money that was paid over. The County Court has no desire to be contentious about the matter, but requested of me an opinion as to whether the same was legal to make such a refund out of the general revenues of the county."

You do not state any facts in your letter from which we may conclude that the collector paid this money over a mistake of fact. We gather from what you do state that the collector paid what he thought was due the county and retained what he thought was due him for commissions for compensation under the statute, and that later when the collector's office was audited by the State Auditor's fieldman, and after the final settlement of the collector was made and approved, the collector then, and after said audit, concluded that he had overpaid the county to the extent of \$160.00.

Replying to your inquiry, we have looked up the law and find that a similar state of facts was ruled by the Supreme Court of this state in 1906 in Hethcock v. Crawford County, 200 Mo. 170. The Court, in that case, ruled against recovery by the collector from the county of excess money he had paid over to the county, and denied his recovery thereof. At pages 176, 177 and 178 the Court said:

"The question, then, comes to this? Having without duress, misrepresentation, or any form of imposition or fraud on the part of defendant's agent, the county court, voluntarily paid this money into the county treasury on the theory it was tax money and belonged to the county treasury - that he had but rendered unto Caesar the things that were Caesar's - can he recover it back, or must he abide the event? Courts have been extremely lenient in seeing a mistake of fact, as distinguished from a mistake of law, but plaintiff has produced no case on all-fours with this one. To the contrary,

there is a live line of controlling decisions holding that under such a record, the mistake is not of fact but of law, and that money so paid voluntarily cannot be recovered back. (Claflin v. McDonough, 33 Mo. 412, and cases cited; Mathews v. Kansas City, 80 Mo. 231, and cases cited; Needles v. Burk, 81 Mo. 569; Price v. Estill, 87 Mo. 378; Norton v. Highleyman, 88 Mo. 623; State ex rel. Scotland County v. Fwing, 116 Mo. 129, and cases cited; State ex rel. Shipman, 125 Mo. 436; Corbin v. Adair County, 171 Mo. 385; Campbell v. Clark, 44 Mo. App. 249; State ex rel. v. Stonestreet, 92 Mo. App. 214.)

"If we look to the natural justice of the thing, the same conclusion should be reached. For instance, the money paid by plaintiff into the county treasury, pertaining to the road fund, presumably, has long since been spent for such purposes; the money he paid into the county treasury, belonging to the county revenue, presumably, has long since been used for the purposes prescribed by the law - that is, this tax money has been paid out and put into circulation and thus gone about doing good. There is no pretense the funds or any part of them are intact in the county treasury, and no presumption of law to that effect. The Constitution and statutes of Missouri contemplate that counties should be run on a cash basis, that the tax levies should be made with an eye to the condition of the county treasury and current demands of the county's business, and plaintiff may not disturb the county treasury of Crawford county unless he is warranted in so doing by the strict law.

"The conclusion we have reached is based on the concession to plaintiff that this suit, in its nature, is for money had and received, and, hence, must be governed by both legal

and equitable principles. But we find no case in assumpsit for money had and received that entitles plaintiff to recover under the conditions existing here. \* \* \* Here plaintiff had the money. He (misjudging the law) voluntarily parted with it without solicitation, misrepresentation, duress, fraud or undue influence, and, as he made his bed, so he must lie."

The above case has been cited many times. In *Donovan v. Kansas City*, 352 Mo. 430 (1943), our Supreme Court, en banc, cited this case as holding that the equitable principle of recovery for goods sold and used does not apply so as to justify recovery "when counter to paramount principles of law."

In *State ex rel. Buchanan County v. Fulks*, 296 Mo. 614, 1.c. 624, the Court, in following the *Hethcock* case, held that if an officer misconstrued the statute it was a mistake of law and not of fact, and he was not entitled to recover the payment from the county. The Court said:

" \* \* \* \* Under our scheme of taxation each year's levy is made to meet 'the conditions of the county treasury and current demands of the county's business and plaintiff may not disturb the county treasury of Crawford County unless he is warranted in so doing by the strict law.' (*Hethcock v. Crawford County*, 200 Mo. 170, 177; *Dameron v. Hamilton*, 264 Mo. 103, 121.) \* \* \* \*"

In *State ex rel. Thompson v. Sanderson*, 336 Mo. 114 (1934), our Supreme Court, in speaking of a similar question, said, 1.c. 118:

"The annual settlement, which is required to be made, is recognized by law as something more than a mere report of the collector of the amounts collected and taxes remaining delinquent. It partakes of the nature of a settlement of the collector's accounts with the county and state. The county court has been

designated by the Legislature as the agency to represent State and county. It was held in State ex rel. v. Shipman, 125 Mo. 436, 28 S.W. 842, and State ex rel. v. Ewing, 116 Mo. 129, 22 S.W. 476, that in the absence of fraud, collusion or mistake of fact, settlements made by a county collector were binding on the county. It was held that excessive commissions paid to the collector in those cases could not be recovered because they were paid under a mistake of law. On the same theory a collector was denied redress where he had been paid a less commission than permitted by law. (Hethcock v. Crawford County, 200 Mo. 170, 98 S.W. 582.)"

Conclusion.

Under the facts here above set forth, it is our opinion that the collector of Morgan County having voluntarily paid to the county at his annual and final settlement as collector an excess above the amount he was required to pay, and having received his quietus and there being no fraud worked on him in so doing, is not entitled to recover such excess from the county.

Yours truly,

DRAKE WATSON  
Assistant Attorney General

APPROVED:

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J. E. TAYLOR  
Attorney General

DW:ml



FILED

June 4, 1947

6/20

Copy to  
J. Smith

Honorable G. Logan Marr  
Prosecuting Attorney  
Morgan County  
Versailles, Missouri

Dear Sir:

Reference is made to your inquiry of recent date, requesting an official opinion of this office, and reading as follows:

"I am requesting a legal opinion on these facts set up in this letter to the Tax Commission, as per their finding on same."

Your letter to the State Tax Commission, referred to, reads as follows:

"Several of our county assessors have had trouble trying to assess for taxation purposes, the Camp, known as The Southern District, Assembly of God, Woodruff Building, Springfield, Mo., c/o Rev. Bert Webb. This Camp consists of 40 acres of the land on the Lake of the Ozarks. It is some kind of a summer retreat for the Church and the ministers of the church. There are several buildings used for the visiting public, a church, ampitheater, an eating house, and a boat dock, and a camping ground. But in addition there are approximately 35 or 40 private dwellings owned by the laymen and ministers of the church group. These improvements are valuable and very substantial, and have been erected for as many as ten years and more being erected each year. There are no deeds recorded as to this property, individually owned and on which the homes are located. There is nothing to show that the same are individually owned.

"The caretaker or the visiting persons, never seem to know who owns what cabin. There has been an attempt to conceal the ownership in order to avoid paying taxes. There is a misconception that because church property is exempt, and because the private dwelling is located on church property, the dwelling is also tax exempt. There is no separate real estate description.

"I am requesting that your traveling auditor for the department come out here, and in cooperation with our assessor try to find some way for the assessor to put this property privately owned on the tax books. Further, it seems that any of the church investment, in excess of five acres, would be taxable, along with these private dwellings.

"Let me know what procedure you suggest in order to help the assessor in assessing this property. How is the best way to get the same named and located to make an assessment valid?"

Further, you have orally informed the writer that the real property referred to in your letter to the State Tax Commission is now on the tax rolls of Morgan County, Missouri, but valued at an amount far below the true value of the real property and improvements thereon.

In view of the matters presented, it first becomes of importance to determine whether or not the real property is subject to taxation. This, in each instance, is a question of fact and one upon which we do not presume to pass. The applicable rules are discussed in an official opinion of this office delivered under date of October 17, 1946, to the Honorable William S. Thompson, Prosecuting Attorney of Mercer County, Missouri. For the benefit of the discussion contained therein, a copy of that opinion is enclosed herewith.

Assuming that a full investigation of the facts discloses the real property to not be used exclusively for religious purposes, it then becomes of importance to determine the method to be followed in assessing the property at its true value.

The duty of assessing property, both real and personal, rests primarily upon the county assessor under the provisions of Section 11000.9, Mo. R. S. A., which reads, in part, as follows:

" \* \* \* After receiving the necessary forms the assessor or his deputy or deputies shall, except in the City of St. Louis, between the first day of January and the first day of June, 1946, and each year thereafter, proceed to make a list of all real and tangible personal property in his county, town or district, and assess the same at its true value in money in the manner following, to wit: \* \* \* " (The following provisions relate to the segregation of the various types of property, the preparation of the assessment lists and their verification by the oaths of the owners of the property, etc., and are not pertinent to the matter under consideration.)

The "list" referred to in the foregoing statute may be made either by the taxpayer or by the assessor in the event of the failure of the taxpayer to do so. Under the provisions of Section 10950, R. S. Mo. 1939, of which Section 11000.9, Mo. R. S. A., is substantially a reenactment with changes necessary to conform to the new constitutional requirements as to the time of assessing, levying and collecting taxes, it was held that if the taxpayer fails to furnish the sworn list disclosing the nature and value of his property subject to taxation, such failure authorizes the assessor to fix the valuation. See State ex rel. Hawkin v. Edwards, 286 S. W. 25, 315 Mo. 209.

On the other hand, if the taxpayer does furnish such list, the assessor is not bound thereby to the valuations placed upon such property by the owner thereof, as was held in State ex rel. Dobbins v. Reed, 60 S. W. 70, 159 Mo. 77. However, before such valuations may be increased, it is necessary that the assessor comply with the requirements of Section 11000.14, Mo. R. S. A., which reads as follows:

"Whenever any assessor shall increase the valuation of any real property he shall forthwith notify the record owner of such increase, either in person, or by mail directed to the last known address; every such increase in assessed valuation made by the assessor shall be subject to review by the county board of

equalization whereat the land owner shall be entitled to be heard, and the notice to the landowner shall so state."

From the foregoing, it appears that the county assessor is one officer who has authority to make the necessary adjustments in the valuation of property on the rolls to conform with the true value of the property assessed.

There is an additional method by which property returned at less than its true value by either the taxpayer or the assessor may be increased. We refer to the county board of equalization, which, under the provisions of Section 11003, Mo. R. S. A., has been given such power by the following language:

"The following rules shall be observed by county boards of equalization: First, they shall raise the valuation of all such tracts or parcels of land and any personal property, such as in their opinion have been returned below their real value, according to the rule prescribed by this chapter for such valuation; but, after the board shall have raised the valuation of such real estate, it shall give notice of the fact, specifying the property and the amount raised to the persons owning or controlling the same, by personal notice, through the mail or by advertisement in any paper published in the county, and that said board shall meet on the fourth Monday of April, except in counties containing a population of more than seventy thousand and less than one hundred thousand, in which counties such board shall meet on the fourth Monday of March of each year, to hear reasons, if any may be given, why such increase should not be made; second, they shall reduce the valuation of such tract or parcels of land or any personal property which, in their opinion, has been returned above its true value as compared with the average valuation of all the real and personal property of the county."

Furthermore, should such property fail to be assessed at its true value as provided by law, by either the county assessor or the county board of equalization, it is still possible that proper adjustments of such valuation may be made. Your attention is

directed to the following provisions of Section 11033.14, Mo. R. S. A., relating to the powers and duties of the state tax commission:

"It shall be the duty of the State Tax Commission, and the commissioners shall have authority to perform all duties enumerated in this section and such other duties as may be provided by law:

\* \* \* \* \*

"(6) To raise or lower the assessed valuation of any real or tangible personal property, including the power to raise or lower the assessed valuation of the real or tangible personal property of any individual, copartnership, company, association or corporation: Provided, that before any such assessment is so raised, notice of the intention of the Commission to raise such assessed valuation and of the time and place at which a hearing thereon will be held, shall be given to such individual, copartnership, company, association or corporation as provided in Section 16.

\* \* \* \* \*

(Emphasis ours.)

#### CONCLUSION

In the premises, we are of the opinion that property subject to taxation may have a valuation placed thereon reflecting its true value in either one of the following methods: (1) By action of the county assessor, (2) by action of the county board of equalization, or (3) by action of the state tax commission.

Respectfully submitted,

WILL F. BERRY, Jr.  
Assistant Attorney General

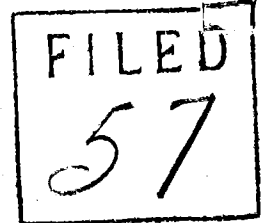
APPROVED:

J. E. TAYLOR  
Attorney General

WFB:HR

MOTOR VEHICLE: Theft of truck unable to operate under its own power would constitute theft of motor vehicle.

July 29, 1947



Mr. G. Logan Marr  
Prosecuting Attorney  
Morgan County  
Versailles, Missouri

Dear Sir:

This will acknowledge your request for an opinion based upon the following facts:

"The facts disclose that the Model T. truck has not been in operation for as much as five to seven years. It stood standing in a field unused for that length of time. The tires and tubes have disappeared off of the truck in the last year. A neighbor boy sold the same for junk, and a junk hauler came after the truck. The real owner, the person on whose property was located the truck, and in whose enclosure the truck was standing, makes complaint that his motor vehicle was stolen. The truck was removed as stated without the consent or knowledge of the owner. The charge is one for feloniously stealing a motor vehicle.

"This model T. truck was sold to a junk dealer and was partly dismantled and sold as junk.

"Now just when does a model T. truck cease to be a motor vehicle, and become junk? Must be in operation condition when the model T. truck was stolen? Or the fact that the truck could not then and there be self propelled make any difference?

"The facts further disclose that the party who bought the model T. truck bought the same for junk and tore same up. Some parts he sold for used car parts and some he sold as just junk."

The question presented in your request asks whether or not the felonious taking of the Model T truck, which has been standing in a field for several years and has not been operated, would support a prosecution for feloniously stealing a motor vehicle.

Section 8404, R. S. Mo. 1939, in part provides:

"(a) Any person who shall be convicted of feloniously stealing, taking or carrying away any motor vehicle, or any part, tire or equipment of a motor vehicle of a value of \$30.00 or more, or any person who shall be convicted of attempting to feloniously steal, take or carry away any such motor vehicle, part, tire or equipment, shall be guilty of a felony and shall be punished by imprisonment in the penitentiary for a term not exceeding twenty-five years or by confinement in the county jail not exceeding one year, or by fine not exceeding one thousand dollars (\$1,000) or by both such fine and imprisonment.

"(b) Any person who shall be convicted of stealing, taking or carrying away any motor vehicle tire or any part or equipment of a motor vehicle under the value of \$30.00 shall be punished by imprisonment in the county jail not exceeding one year or by fine not exceeding one hundred dollars (\$100.00) or by both such fine and imprisonment."

Whether or not the taking of the truck in question would support a prosecution under the above statute depends upon the determination that the truck was a "motor vehicle" within the meaning of the statute.

The term "motor vehicle" is defined in Section 8367, Laws Missouri 1945, page 1195, as follows:

"\* \* \* 'Motor vehicle.' Any self-propelled vehicle not operated exclusively upon tracks, except farm tractors. \* \* \*"

This definition does not take into consideration the mechanical condition of the vehicle or its use or non-use and although the truck in question, at the time it was taken, was not in running condition we believe it would be a question of fact whether or not it had lost its identity as a motor vehicle within the purview of the definition contained in the above quoted statute.

In the case of State v. Tacey, 102 Vt. 150 Atl. 68, the Supreme Court of Vermont was considering the conviction of a person found guilty in the lower court of operating a motor vehicle while under the influence of intoxicating liquor. The statute relative to the offense defined "motor vehicle" as including all vehicles propelled by power other than muscular power, with certain exceptions. The defendant had contended that inasmuch as the car he was charged with operating was disabled and unable to move under its own power, (he was being towed by another car at the time of arrest) it was not a "motor vehicle" within the meaning of the statute. Overruling the defendant's contention the court said at Atlantic l.c. 69:

"(1) The first ground is untenable. Manifestly it was the design, mechanism, and construction of the vehicle, and not its temporary condition, that the Legislature had in mind when framing the definition of a motor vehicle. Neither the authorities nor sound logic admit of a different conclusion."

Again in the case of State v. Lansing, 108 Vt. 218, 184 Atl. 692, the Vermont Supreme Court affirming a conviction of operating a non-registered motor vehicle where defendant steered a Dodge car as it coasted down hill, said car being in such poor mechanical condition that it would not operate under its own power, said "the inability of the Dodge car to operate on its own power was a temporary and not a permanent condition." The court also cited and quoted from the Tacey case, supra.

Considering the cases cited above in connection with the facts which you have related, we believe it is a question of fact whether or not the truck in question had lost its identity as a motor vehicle at the time it was taken. If, when it was taken, it could have been put into operating condition with ordinary repairs it would have possessed the characteristics identifying it as a motor vehicle. If this is found to be true, and the other elements of the crime are present the charge of feloniously



Mr. G. Logan Marr

-4-

stealing a motor vehicle could be lodged against the offending person.

Respectfully submitted,

RICHARD F. THOMPSON  
Assistant Attorney General

RFT:mw

APPROVED:

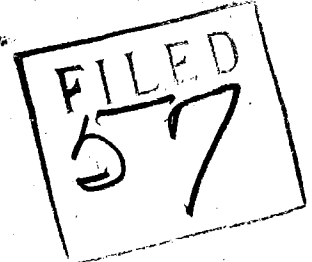
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J. E. TAYLOR  
Attorney General

**NEPOTISM:** An officer approving an appointment submitted to him of an employee related to him within the fourth degree of consanguinity or affinity forfeits his office under the provisions of Section 6 of Article VII of the Constitution of 1945.

October 10, 1947

Honorable Samuel Marsh, Director  
Department of Public Health and Welfare  
State Office Building  
Jefferson City, Missouri



Dear Sir:

This is in reply to your letter of October 4, 1947, requesting an opinion from this department and reading as follows:

"In the light of the fact that Senate Bill #349 specifically provides that no appointments or discharges shall be made without the approval of the Director of the Department of Public Health and Welfare, will you please give me your opinion as to whether, if one of the division directors in the Department employed a relative within the fourth degree, by consanguinity or affinity, with my approval, the division director, or the department director, or both would suffer the penalty of loss of office under the provision of the Constitution referred to."

The Constitution of the State of Missouri 1945, Article VII, Section 6, provides as follows:

"Any public officer or employee in this state who by virtue of his office or employment names or appoints to public office or employment any relative within the fourth degree, by consanguinity or affinity, shall thereby forfeit his office or employment."

It will be seen that the power to appoint employees is given to division directors and the power of approval of such appointments is given to the department director in Laws of Missouri 1945, page 947, Section 6, which reads, in part, as follows:

" \* \* \* Each division director shall appoint, subject to the approval of the director of the department, all employees in his division and may discharge, subject to the approval of the director of the department, such employees after proper hearing: Provided, such employment and discharge conform to practices governing selection of employees in the department of public health and welfare."

This question will be discussed in two phases, first of which will be the instance of an appointment by a division director of a person related to the division director within the fourth degree of consanguinity or affinity, but not related to the department director within the fourth degree of consanguinity or affinity. In this case the action of the division director in making the appointment would obviously be in violation of Section 6, supra, even though the appointment would be subject to the approval of the department director. The leading case in Missouri interpreting this section of the Constitution is *State ex inf. McKittrick v. Whittle*, 63 S.W. (2d) 100. In this case the Court said, l.c. 101:

" \* \* \* Respondent also argues that the amendment is only directed against officials having all the right (power) to appoint. We do not think so. The question must be determined upon a construction of the amendment. It is not so written therein. The amendment is directed against officials who shall have (at the time of the selection) 'the right to name or appoint' a person to office. Of course, a board acts through its official members, or a majority thereof. If at the time of the selection a member has the right (power), either by casting a deciding vote or otherwise, to name or appoint a person to office, and exercises said right (power) in favor of a relative within the prohibited

degree, he violates the amendment. In this case it is admitted that respondent had such power at the time of the selection, and that he exercised it by naming and appointing his first ~~cousin~~ to the position of teacher of the school in said district." (underscoring ours.)

The second phase of this question is the instance of an appointment of a person, related to the department director within the fourth degree of consanguinity or affinity, by a division director, but not related to the division director within the fourth degree of consanguinity or affinity, which appointment is approved by the department director. In this instance it would seem that the underlined words in the case of State v. Whittle, above, would make this positive action of the department director a violation of Article VII, Section 6 of the Constitution of 1945. This, in spite of the fact that the department director does not have a power of appointment in the first instance, but because he participates in the appointment in a direct and positive manner, it would seem that such action would jeopardize the department director's office. In the case of State ex rel. McKittrick v. Becker, 81 S.W. (2d) 948, the court said, 1.c. 950:

"We are of the opinion that the reason of decision\*, as it appears in the quotation given, and as stated in the provision itself, does not support relator's position. The essence of the provision and likewise of said decision is the power of appointment vested in one and the successful exercise thereof by him in accomplishing the appointment of his relative. Action, direct or indirect, not inaction is prohibited. The only correlation expressed or implied is a specific kinship existing between two individuals, specifically indicated, and none other. No implication may properly be drawn from what has just been said that one clothed with a power of selection or appointment might not through connivance or confederation with his associates who share in such power bring himself within said prohibition. Such is not the present case. Nor have we any call to consider in what circumstances

one who acts in connivance in bringing about the appointment of a relative of an associate of his in the exercise of the power of appointment will suffer penalty as for violation of said provision."

(Underscoring ours.)

\* Referring to the Whittle case, above.

Conclusion.

It is the opinion of this department that:

(1) The department director would forfeit his office, under the provision of Article VII, Section 6 of the Constitution of 1945, by approving an appointment by a division director of an employee related to the department director within the fourth degree of consanguinity or affinity; but that the division director would not forfeit his office, under the provision of Article VII, Section 6 of the Constitution of 1945, because of the lack of the forbidden relationship existing between the division director and the person appointed.

(2) The department director would not forfeit his office, under the provision of Article VII, Section 6 of the Constitution of 1945, by virtue of approving an appointment by a division director of an employee related to the division director within the fourth degree of consanguinity or affinity; but that the division director would forfeit his office by making such appointment. The department director would not be related to the person appointed within the fourth degree of consanguinity or affinity.

Respectfully submitted,

JOHN R. BATY  
Assistant Attorney General

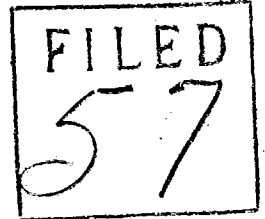
APPROVED:

J. E. TAYLOR  
Attorney General

JRB:ml

DEPARTMENT OF PUBLIC  
HEALTH AND WELFARE:

Division directors the sole appointing  
authorities within the meaning of the  
State Merit System Act.



October 11, 1947

Honorable Samuel Marsh, Director  
Department of Public Health and Welfare  
State Office Building  
Jefferson City, Missouri

Dear Sir:

This is in reply to your letter of October 4, 1947,  
requesting an opinion from this department and reading as  
follows:

"In the light of the fact that Senate  
Bill #349 specifically provides that  
no appointments or discharges shall be  
made without the approval of the Direc-  
tor of the Department of Public Health  
and Welfare, will you please give me  
your opinion as to whether I am the  
sole appointing authority in the Depart-  
ment, or whether the three division  
directors are also appointing authori-  
ties within the Department as the term  
is used in the Merit System Act."

Laws of Missouri, 1945, page 947, Section 6, reads, in  
part, as follows:

" \* \* \* Each division director shall  
appoint, subject to the approval of the  
director of the department, all employees  
in his division and may discharge, sub-  
ject to the approval of the director of  
the department, such employees after  
proper hearing: Provided, such employ-  
ment and discharge conform to practices  
governing selection of employees in the  
department of public health and welfare."

In connection with this section it will be noted that the division directors are the only ones given the power of appointment of employees in their respective division. There is no express provision giving the power to appoint to the director of the department, but only the right of approval of the division directors' appointments.

Does the department director have an implied power to appoint because he has been given the power of approval of appointments? In order to determine this question we should look to the meaning of the words "appoint" and "approval" as used in their usual and ordinary sense.

In 6 C. J. S., page 87, the word "appoint" is defined as follows:

"To allot, set apart, or designate; to choose or select; to nominate or authoritatively assign. It usually implies an appointing power or authority under which the appointment is made; \* \* \*"

In 3 Words and Phrases, page 830, the word "approval" is defined as follows:

"The term 'approval' is susceptible of different meanings, dependent upon the subject-matter and context concerning which the term is employed and the object and purpose to be subserved or accomplished. Ordinarily, the term in its most obvious meaning is to commend, confirm, ratify, sanction, or to consent to some act or thing done by another. \* \* \*"

In the case of State v. Caulfield, 62 S.W. (2d) 818, the court said, 1.c. 823:

" \* \* \* The construction we place upon the statute will find support in the illustrations and the judicial decisions following, all of which pertain to the word 'approve.'"

"Under a constitutional provision the Governor and the General Assembly participate in the enactment of laws (see Const. art. 4, sec. 24 et seq.). A bill passed by the House and Senate becomes a law when, and only when, approved and signed by the Governor, unless it be passed over his veto. Also the state treasurer is by another constitutional provision empowered to select the depositories of state moneys, subject to the approval of the Governor. It is clear that each of the matters instanced involves a participation on the part of two authorities or agents, but neither can exercise the whole power of the other.

"In reviewing a proceeding heard by the Public Service Commission and transferred thence to the circuit court, the latter must either affirm or set aside the order reviewed. Such limitations upon the scope of review of the actions of inferior agencies or tribunals are not unusual.

"Among the decisions involving matters cognate to those instanced above and bearing on the question now under consideration, the power of approval, reference will be made to two, these being typical of a number of others.

"In the case of *State v. Rhein, Treas.*, 149 Iowa, 76, loc. cit. 80, 127 N.W. 1079, 1081, a statute was under construction which authorized the county treasurer to select depositories 'to be approved by supervisors,' and the court held that the supervisors had no power of selection, saying: 'Had it been the purpose of the Legislature to empower the board to designate the depository, the easy and the obvious thing was to say so in plain unambiguous terms. \* \* \* To "approve" or give "approval" is in its essential and most obvious meaning to confirm, ratify, sanction, or consent to some act or thing done by another.'



Thus, it seems to be the general rule that the grant of the power of approval does not carry with it the power to appoint by implication. The courts take the attitude that if the Legislature wanted the power to appoint to accompany the power to approve it should do so in expressed terminology.

Laws of Missouri, 1945, page 1159, Section 3 (1), reads as follows:

"'Appointing authority' means an officer or agency subject to this act having power to make appointments to positions under this act."

This section thus expressly defines the term "appointing authority" to mean an officer or agency having the power to make appointments. The Director of Public Health and Welfare does not have this power either expressly or by implication.

However, the Legislature has granted to the Director of Public Health and Welfare the right to designate the duties and responsibilities of employees. Laws of Missouri, 1945, page 948, Section 11, reads as follows:

"The director of public health and welfare shall set forth the duties and responsibilities of all superintendents, officers, assistants and other employees of the department; and shall provide for the preparation and issuing of such reports and other informational matters as may be necessary and expedient."

Laws of Missouri, 1945, page 1171, Section 25(a), reads as follows:

"Whenever an appointing authority proposes to fill one or more vacancies in a class of positions subject hereto, he shall submit to the Director, as far in advance of the desired appointment date as possible, a requisition for the certification of eligible persons from an appropriate register. The requisition shall contain a statement showing the title of the position to be filled, the duties thereof, and the necessary or desirable qualifications of the person to be appointed thereto, and

such other information as the regulations may require. Subject to the regulations adopted hereunder, the appointing authority may also designate special requirements of sex, domicile, or the possession of special skills. If the Director determines upon investigation that such requirements are in fact essential for the effective performance of the duties of the position, certification may be limited to persons on the eligible register who meet such requirements."

In order for the division directors to comply with Section 25(a) of the State Merit System Act, it would seem that they should first submit their requisition for employees to the department director for his approval of the qualifications and duties of the requested employees before submitting a requisition for the certification of eligible persons to the personnel director.

Upon receipt of the certification of eligibility from the personnel director, the division directors should make their appointments and submit them to the department director for his approval.

Conclusion.

It is the opinion of this department that the sole appointing authorities in the Department of Public Health and Welfare are the division directors, and that the department director is not an appointing authority within the meaning of the statute providing for a State Merit System Act.

Respectfully submitted,

JOHN R. BATY  
Assistant Attorney General

APPROVED:

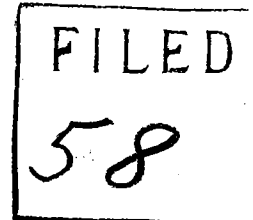
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J. E. TAYLOR  
Attorney General.

JRB:ml

NOTARIES PUBLIC: Jurisdiction of notaries public in the  
JURISDICTION: City of St. Louis in adjoining counties.

September 18, 1947



Mr. U. A. McBride  
Commission Clerk  
Office of Secretary of State  
Jefferson City, Missouri

Dear Sir:

This is in reply to your letter of recent date wherein you request an official opinion on the following statement of facts:

"We are this date in receipt of a letter from a Notary Public, commissioned for the City of St. Louis, who desires to know if he changes his place of residence to St. Louis County, if he will have the right to take acknowledgements in the City of St. Louis, as well as St. Louis County and adjoining counties.

"The law makes no mention of St. Louis City, being considered as one of the adjoining counties."

Section 13360, R.S. Mo. 1939, which relates to the appointment, commission and jurisdiction of notaries public, reads as follows:

"The governor shall appoint and commission in each county and incorporated city in this state, as occasion may require, a notary public or notaries public, who may perform all the duties of such office in the county for which such notary is appointed and in adjoining counties. Each such notary shall

hold office for four years, but no person shall be appointed who has not attained the age of twenty-one years, and who is not a citizen of the United States and of this state. It shall be the duty of every such notary when he performs an official act outside his or her own county to state in his or her certificate that the county in which such act is performed adjoins the county within and for which he was appointed and commissioned."

It will be noted from this section that a notary public has jurisdiction to perform official duties in the county in which he is commissioned and in the adjoining county.

Your question is presented on account of the fact that there might be some question whether or not a notary public in the City of St. Louis could perform official duties in an adjoining county because of the fact that the City of St. Louis might not be considered as an adjoining county. We think this question is solved by the provisions of Section 655, R.S. Mo. 1939, which relates to rules of statutory construction. This section reads, in part, as follows:

"The construction of all statutes of this state shall be by the following additional rules, unless such construction be plainly repugnant to the intent of the legislature, or of the context of the same statute: \* \* \* \*  
\* \* \* nineteenth, whenever the word 'county' is used in any law, general in its character to the whole state, the same shall be construed to include the city of St. Louis, unless such construction be inconsistent with the evident intent of such law, or of some law specifically applicable to such city; \* \* \* \*"

Under this construction the City of St. Louis would be considered as a county under the terms of said Section 13360, supra.

Mr. U. A. McBride

-3-

**Conclusion.**

Therefore, it is the opinion of this department that a notary public of the City of St. Louis would have jurisdiction to perform official duties in St. Louis County or any other county adjoining the City of St. Louis.

Respectfully submitted,

TYRE W. BURTON  
Assistant Attorney General

APPROVED:

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J. E. TAYLOR  
Attorney General

TWB:ml

SCHOOLS:

Proposition for change of site of common school district schoolhouse may be submitted at an

CHANGE OF SITE:

annual or special meeting.

FILED

59

July 25, 1947

Honorable L. Clark McNeill  
Prosecuting Attorney  
Dent County  
Salem, Missouri

Dear Sir:

This is in reply to your letter of recent date wherein you submit the following statement of facts and request an opinion on same:

"The Board of Directors of a common school district in this County desire to hold a special meeting to vote bonds to build a new school house and change the site from the old location to a new location.

"In checking the statute, Section 10419 authorizes, under paragraph 11, a change of location of site at the annual meeting and I have been unable to find any authority to vote on the change of a site except at an annual meeting, although bonds can be voted at a special meeting."

Section 10419, R. S. Mo. 1939, referred to in your request, was repealed and reenacted in 1945, Laws of Missouri 1945, page 1632. This section, as repealed and reenacted, insofar as it applies to your inquiry, provides as follows:

"The qualified voters assembled at the annual meeting, when not otherwise provided, shall have power by a majority of the votes cast:

\* \* \* \* \*

"Eleventh--To change the location of the schoolhouse site, when the same for any cause is deemed necessary, the vote required therefor to be as follows: to remove the site nearer the center of the district, a majority of the qualified

voters voting thereon; to remove the site farther from the center of the district, two-thirds of the qualified voters voting thereon."

This section relates to the powers and duties of the voters of the common school district at an annual school meeting.

Your question is: "Can a proposition to change the schoolhouse site in a common school district be submitted at any meeting other than the annual meeting?" Section 10361, R. S. Mo. 1939, which relates to special meetings of all classes of schools, provides as follows:

"Special school meetings for the transaction of business authorized by this chapter, and not restricted to the annual meeting or otherwise provided for, shall be called by the board when a majority of the qualified voters of the district sign a petition requesting the same, and designating therein the purpose for which said meeting is desired. Upon the reception of such petition, the board shall call said special meeting, by notices thereof to be given in the same manner as is provided in section 10418; and when assembled, the meeting shall be organized by the election of a chairman and a secretary, who shall keep a correct record of the transactions of the meeting, said record to be signed by the secretary, attested by the chairman, and filed with the district clerk, who shall enter the same upon the records of the district; but said meeting shall have no power to act upon any proposition not contained in the petition and submitted in the notices."

It will be noted from this section that any business of the district may be conducted at this meeting if such business is authorized by Chapter 72, R. S. Mo. 1939, and which is not restricted to the annual meeting or otherwise provided. Then the answer to your question would depend upon whether or not the proposition to change the schoolhouse site is restricted

to the annual meeting or whether or not provisions for the change of the site is otherwise provided for. Since Sections 10361 and 10419, hereinbefore referred to, are in the same chapter, to wit: Chapter 72, R. S. Mo. 1939, there would be no prohibition on submitting such proposition at the special meeting on account of said Section 10419 being in another chapter.

In searching through the statutes relative to laws applicable to common schools, we fail to find where the proposition to change the site of a school building is restricted to the annual meeting. The selection of the directors of a common school district is business which is restricted to the annual meeting. The determination by ballot of the length of the school term in excess of eight months for the ensuing school year would be business restricted to the annual school meeting. In the case of State vs. McKown, 290 S. W. 123, the court, in discussing the powers and duties of a common school district at the first annual meeting, said at l.c. 129:

"The powers with which the qualified voters of a common school district are invested at the first annual meeting, while not separately defined, are in no wise different from those conferred upon the voters at any annual meeting by section 11210, except as stated in section 11213, concerning the election of the first board of directors, as at bar, when three are to be elected for one, two, and three years, instead of one for three years."

In discussing the rules applicable to the construction of statutes relating to schools, the court further said:

" \* \* \* The object and purpose of the organization of this district was beneficent, in that it afforded added facilities for the education of the children residing therein. We have uniformly held that statutes in regard to the public school system, having to do with the creation and the conduct of the business of country districts should be liberally construed to effect the purpose for which they were



enacted. Formed and conducted as they are by ordinary citizens, not learned in the law, any other construction would tend to defeat the purpose, and lessen the educational advantages, of such districts.\* \* "

Section 10348, R. S. Mo. 1939, which relates to the condemnation of land for school sites provides that whenever any school district shall select at the annual or any special meeting one or more sites for one or more schoolhouses that such board, if necessary, may condemn lands for such purposes. The foregoing statement which is underscored would indicate that the Legislators had construed the foregoing statutes to mean that school sites might be selected at annual or special meetings. That conclusion supports our conclusion that the question of the removal of a site of a school building may be submitted at an annual or special meeting. In our research on this question, we fail to find where it has been before the courts of this state. However, from a review of all the statutes pertinent to the subject, we are of the opinion that such a proposition may be submitted at a special meeting under the provisions and proceedings provided for in said Section 10361, supra.

#### CONCLUSION

From the foregoing, it is the opinion of this department that the proposition for change of a school site in a common school district may be submitted at an annual or special meeting.

Respectfully submitted,

TYRE W. EURTON  
Assistant Attorney General

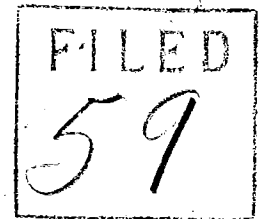
APPROVED:

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J. E. TAYLOR  
Attorney General

TWB:VLM

PUBLIC OFFICERS: Right to reimbursement for travel expense necessarily incurred in discharge of official duties.



September 4, 1947

Mr. Hugh I. McSkimming  
Division of Collection  
Department of Revenue  
Jefferson City, Missouri

Dear Sir:

Reference is made to your request of recent date for an official opinion of this office, reading as follows:

"I have been requested to ask of you for an opinion in regards to the following subject:

"This department maintains an office in St. Louis employing four (4) people which handle the major portion of all business done by this department, including the checking of barge terminals up and down the Mississippi.

"Naturally I have occasions to be in St. Louis and use hotels whenever necessary - the same as I use in Kansas City or St. Joseph. The comptroller advises he can not honor any receipt for expenses from St. Louis, as I am a registered voter in that city, although I claim my home is here in Jefferson City and establish a legal residence wherever I please.

"I realize he is being guided by the law, which says the State shall not pay an employee while he is in his own home town, but I am trying to claim that my case is somewhat different, as I have no home in St. Louis and I must be there more so than any other town, and I think it is an injustice that I should have to pay my own expense while there on State business.

We are cognizant of the fact that the position which you hold is that of Administrator of the Motor Vehicle Fuel Tax Law of the State of Missouri within the Division of Collection.

The duties which you discharge in connection with the administration of the Missouri Motor Vehicle Fuel Tax Act are those previously discharged by the State Inspector of Oils. Such duties were transferred to the Division of Collection of the Department of Revenue, under the provisions of Section 16 of an act found in Laws of 1945, page 1428, as amended by Senate Bill No. 143 of the 64th General Assembly. The duties there imposed relate, in general, to the licensing, inspection and collection of a tax upon certain types of motor vehicle fuels used in the State of Missouri.

Section 20 of Article IV of the Constitution of 1945 requires that the principal offices of all executive and administrative officials and departments shall be maintained at the City of Jefferson. The constitutional provision mentioned reads as follows:

"The executive and administrative officials and departments herein provided for shall establish their principal offices and keep all necessary public records, books and papers at the City of Jefferson."

To the same effect, Section 7 of the act found in Laws of 1945, page 1428, reads as follows:

"The director of revenue and the department of revenue shall be provided by the board of permanent seat of government, or such agency as may hereafter exercise the powers and duties of the board of permanent seat of government, with suitable quarters in the City of Jefferson. The director of revenue shall also establish and maintain permanent branch offices in the cities of St. Louis and Kansas City, and shall have power to select other additional places in the state for special full time or temporary offices."

You will note that this last-quoted statutory enactment also provides for the establishment and maintenance of permanent branch offices in St. Louis and Kansas City and of temporary offices in other locations to be selected by the Director of Revenue. We note from your letter of inquiry that such an office has been established in the City of St. Louis, and that the Comptroller has refused payment of any claim for reimbursement for travel expenses incurred while in that city on official business for the reason that you are a registered voter in the City of St. Louis.

It has long been the rule in Missouri that a public officer who necessarily incurs expense in the discharge of his official duties is entitled to reimbursement therefor. We direct your attention to Ewing v. Vernon County, 216 Mo. 681, wherein the court said, l. c. 695:

"The conclusion we have come to comports with the general doctrine announced in 23 Am. and Eng. Ency. Law (2 Ed.), 388. 'Where,' say the editors of that standard work, 'the law requires an officer to do what necessitates an expenditure of money for which no provision is made, he may pay therefor and have the amount allowed him. Prohibitions against increasing the compensation of officers do not apply to such cases. Thus, it is customary to allow officers expenses of fuel, clerk hire, stationery, lights, and other office accessories.'"

This case, in principle, was followed in Rinehart v. Howell County, 153 S. W. (2d) 381.

Legislative recognition of the right to be reimbursed for necessary travel expense incurred while travelling in the discharge of official duties is evidenced by the incorporation of the following language in the appropriation made for the operation of the Department of Revenue. This appropriation appears in two parts, Sections 3.040 and 3.070 of House Bill No. 172 of the 64th General Assembly. We quote:

"Section 3.040. \* \* \* \*

"D. OPERATION:

"General expense: consisting of \* \* travel within and without the state, \* \* \* "

"Section 3.070. \* \* \* \*

"D. OPERATION:

"General expenses: consisting of \* \* \* travel within and without the state, \* \* \* "

From the foregoing, it appears that funds are available from which such reimbursement may be made. We are unable to

discern the pertinency of the fact that you are a legal resident of the City of St. Louis, for the reason that by both constitutional and statutory provisions the official headquarters of the department by which you are employed has been designated as the City of Jefferson, and that city thereby has become your "official home."

We do not wish to say by the above, however, that minor employees are to be permitted to receive reimbursement for expenses incurred while living at their homes in cities wherein are located permanent or temporary branch offices of any of the executive departments or officials. Such employees are only entitled to reimbursement when their duties necessarily entail their incurring expense for travel in the discharge of their duties away from the point at which they are regularly assigned to duty.

CONCLUSION

In the premises, we are of the opinion that an administrative employee of an executive department or official whose activities are state-wide in scope, and whose duties necessarily require the expenditure of private funds for travel expense incurred in travel necessary for the discharge of the duties of the office, is entitled to reimbursement therefor. The question of the necessity of such travel and the reasonableness of such expenses so incurred is, of course, a question of fact to be determined in each instance by the officer approving claims against the state treasury.

Respectfully submitted,

WILL F. BERRY, Jr.  
Assistant Attorney General

APPROVED:

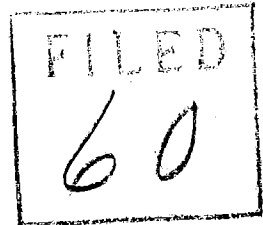
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J. E. TAYLOR  
Attorney General

WFB:HR

PROBATE COURT\ Right of probate court to fees for holding  
FEES: hearing in an insanity case.

February 3, 1947



7/6

Honorable Emory C. Medlin  
Prosecuting Attorney  
Barry County  
Cassville, Missouri

Dear Sir:

This will acknowledge receipt of your request for an official opinion, which reads:

"I understand the law to be that the probate court is the only court which has the power to commit indigent insane to state hospitals.

"Now the Probate Judge requests an opinion in regard to the fees due the probate judge for hearing insane cases and also if the attorneys that he calls in to represent the party charged of unsound mind is entitled to any fee and if so who pays the fee in case the party charged has no money or property to pay attorney fee and court fee. Will appreciate your opinion in regard to this matter."

Under date of July 31, 1946, this department rendered an opinion to Honorable George H. Hubbell, Probate Judge of Grundy County, Missouri, holding that probate courts under Senate Bill No. 284, passed by the 63rd General Assembly, which became effective on July 1, 1946, are the only courts any longer authorized to commit indigent insane persons to state hospitals.

You now inquire if the probate judge is entitled to a fee in such cases and if an attorney called in to represent such persons is also entitled to a fee; if so, who pays same.

It is well established that probate judges are entitled to all fees earned during their term of office prior to January 1, 1947, however, not to exceed the maximum amount they are allowed to retain under the law. This department has rendered such an opinion. Under Section 24, Article V, Constitution of

Missouri, 1945, probate judges were entitled to receive their compensation as provided by law until the expiration of their term of office, which terms, in most instances, expired as of January 1, 1947. Section 24, Article V, supra, reads:

"All judges shall receive as salary the total amount of their present compensation until otherwise provided by law, but no judge's salary shall be diminished during his term of office. Until the end of their present terms probate judges shall continue to receive compensation and clerk hire as now provided by law. The salaries of magistrates shall be fixed by law. No judge or magistrate shall receive any other or additional compensation for any public service, or practice law or do law business, except probate judges during their present terms. Judges may receive reasonable traveling and other expenses allowed by law. The fee of all courts, judges and magistrates shall be paid monthly into the state treasury or to the county paying their salaries."

Probate courts for a long time have been vested with authority to hold sanity inquisitions. However, until the 63rd General Assembly passed Senate Bill 284, such courts had no authority to commit indigent insane persons to state hospitals. Such authority was vested solely in the county court. The law also provided that, in the absence of sufficient funds in the estate of one found to be insane, costs of such proceedings shall be paid by the county. (See Sections 447 and 453, R.S. Mo. 1939.)

Section 13404, R.S. Mo. 1939, was the fee statute controlling the amount of fees probate judges were entitled to receive for services rendered and was in effect until repealed by Senate Bill No. 284, supra. In *Van Loo v. Osage County*, 141 S.W. (2d) 805, 1.c. 808, 809, the Supreme Court discussed at length the authority of the probate court to hold sanity inquisitions of poor persons. In that decision, the court held that probate courts had concurrent jurisdiction with county courts in holding such hearings, but that probate courts had no authority to commit an insane poor person to the state hospital. It was held that when costs could not be paid out of the estate, the county was liable for same. In so holding, the court said:

"It is our conclusion and we so rule that the probate court has concurrent jurisdiction with the county court to hold sanity inquisitions of poor persons, but that such court has no authority to commit an insane poor person to a state hospital. And we further rule that when a poor person is adjudged by the probate court to be insane and also found by said court to be disordered in mind, etc., as set out in Sec. 498, supra, then the probate court has the authority to make an order that such person be held until the county court shall cause him or her, as the case may be, to be 'removed to a state hospital' as provided in Sec. 8657, R.S. 1929, Mo. St. Ann. Sec. 8657, p. 7750, for the circuit court, and to transmit to the county court a certified copy of its proceedings in the matter. And in such situation there would be, as in the circuit court procedure, no occasion for any adjudication of sanity in the county court. The procedure in the Cox case, supra, was such or similar.

"As appears, supra, from Sec. 454, R.S. 1929, Mo. St. Ann. Sec. 454, p. 286, and from the Cox case, when a person is adjudged insane in the probate court, and the costs cannot be paid out of the estate of such insane person, then the county is liable for such costs, and the fact that the probate court committed Anna Van Loo to the state hospital at Fulton, instead of ordering her held for disposition by the county court, would not relieve the county of its duty to pay the costs. The judgment should be affirmed and it is so ordered."

Senate Bill No. 284, supra, repeals said statutes authorizing the county courts to hold sanity hearings and commit indigent insane persons to state hospitals and prescribes a procedure that shall be followed in such cases. Under said bill, it requires a probate court to appoint an attorney to represent any alleged insane person, if none appear for said person, and that the court shall also allow a reasonable attorney fee for services rendered by the attorney, same to be taxed as costs. Section 9338, Senate Bill No. 284, in part reads:



"\* \* \* If no licensed attorney appears for the alleged insane person at such hearing, the court shall appoint an attorney to represent such person in such proceeding and shall allow a reasonable attorney fee for the services rendered, same to be taxed as costs in such proceeding."

Furthermore, Section 9339 of Senate Bill No. 284, in providing that the costs of such examination shall be paid out of the county treasury, in part reads:

"\* \* \* and, also, that the costs of this examination be paid out of the treasury of the county; \* \* \*"

We also find, in Section 9344 of said Senate Bill No. 284, that, whenever inmates of any private or public charitable institutions for the maintenance and care of indigent persons shall be determined to be insane by the probate court, the county of which such insane indigent persons may be found to have been a resident just prior to his admission to such institution, shall pay all costs and expenses in like manner to that of an insane indigent person being sent to a state hospital on order of the county court. Said section in part reads:

"\* \* \* and the county of which such insane person is found to have been a resident immediately prior to his admission to such charitable institution shall pay all costs and expenses and provide all things required by this article, the same as if said person had been sent to the state hospital as an indigent insane person by order of the court of the county of which he is found to have been a resident immediately prior to his admission to said charitable institution."

All of the foregoing provisions clearly indicate that it was the legislative intent that the county shall pay the costs of such proceedings in a hearing to determine if a person is an indigent insane person.

The 63rd General Assembly passed Senate Committee Substitute for Senate Bill No. 200, which bill specifically repeals Section 13404, R.S. Mo. 1939. Said bill provides what fees the probate court shall charge and collect. However, said bill also provides when it shall become effective, and reads:

"This Act shall take effect on January 1, 1947, except that in all counties where the present terms of office of the incumbent probate judges extend beyond said date, this Act shall become effective in each such county at the expiration of the present terms of the probate judges of such county."

This last proviso carries out the provisions of the Constitution of Missouri of 1945. (See Section 24, Article V, Constitution, 1945.)

The 63rd General Assembly also passed Senate Committee Substitute for Senate Bill No. 198, which places probate judges in this state on an annual salary. Said bill became effective January 1, 1947, except in such cases where the term of the present incumbent probate judge ended after the aforesaid date. In such case, the act became effective in such county when said judge's term ends. The same General Assembly enacted Senate Bill No. 207, which contained an emergency clause and became effective when approved by the Governor on March 11, 1946. This bill provides that, in counties of 30,000 inhabitants or less, the probate judge shall be the magistrate. (See Sections 1 and 6 of said bill.) Section 17 of the same act provides the salary of all magistrates shall be paid by the state, except that additional magistrates appointed in the county shall be paid by the county, and further provides what the annual salary of such magistrates shall be, and also provides that, in all counties now or hereafter containing a population of 30,000 inhabitants or less, the salary of the magistrate as above provided shall include his compensation as probate judge of said county.

Senate Committee Substitute for Senate Bill No. 200, supra, requires the probate judges or clerks of said probate courts, in some instances, shall collect and pay over monthly all fees accruing to said offices either to the county or state treasury, as the case may be, and in counties having less than 30,000 inhabitants such fees shall be paid to the Director of Revenue, to be deposited with the state treasurer in the "magistrate fund." Said bill in part reads:

"It shall be the duty of the judge and clerk of the probate court to charge upon behalf of the state or county as the case may be every fee that accrues for the services of such judge, clerk or court; except that in counties now or hereafter having more than 250,000 inhabitants the duty to charge such fees shall

be imposed on the clerk of the probate court.

"In counties now or hereafter having 30,000 inhabitants or less, the judge shall, at the end of each month, pay over to the director of revenue, to be deposited by him with the state treasurer in the 'magistrate fund', all moneys collected by him or his clerk as fees, taking two receipts therefor, one of which he shall immediately file with the state treasurer. Each judge shall, within thirty days after the expiration of each calendar year file with such director revenue a written report, verified by his affidavit specifying the name and court number of each estate in which fees were paid in such calendar year, the amount of such fees paid in each such estate and the amount of fees unpaid and due in each estate at the end of such year. Such judge shall also, within such thirty day period after such calendar year make a written report to such director of revenue of all fees which have been due and unpaid for more than one year, the amounts thereof and the name of the estate in which the same are due, which report shall be verified by affidavit of the judge that he has been unable after the exercise of diligence, to collect the same; and it shall thereupon be the duty of the director of revenue to cause the same to be collected by law and turned over to the state treasurer.

"In all counties which now or may hereafter have more than 30,000 inhabitants such fees shall be charged on behalf of the county and paid over to the county treasurer, who shall issue two receipts therefor, one of which shall be filed with the clerk of the circuit court having jurisdiction in such county. The reports herein above required to be made to the director of revenue shall be made to the county treasurer."

The last provision in Senate Committee Substitute for Senate Bill No. 200, requiring the courts and clerks to pay over fees to the county or state treasury as the case may be, also complies with Section 24, Article V, Constitution, 1945, which requires the fees of courts, judges and magistrates to be paid monthly into the state or county paying their salaries.

CONCLUSION

Therefore, it is the opinion of this department that the probate court is the only court authorized to commit indigent insane persons to state hospitals subsequent to Senate Bill No. 284, passed by the 63rd General Assembly, becoming effective; that when no attorney appears to represent a person before a probate court in a sanity hearing the court shall appoint an attorney and allow him a reasonable fee for services rendered, said fee to be taxed as costs in such proceedings and to be paid by the county if the estate of such person is insufficient to meet such expenses. Likewise, all costs of the proceedings shall be taxed as costs and be paid out of the county treasury when the estate is insufficient to meet said costs. Furthermore, probate judges are entitled to any fees accruing to their office for holding sanity inquisitions and earned prior to January 1, 1947, however, subject to the maximum amount allowed said judge under the law. After the aforesaid date, said judges shall charge and collect all fees accruing to their office by virtue of authority granted under Senate Bill No. 284, passed by the 63rd General Assembly, however, such fees shall be paid monthly into the county or state treasury.

Respectfully submitted,

AUBREY R. HAMMETT, Jr.  
Assistant Attorney General

APPROVED:

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J. E. TAYLOR  
Attorney General

ARH:LR

COUNTY SCHOOL FUNDS:  
LIQUIDATION:  
ELECTION:

Capital of township and county school funds invested in government bonds can be liquidated before maturity. By the petition of the voters county court must call special election for liquidation of school funds even though this expenditure has not been provided for in county budget.

February 7, 1947

Honorable Emory L. Melton  
Prosecuting Attorney  
Barry County  
Cassville, Missouri



Dear Sir:

We hereby acknowledge receipt of your letter of January 31, 1947, requesting an opinion from this department, which reads as follows:

"The question has arisen in this county with reference to the construction of MRSA Sections 10376.1 and 10376.2 wherein it is provided for the election at which the voters will determine for or against annual distribution of the capital of the liquidated county school funds.

"At present this county has some \$60,000 invested in Series G. Government Bonds. Should the election decree distribution of these funds would it be mandatory that the county court liquidate these Government Bonds which have some 18 years to run yet before maturity or would the distribution be only of that portion of the funds which become liquidated over a period of years according to the obligation.

"Should the petitions be presented to the county court as provided by the above named sections is it mandatory that the election be held as provided for by law even though there has been no provisions made in the county budget for such expenses?"

The first question presented here is in regard to the action that the county court is compelled to take with respect

to the capital of the liquidated township and county school funds after the majority of the voters voting thereon have voted to distribute said funds according to the provisions of Section 10376.1 and Section 10376.2, Mo. R.S.A. Your attention is directed to Section 7, Article IX of the 1945 Constitution of Missouri, which provides, in part:

"\* \* \* Any county or the city of St. Louis by a majority vote of the qualified electors voting thereon may elect to distribute annually to its schools the proceeds of the liquidated school fund, at the time and in the manner prescribed by law. \* \* \*"

A similar question was presented and an opinion from this department rendered to the Honorable G. R. Chamberlain, Prosecuting Attorney, Harrisonville, Missouri, under date of March 19, 1945. There the county court was in doubt as to when it should begin liquidating the county loans referred to in Section 7 of Article IX of the Constitution. That opinion construed Section 7 of Article IX to mean that such liquidation should occur only at the time when the principal became due according to the tenure of the instrument evidencing the loan subsequent to the effective date of the Constitution. The ruling of that opinion was with respect to county loans and was apparently based on the rule set out in Section 5 of the Schedule of the 1945 Constitution that existing contract obligations were not impaired by the adoption of the Constitution.

However, the reason for this ruling is not present in our case as here the funds are invested in government bonds which may be cashed in at any time before maturity. Therefore, the capital of the township and county school funds which has been liquidated according to Section 7 of Article IX of the 1945 Constitution and immediately reinvested in government bonds, may again be liquidated by the county court at any time such action is authorized by a majority of the voters voting in an election called to determine whether or not the capital of said fund shall be distributed annually to the schools of the county as provided by law.

In answering the second question, your attention is directed to Section 10376.2, Mo. R.S.A., which is in part as follows:

"Said proposal shall be submitted at a special election to be held for that purpose within sixty days after the filing of the petition therefor. \* \* \* \* \*"

We think the wording in this provision is mandatory and requires a special election to be called within a certain time after the filing of the petition as provided in Section 10376.1.

The rule to be applied in determining whether this provision is mandatory or directive is set out in the case of Warrington v. Bobb, 56 S.W. (2d) 835, page 837:

" \* \* \*and, in determining whether a statute is directory or mandatory, the prime object is to ascertain the legislative intention disclosed by the statutory terms and provisions in relation to the object of the legislation. Provisions relating to the essence of the thing to be done, that is, matters of substance, are mandatory, while, generally, statutory provisions not relating to the essence of the thing to be done, and as to which compliance is not a matter of substance, are directory. State ex rel. v. Brown, 326 Mo. 627, 33 S.W. (2d) 104, 107."

And also in the case of State v. Flynn, 147 S.W. (2d 210, at 211:

"Relator's position is that the provisions of Section 15 supra, which require that registration shall be closed fifteen days preceding a general election, and forty days prior to a municipal election, are mandatory, while respondent contends the provisions are merely directory. There is no absolute test by which the question here presented may be resolved, but in passing upon the matter, the prime object is to ascertain the legislative intent from a consideration of the statute as a whole, bearing in mind its object and the consequences that would result from construing it one way or the other. State ex rel. Ellis v. Brown, 326 Mo. 627, 33 S.W. 2d 104. \* \* \*"

Following the rule as set out in the above cases we must find the intent of the General Assembly by considering the statute as a whole in connection with the overall plan. We see then that the General Assembly set up a procedure by which the capital of the certain school funds could be liquidated and distributed to the schools of the county according to the discretion of the voters of the county. It was evidently the intent of the General Assembly to leave this matter entirely to the discretion of the voters, and further, that when these voters

petition for such procedure to be put into operation, this should be done in the manner and within the time as provided by law.

This is further supported by 29 C.J.S., Section 67, page 91, which is in part as follows:

"\* \* \* Whether a statutory provision with respect to an election is mandatory or directory depends on the legislative intent. Ordinarily provisions of an election law are mandatory if enforcement is sought before election in a direct proceeding for that purpose; \* \* \*"

Even if there has been a failure to budget funds for such special election, this does not warrant the county court in refusing or failing to call said election. The provisions calling for such election are mandatory and cannot be disregarded.

The rule is set out in the case of Gill v. Buchanan County, 142 S. W. (2d) 665, at 668-669:

"\* \* \* Failure to budget funds for the full amount of salaries due officers of the county, under the applicable law, which the county court must obey, cannot bar the right to be paid the balance. Instead, it must be the discretionary obligations incurred for other purposes which are invalid, rather than the mandatory obligation imposed by the same authority which imposed the budget requirements. We, therefore, hold that a county court's failure to budget the proper amounts necessary to pay in full all county officers' salaries fixed by the Legislature, does not affect the county's obligation to pay them."

And also in the case of State v. Smith, 182 S. W. (2d) 571, at 574:

"\* \* \* Sec. 10907 of the Budget Law cannot be construed as making invalid, contracts or agreements for which express authority of law is given specifically by other later statutes.\* \* \*"



If a sum sufficient to conduct such special election was not set aside in classification two of the county budget which is to include expenditure for elections, arrangements must necessarily be made to put this expenditure under either classifications 5 or 6 or to provide for it in some other manner.

Conclusion

Therefore, it is the opinion of this department that the capital of township and county school funds which is invested in government bonds can be liquidated as provided by law before maturity of such bonds. It is further the opinion of this department that upon petition of the voters of any county or the City of St. Louis as provided by Section 10376.1, Mo. R.S. A., it is mandatory that the county court call a special election as provided by Section 10376.2, Mo. R.S.A., even though funds have not been set aside in the county budget for this purpose.

Respectfully submitted,

DAVID DONNELLY  
Assistant Attorney General

APPROVED:

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J. E. TAYLOR  
Attorney General

CORONERS: In counties of the fourth class are entitled to actual and necessary expenses while carrying out their official duties.

February 25, 1947

FILED

60

3/7

*Copy to  
G.D. Smith*

Honorable Robert I. Meagher  
Prosecuting Attorney  
Madison County  
Federicktown, Missouri

Dear Sir:

This will acknowledge receipt of your request for an opinion of this department, which reads as follows:

"Please give me an opinion in regard to the total compensation of a coroner in a county of the fourth class of less than ten thousand population.

"I have read House Bill 881 which sets this compensation at \$5.00 per month. Our Coroner in Madison County states that that sum will not pay his actual car expense in the performance of his duties. In your opinion would the coroner in above mentioned counties have to pay his own expenses. It seems somewhat unfair that a public official would be required to perform duties and not be paid sufficient compensation to pay his actual expenses."

Prior to the enactment of House Bill 881 passed by the 63rd General Assembly, coroners in counties having a population of less than 10,000 inhabitants were on a fee basis. Under House Bill 881 the General Assembly changed the method of compensation by placing the coroners on an annual salary. Section 1 of said bill reads as follows:

"The coroner in all counties of the fourth class shall receive for his services annually, payable out of the county treasury in equal monthly installments the

following: In counties with a population of less than 10,000. the sum of \$60.00; in counties with a population of 10,000 and less than 15,000 the sum of \$90.00; and in counties having a population of 15,000 and more the sum of \$120.00."

In your request for an opinion you have specifically inquired whether or not the coroner in counties of the fourth class may be reimbursed for his actual and necessary expenses while carrying out his official duties. We have found no specific statutory authority authorizing the county court to allow actual and necessary expenses incurred by the coroner. However, it is our opinion that a situation of this nature is distinguishable from those cases announcing the rule that officials may not receive any other compensation than that authorized by law. *Maxwell v. Andrew County*, 146 S. W. (2d) 621; *Smith v. Pettis County*, 136 S. W. (2d) 282.

In the case of *Rinehart v. Howell County*, 155 S. W. (2d) 381, the court held that the prosecuting attorney could be reimbursed for reasonable sums paid for necessary stenographic services, in addition to that authorized by law. In arriving at this decision the court stated at l. c. 382-383:

"\* \* \* The instant case was submitted on the theory, as disclosed by the stipulated facts and undisputed testimony, that the outlays, as contradistinguished from income, were bona fide, reasonable and actual expenditures for indispensable expenses of the office by respondent (not on the theory that compensation to an officer was involved) and falls within the ruling in *Ewing v. Vernon County*, 216 Mo. 681, 695, 116 S. W. 518, 522(b). That case quoted with approval a passage from 23 Am. and Eng. Ency. Law, 2d Ed., 388, to the effect that prohibitions against increasing the compensation of officers do not apply to expenses for fuel, clerk hire, stationery, lights and other office accessories and held a recorder entitled to reimbursement for outlays for necessary janitor service and stamps, stating: 'fees are the income of an office. Outlays inherently differ. An

officer's pocket in no way resembles the widow's cruse of oil. Therefore those statutes relating to fees, to an income, and the decisions of this court strictly construing those statutes, have nothing to do with this case relating to outgo." (Emphasis ours.)

You will note in the above quotation that the court placed great emphasis upon the fact that the expenses allowed were "reasonable and actual expenditures for indispensable expenses of the office."

In arriving at this conclusion the court further pointed out that in certain counties the General Assembly has specifically provided that stenographic services should be furnished a prosecuting attorney. We have a analogous situation here in that House Bill 881 of the 63rd General Assembly provides for expenses for coroners in fourth class counties. In discussing a situation of this kind, the court stated at l. c. 383:

"Appellant points out that \* \* \* the General Assembly authorized and established salaries for stenographic services to prosecuting attorneys in the larger counties of the State, did not provide for like services in counties of the population of Howell county, and contends for the application of the maxim expressio unius est exclusio alterius.  
\* \* \* \* \*

"Appellant's statutory citations constitute legislative recognition of the propriety of expenditures for stenographic services in the discharge of the present-day duties of prosecuting attorneys in the communities affected--an approved advance in proper instances for the administration of the laws by county officials and the business affairs of the county and for the general welfare of the public. Such enactments, in view of the constitutional grant to county courts, should be construed as relieving the county courts in the specified communities from determining the necessity therefor and, by way of a negative pregnant,

as recognizing the right of county courts to provide stenographic services to prosecuting attorneys in other counties when and if indispensable to the transaction of the business of the county, and not as favoring the citizens of the larger communities to the absolute exclusion of the citizens of the smaller communities in the prosecuting attorney's protection of the interests of the state, the county and the public. \* \* \*

We believe that the Rhinehart case is authority for the conclusion that if a county court determines that actual and necessary expenses are necessary for the proper conduct of the duties of the office of coroner, then said expenses can be paid for by the county court out of county revenue, and further that if such expenses are indispensable and the county court refuses to provide same and the coroner is compelled to provide it himself, then said coroner can recover from the county his reasonable and actual expenses. It should be noted that what is bona fide, reasonable and actual expenditure is a matter of fact to be determined by the county court. However, if the coroner is of the opinion the county court has acted arbitrarily in its determination, then he may bring suit against the county to recover for his necessary expenditures, but the duty would be upon him in such an action to prove that these expenses are indispensable to the proper conduct of his office.

#### Conclusion

Therefore, it is the opinion of this department that necessary and actual expenses may be provided by the county court for coroners in counties of the fourth class if the county court finds as a fact said expenses are necessary for the proper conduct and administration of the affairs of said office; and it is further our opinion that if a county court refuses to provide for actual and necessary expenses for the coroner, then, if in fact said expenses are indispensable to the proper conduct and administration of the affairs of his office, he may recover his actual and reasonable expenditures.

Respectfully submitted,

APPROVED:

PERSHING WILSON  
Assistant Attorney General

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J. E. TAYLOR  
Attorney General

P.L:EO

*Copy to  
J. Smith*

SHERIFF'S MILEAGE:

Sheriff entitled to actual expense not in excess of five cents per mile for taking prisoners to penitentiary; magistrate court costs to be taxed as provided for in Section 13409, R. S. Mo. 1939.

MAGISTRATE COURT COSTS:

February 28, 1947

FILED

60

Honorable Emory L. Melton  
Prosecuting Attorney  
Barry County  
Cassville, Missouri

Dear Mr. Melton:

Your letter of recent date, requesting an opinion of this department, reads as follows:

"A question has arisen as to whether the sheriff of this county, Barry county being a third class county, is entitled to guard hire and expenses under the new law. For example; in taking prisoners to the state penitentiary or in effecting extraditions, is the sheriff entitled to one or two guards as the necessity demands plus their travel expenses?

"The second problem I would appreciate information on is; what are the costs in the Magistrate Court in addition to the Sheriff fee of \$3.00 and the Prosecuting Attorney fee of \$5.00 in misdemeanors and preliminary hearings?"

Your two questions, which each embody a subquestion, for convenience, will be numbered 1 and 2, in the order presented, and will be set out at the beginning of the discussion of their particular subject.

Question No. 1.

"A question has arisen as to whether the sheriff of this county, Barry county being a third class county, is entitled to guard hire and expenses under the new law. For ex-

ample; in taking prisoners to the state penitentiary or in effecting extraditions, is the sheriff entitled to one or two guards as the necessity demands plus their travel expenses?"

Section 13547.305, Laws of 1945, p. \_\_\_\_\_, H.B. No. 899, Sec. 5, provides for the actual expense of each mile traveled by the sheriff or his deputies in serving warrants or any other criminal process, not to exceed five cents per mile. Said section reads as follows:

"In addition to the salary provided in Section 1 of this act, the county court shall allow the sheriffs and their deputies, payable at the end of each month out of the county treasury, actual expenses for each mile travelled in serving warrants or any other criminal process not to exceed five cents per mile."

Taking a prisoner to the penitentiary, we think, would come under the provision for serving other criminal process, in that when the prisoner is delivered to the penitentiary a copy of the commitment is served upon or delivered to the Warden; the commitment being a criminal process issued by the trial court. In that event, the sheriff and, or, his deputies, would be entitled to the actual expense not to exceed five cents per mile.

In this connection, the five cents per mile is a basis upon which expenses are computed, and covers all expenses, not to exceed five cents per mile, for the trip, which would include meals, lodging, if necessary, car expense or bus or train fare.

Section 13547.302, Laws of 1945, p. \_\_\_\_\_, H.B. 899, Sec. 2, provides that the sheriff, in counties of the third class, shall be entitled to such number of deputies and assistants, with the approval of the circuit judge, as such judge may deem necessary. Said section reads as follows:

"The sheriff in counties of the third class shall be entitled to such number of deputies and assistants, to be appointed by such official, with the approval of the judge of the circuit court, as such judge shall deem neces-

sary for the prompt and proper discharge of his duties relative to the enforcement of the criminal law of this state. The judge of the circuit court, in his order permitting the sheriff to appoint deputies or assistants, shall fix the compensation of such deputies or assistants. The circuit judge shall annually, and oftener if necessary, review his order fixing the number and compensation of the deputies and assistants and in setting such number and compensation shall have due regard for the financial condition of the county. Each such order shall be entered on record and a certified copy thereof shall be filed in the office of the county clerk. The sheriff may at any time discharge any deputy or assistant and may regulate the time of his or her employment."

In the event that assistance is required by the sheriff to take a prisoner to the penitentiary, and the sheriff requests the court to make an appointment for this purpose, as the only provision for sheriff's help is by deputies or assistants, the court, if the need arises and such is necessary, might make such appointment to aid and assist the sheriff and, the deputy's expenses could not exceed an amount in excess of five cents per mile; but, in any event, the full amount that can be claimed by either the sheriff or the deputy, for taking the prisoner to the penitentiary, figuring on a mileage basis, cannot exceed five cents per mile.

As to the expense of extradition; this is provided for in Chapter 30, Article 9, Revised Statutes of Missouri 1939, since these provisions have not been changed by any later enactment, and are found in Sections 3976 and Section 3977, the two sections which are pertinent to your question.

Section 3976, R. S. Mo. 1939, reads as follows:

"Whenever the governor of this state shall demand a fugitive from justice from the executive of another state or territory,



and shall have received notice that such fugitive will be surrendered, he shall issue his warrant, under the seal of the state, to some messenger, commanding him to receive such fugitive and convey him to the sheriff of the county in which the offense was committed, or is by law cognizable."

Section 3977, R. S. Mo. 1939, reads as follows:

"The expenses which may accrue under the last section, being first ascertained to the satisfaction of the governor, shall, on his certificate, be allowed and paid out of the state treasury, as other demands against the state."

The expenses of the sheriff, if appointed by the governor as the governor's messenger, and the expenses of a guard, if allowed by the governor, are subject to the approval and satisfaction of the governor, and, if approved, shall be paid out of the state treasury on the governor's certificate.

Question No. 2.

We are enclosing a copy of an opinion of this Department, under date of February 10, 1947, to Honorable Gordon J. Massey, Prosecuting Attorney of Christian County, prepared by Assistant Attorney General Robert L. Hyder, which answers your second question.

CONCLUSION

Therefore, it is the opinion of this Department that the Sheriff and his deputy (if the court appoints a deputy), in taking prisoners to the penitentiary are entitled to their actual travel expense, which total expense shall not exceed the rate of five cents per mile, in addition to their salaries. Further, it is the opinion of this Department that the expenses of the Sheriff, as the Governor's messenger in extradition matters, which are in-

Hon. Emory L. Melton

(5)

curred in effecting extradition, are subject to the approval of the Governor.

Respectfully submitted,

GORDON P. WEIR  
Assistant Attorney General

APPROVED:

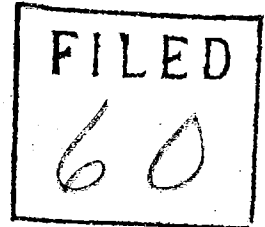
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J. E. TAYLOR  
Attorney General

GPW:CP

AIRPORTS: ) Fourth class city can condemn land a  
EMINENT DOMAIN: ) reasonable distance outside corporate  
CITIES OF THE FOURTH ) limits to establish airports. Reason-  
CLASS: ) ableness of distance is question of fact.

June 10, 1947



Honorable Emory L. Melton  
Prosecuting Attorney  
Barry County  
Cassville, Missouri

Dear Mr. Melton:

This is in reply to your letter of May 27, 1947,  
requesting an opinion from this department, which reads as  
follows:

"The question has arisen in this county  
as to the right of a city of the fourth  
class to exercise powers of condemnation  
for a municipal airport, as given in  
MRSA Sec. 15125.

"The proposed airport site is some 3.5  
miles from the nearest point of the  
corporate limits. Does the city's  
condemnation powers extend this far  
beyond the city limits?"

The questions presented in your letter are: first,  
whether a city of the fourth class is authorized to condemn  
private property outside the corporate limits for the purpose  
of constructing an airport; and, second, if such authority is  
present, how far outside the incorporated limits does said  
power extend?

Your attention is directed to Section 15122, Mo.  
R.S.A., which provides that any city is authorized to establish  
and operate an airport either within or without the limits of  
such city. It is as follows:

"The local legislative body of any city, including cities under special charter, village or town in this state is hereby authorized to acquire, by purchase or gift, establish, construct, own, control, lease, equip, improve, maintain, operate, and regulate, in whole or in part, alone or jointly or concurrently with others, airports or landing fields for the use of airplanes and other aircraft either with in or without the limits of such cities, villages, or towns, and may use for such purpose or purposes any property suitable therefor that is now or may at any time hereafter be owned or controlled by such city, village, or town."

Section 15124, Mo. R.S.A., provides that cities have the right to acquire property for the purposes set out in Section 15122, under the power of eminent domain. Said section 15124 is as follows:

"Any lands acquired, owned, controlled or occupied by such cities, villages, towns or counties for the purposes enumerated in sections 15122 and 15123 hereof shall and are hereby declared to be acquired, owned, controlled, and occupied for a public purpose and as a matter of public necessity, and such cities, villages, towns, or counties shall have the right to acquire property for such purpose or purposes under the power of eminent domain as and for a public necessity."

Section 15125, Mo. R.S.A., also authorizes cities to acquire property for airports by condemnation proceedings. It is, in part, as follows:

"Any county, city or city under special charter shall have the power to acquire by purchase, property for an airport or landing field or addition thereto, and if unable to agree with the owners on the

terms thereof, may acquire such property by condemnation in the manner provided by law under which such county or city is authorized to acquire real property for public purposes, or if there be no such law, then in the same manner as is now provided by law for the condemnation of property by any railroad corporation.

\* \* \* \* \*

It is clear then that cities of the fourth class are authorized to establish and operate airports both within and without their corporate limits. And since they have authority to condemn property for this purpose, it necessarily follows that the power of condemnation extends to property outside the corporate limits. In *Colorado Central Power Co. v. City of Englewood*, 89 Fed. (2d) 233, the Circuit Court of Appeals, for the Tenth Circuit, said at page 235:

"The fact that the company is now using the property outside the city limits to furnish its customers with electric energy is not enough to withstand the power of the city to acquire it for the purpose of establishing and operating a municipal system. A city may condemn property of a utility company in use as a part of the system which serves consumers within the city for the purpose of devoting it to a municipal plant. \* \*"

Also, in *In Re City of Rochester*, 121 N. E. 102, a New York case, the Court of Appeals said, l. c. 103:

"The respondents assert and argue that the empowerment of the common council to conclusively determine that lands, which are without the city, are necessary for municipal purposes violates the provision of the federal Constitution that no person shall be deprived of property without due process of law. Article 5, Amend. In this they err. Whether the public exigency requires the taking of private property for public

use is a legislative question, the determination of which by the Legislature is, generally speaking, final and conclusive. Whether the use for which such taking is authorized is a public use is a judicial question for the determination of the court. That the taking, in the instant case, is for a public use, is not denied. The Legislature has the right to designate officers, bodies, or tribunals to determine the question of exigency or necessity. The territorial limitations of the general authority or jurisdiction of the designated tribunal is immaterial. The state has the inherent power to take the private property it requires for the use of the public, wherever it may be located, and in the taking may act directly or through a local agency authorized to exercise its power in whole or in part. \* \* \* \* \*

The right to condemn private property for public use is an exercise of the state's sovereign power and the extent of such condemnation is within the discretion of the Legislature (*Riggs v. City of Springfield*, 126 S. W. (2d) 1144). The state has the power to take the private property it requires for the use of the public wherever it may be located, and in the taking may act directly or through a local agency authorized to exercise this power. The state has authorized the cities of the state to establish and operate airports both within and without the cities and by Sections 15124 and 15125 has delegated to the cities the power of condemnation of private property for this purpose.

While the Legislature has authorized the cities to condemn private property outside the corporate limits for said purposes, an arbitrary distance beyond which such power of condemnation cannot extend, has not been set up. We submit, then, in order to render such statutes operative, that cities can exercise such power of condemnation a distance from the corporate limits which is reasonable and practicable under the particular circumstances. Whether 3.5 miles is a reasonable distance for

said purpose is a question of fact for the city authorities. This department has no means of determining the reasonableness because the facts are not presented. If said distance is determined to be reasonable under the particular circumstances existing in Barry County, the power of condemnation under the law extends that distance.

Conclusion

Therefore, it is the opinion of this department that a city of the fourth class may condemn private property a reasonable distance outside the corporate limits for the purpose of establishing, maintaining and operating an airport. It is further our opinion that whether a particular distance is reasonable is a question of fact and if determined to be reasonable under the particular circumstances, the power of condemnation extends that distance.

Respectfully submitted,

DAVID DONNELLY  
Assistant Attorney General

APPROVED:

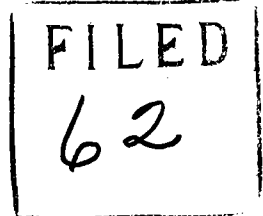
J. E. TAYLOR  
Attorney General

DD:EG

MAGISTRATES:  
PROBATE JUDGES:  
OFFICERS:

Person may not hold the position of  
probate judge and magistrate and  
mayor of a city at the same time.

February 5, 1947



Honorable Edwin W. Mills  
Prosecuting Attorney  
St. Clair County  
Osceola, Missouri

Dear Sir:

We hereby acknowledge receipt of your letter of recent date requesting an official opinion of this department, reading as follows:

"Our Probate Judge, George Anderson of Osceola, who has served as Mayor of Osceola this year, 1946, without compensation, and who has just been re-elected Probate Judge and Magistrate, asks if he can continue to act as Mayor of Osceola after the first of next year.

"He will appreciate your opinion as to whether he can hold the three offices simultaneously or whether he should resign as mayor."

Section 18, Article V, Constitution of Missouri, 1945, provides in part as follows:

"There shall be a magistrate court in each county. In counties of 30,000 inhabitants or less, the probate judge shall be judge of the magistrate court. In counties of more than 30,000 and not more than 70,000 inhabitants, there shall be one magistrate. \* \* \*"



Since St. Clair County has a population of less than 30,000 it is proper that one person perform the duties of Probate Judge and Magistrate.

As to the question of whether the same person may also hold the office of mayor of a municipality, we quote from 42 Am. Jur., Section 59, page 926:

"Even in the absence of express prohibitions against the holding by one person of more than one office at the same time, there is a well-established limitation on the right so to do. This limitation operates upon offices that are in their nature incompatible, for it is a settled rule of the common law that a public officer cannot hold two incompatible offices at the same time.  
\* \* \*"

This general rule has been adopted by our Supreme Court in the case of State ex rel. Walker, Attorney General vs. Bus, 135 Mo. 325, wherein they stated, at l.c. 330:

"The rule at common law is well settled that one who, while occupying a public office, accepts another which is incompatible with it, the first will, ipso facto, terminate without judicial proceeding or any other act of the incumbent. The acceptance of the second office operates as a resignation of the first. \* \* \*"

We have been unable to find any cases in this jurisdiction holding specifically the offices of probate judge and mayor of municipalities incompatible. However, in State ex rel. Walker, Attorney General vs. Bus, supra, the court stated at l.c. 338:

"The remaining inquiry is whether the duties of the office of deputy sheriff and those of school director are so inconsistent and incompatible as to render it improper that respondent should hold both at the same time. At common law the only limit to the number of offices one

person might hold was that they should be compatible and consistent. The incompatibility does not consist in a physical inability of one person to discharge the duties of the two offices, but there must be some inconsistency in the functions of the two; some conflict in the duties required of the officers, as where one has some supervision of the other, is required to deal with, control, or assist him." (Emphasis ours.)

The mayor of a city of the fourth class may also act as police judge. Section 7122, R. S. Mo. 1939, provides:

"The mayor and board of aldermen of cities of the fourth class may, by ordinance, provide for the election of police judges in such cities, who shall be elected at the regular city elections, and who shall, when so elected, have exclusive jurisdiction to hear and determine all offenses against the ordinances of the city in which he was elected: Provided, that when such police judges shall be so elected, then the jurisdiction in this article hereinafter conferred on the mayor to hear and determine cases for the violation of city ordinances shall be held to refer to the police judge elected under this section: Provided further, that in case of the absence, sickness, or disability in anywise of such police judge, or in case of vacancy in such office, the mayor shall perform all such duties until the disability is removed or the vacancy is filled."

It is noted that even though the board of aldermen does provide for a separate police judge, in case of any absence or disability the mayor performs all his duties. In performing the duties of the police judge and also judge of the magistrate court there would be certain instances where it would be necessary for the same person to review, when he was acting as magistrate, action taken by him as the police judge. Section 9017 of Senate Bill 217 of the 63rd General Assembly, provides:

"Before any sentence made by a police court or police magistrate under this article shall be executed, it shall be approved by the judge of the circuit court or magistrate of the county and his approval indorsed on the commitment, and if such sentence shall be disapproved, the police court or magistrate shall have power to pronounce the ordinary sentence prescribed by law."

Section 9029 of Senate Bill 218 of the 63rd General Assembly, provides:

"Before any sentence made by a police court or police magistrate under this article shall be executed it shall be approved by the judge of the circuit court or magistrate of the county, and his approval indorsed on the commitment, and if such sentence shall be disapproved, the police court or magistrate shall have power to pronounce the ordinary sentence prescribed by law."

This clearly makes the two offices incompatible since the office of magistrate has some supervision over the office of mayor.

#### CONCLUSION

Therefore, it is the opinion of this department that one person may not hold the offices of magistrate and probate judge and mayor of a municipality at the same time.

Respectfully submitted,

PERSHING WILSON  
Assistant Attorney General

APPROVED:

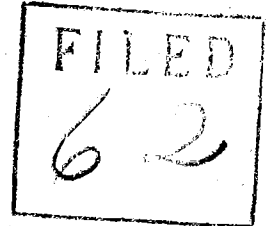
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J. E. TAYLOR  
Attorney General

ROADS AND BRIDGES: Funds from which the salary of the highway engineer may be paid.

HIGHWAY ENGINEER:

February 21, 1947



*Copy to  
J. B. Smith*

Honorable Roy C. Miller  
Prosecuting Attorney  
Webster County  
Marshfield, Missouri

*3/7*

Dear Sir:

This is in reply to your letter of recent date wherein you request an opinion from this department on the following statement of facts:

"At your earliest convenience I would appreciate an opinion from your Office as to the following matter: Can the compensation for the county highway engineer provided for in H.C.S.H.B. No. 792, Sec. 1 (Mo. R.S.A., Sec. 8655) be paid by the county court out of the 'Special Road and Bridge Fund' which is established by H.C.S.H.B. No. 784, Sec. 1 (Mo. R.S.A., Sec. 8527) and which is to be used 'for road and bridge purposes and for no other purpose whatever.'"

The substance of your question is, "may the highway engineer's salary be paid out of the 'special road and bridge fund' created by Section 8527 of House Committee Substitute for House Bill No. 784 of the 63rd General Assembly."

Said Section 8527 authorizes county courts to levy an additional tax of not to exceed thirty-five cents on the one hundred dollars assessed valuation and requires this tax to be turned into the county treasury, designated as the "special road and bridge fund," and provides that this tax shall be used for road and bridge purposes and for no other purpose whatever. This Act limits the use of this special road and bridge fund to road and bridge purposes only.

We fail to find where a question similar to this one has been before the courts, however, we do find language in the Constitution of 1875 and in Section 8527, R. S. Mo. 1939, which similarly limits the use of these funds.

Section 22 of Article X of the Constitution of 1875 authorized the levy of a tax for "special road and bridge purposes." This section provided that "this tax should be used for road and bridge purposes, and for no other purpose whatsoever."

Section 8527, R. S. Mo. 1939, which was repealed by said H.C.S.H.B. No. 784, and which was the enabling act to carry out the provisions of said Section 22 of Article X of the Constitution of 1875, contained the same language with respect to the limitation of the use of the special road and bridge fund.

By said Section 8527, R.S. Mo. 1939, it was provided that all the tax received under the special road and bridge levy on property in a special road district should be paid over to the special road district containing such property. This provision of the old act would indicate that the lawmakers did not intend for any part of that tax to be used to pay the salary of the county highway engineer or any other county officer who had duties to perform in relation to the administration of that law, and we think the record will show that during the time these provisions of the law were in force, the salary of the county highway engineer was paid out of county revenue. Since the language in Section 8527 of said H.C.S.H.B. No. 784, which limits the use of this road and bridge fund, is similar to the language used in the Constitution of 1875, authorizing the special road and bridge levy and the enabling act, Section 8527, R. S. Mo. 1939, then it would seem that the same rule, with respect to the expenditure of this money, would be applicable.

By the provisions of H.C.S.H.B. No. 792, the county highway engineer is to be paid such compensation as the county court may deem advisable, but the Act does not designate from what fund this compensation is to be paid. Ordinarily, county officers' salaries are paid out of what is termed the "ordinary revenue" or "county revenue," unless otherwise provided by law. State ex rel. Hall v. Mohlroy, 274 S.W. 753, 1. c. 754. The tax for "county purposes" is authorized by Section 11 (b) of Article X of the Constitution of 1945 and by House Bill No. 468 of the 63rd General Assembly. This is the tax which is the source of the revenue for "county purposes" or "county revenue."

The County Budget Act (Section 10911, Laws of Missouri, 1941), under class four claims, requires the county court to set aside funds in this class to pay salaries where the same are, by law, payable out of ordinary revenue.

By referring to the laws relating to county officers and their salaries, we fail to find where it is specifically provided that such salaries be paid out of ordinary revenue. However, it is common knowledge that salaries of county officers are paid out of the ordinary revenue which, as stated above, is derived from the tax for county purposes under said Section 11 (b) of Article X of the Constitution of 1945 and House Bill No. 468 of the 63rd General Assembly.

The county highway engineer is a county officer. State ex rel. Koehler v. Bulger, 289 Mo. 441.

As stated above, said Section 8527 limits the use of the "special road and bridge fund" to "road and bridge purposes, and to no other purpose whatever." The Act does not say just what is included within the term "road and bridge purposes."

It will be seen under H.C.S.H.B. No. 792 and Article 9 of Chapter 46, R. S. Mo. 1939, that the duties of the county highway engineer are performed generally for road and bridge purposes. However, other county officers have duties to perform in connection with the administration of the laws enacted for road and bridge purposes, but these officers are generally paid out of county revenue. We refer to the taxing officers and the judges of the county courts and county clerks.

The county court, under Section 7 of Article VI of the Constitution of 1945, is required to manage all county business as is prescribed by law. We do not think that this term would be broad enough to authorize the county court to pay the salary of the county highway engineer out of this special road and bridge fund unless a statute permitted this to be done.

#### CONCLUSION

From the foregoing, it is the opinion of this department that the county court would not be authorized to pay the salary of the county highway engineer out of the "special road and bridge fund" authorized by Section 8527 of H.C.S.H.B. No. 784 of the 63rd General Assembly.

Respectfully submitted,

APPROVED:

TYRRE W. BURTON  
Assistant Attorney General

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J. E. TAYLOR  
Attorney General

TWB:VLM

*2621  
Smith*

TAXATION: S.B. 11041, H.C.S.H.B. 468, 63rd General Assembly, does not authorize the circuit judge to order levy of 3¢ on \$100 for maintenance, operation and repair of county buildings when constitutional limit for county purposes has been levied.

April 18, 1947

FILED

62

4  
118

Honorable Harold L. Miller  
Prosecuting Attorney  
DeKalb County  
Maysville, Missouri

Dear Sir:

This is in reply to your letter of recent date, requesting an official opinion of this department and reading as follows:

"Respectfully request that we be furnished with your opinion on the following proposition involving taxation in DeKalb County:

"This County operates under Township Organization, and is at present levying the maximum provided by Section 11046, RS 1939, of 50 cents on the hundred dollars assessed valuation, for county purposes of which 20 per cent. is going to the various townships. At the present time, and for some time past this revenue has not been sufficient to operate, maintain and repair the County Buildings, namely, the Court House and County Poor Farm buildings, adequately, and in fact, not enough funds are raised to provide preventive maintenance. Our query is whether or not the Circuit Judge would be authorized to order an additional levy of \$0.03 on the one hundred dollars assessed valuation for such purpose, if proper action requesting such additional levy was taken under Section 11041, RS 1939."

Section 11040 of House Committee Substitute for House Bill No. 468 of the 63rd General Assembly provides as follows:

"The following named taxes shall hereafter be assessed, levied and collected in the

several counties in this state, and only in the manner, and not to exceed the rates prescribed by the Constitution and laws of this state, viz.: The state tax and taxes necessary to pay the funded or bonded debt of the state, county, township, municipality, road district, or school district, the taxes for current expenditures for counties, townships, municipalities, road district and school districts, including taxes which may be levied for library, hospitals, public health, recreation grounds and museum purposes, as authorized by law."

Section 11041 of House Committee Substitute for House Bill No. 468 of the 63rd General Assembly provides, in part, as follows:

"No other tax for any purpose shall be assessed, levied or collected, except under the following limitations and conditions, viz.: The prosecuting attorney or county counselor of any county, upon the request of the county court of such county--which request shall be of record with the proceedings of said court, and such court being first satisfied that there exists a necessity for the assessment, levy and collection of other taxes than those enumerated and specified in the preceding section--shall present a petition to the circuit court of his county, or to the judge thereof in vacation, setting forth the facts and specifying the reasons why such other tax or taxes should be assessed, levied and collected; and such circuit court or judge thereof, upon being satisfied of the necessity for such other tax or taxes, and that the assessment, levy and collection thereof will not be in conflict with the Constitution and laws of this state, shall make an order directed to the county court of such county, commanding such court to have assessed, levied and collected such other tax or taxes, and shall enforce such order by mandamus or otherwise.

\* \* \* "

Since Section 11040 provides the "taxes for current expenditures for counties" and Section 11041 provides that such Section



11041 is applicable only to taxes other than those enumerated and specified in Section 11040, and since taxes for operation, maintenance and repair of county buildings are taxes for current expenditures for counties, the proposed tax of three cents per one hundred dollars for operation, maintenance and repair of county buildings is not authorized by the provisions of Section 11041. The tax of three cents on the one hundred dollars is not authorized by the provisions of Section 11041 for the further reason that a tax authorized under the provisions of Section 11041 must be a tax within the constitutional limit, which is set in your county at fifty cents per one hundred dollars by Section 11(b) of Article X of the Constitution and Section 11046 of House Committee Substitute for House Bill No. 468 of the 63rd General Assembly.

In the case of State ex rel. v. Wabash Ry. Co., 169 Mo. 563, the facts were that the Ray County Court, for the years 1896 and 1897, levied for county purposes the constitutional limit of forty cents per one hundred dollars, and in addition levied a tax of twenty cents per one hundred dollars pursuant to an order by the Circuit Court made under authority of what is now Section 11041 of House Committee Substitute for House Bill No. 468 of the 63rd General Assembly, such additional levy being made to pay protested warrants of Ray County issued in prior years. The Supreme Court held that the twenty-cent levy was invalid, and said at l. c. 577:

" \* \* \* Now, if under such circumstances, the county court had the power to make a special levy of twenty cents on the hundred dollars valuation of property in the county in addition to the levy of forty cents, the constitutional limit, it could of course upon the same theory and by the same authority levy fifty or one hundred per cent and thus ignore those wholesome provisions of our Constitution which were intended to protect the property rights of the people, and to prevent its confiscation by an evasion of that instrument. That no such purpose was contemplated by the statute is indisputable, but what was meant thereby was that a special levy in addition to a general levy, when the latter does not come up to the constitutional limit, may be made for the purpose of paying past indebtedness of the county, provided it, including the general levy, or the levy for general purposes, does not exceed the constitutional limit."

In the case of State ex rel. v. Railway Co., 296 Mo. 518, the Supreme Court said at l. c. 524:

" \* \* \* Ever since their enactment the levy authorized by Section 12860 has been regarded as a special tax for county indebtedness in addition to the general levy for county purposes. In State ex rel. v. Wabash Ry. Co., 169 Mo. 563, it was held (syl. 6):

" 'A proceeding in conformity with Section 7654, Revised Statutes 1889' (now Sec. 12860, R. S. 1919), 'is the proper course to pursue in order to require a county court to make a special levy for the purpose of paying outstanding and unpaid warrants, but a proceeding under that section does not make valid a levy in excess of the constitutional limit. What is meant by that section is that a special levy in addition to a general levy, when the latter does not come up to the constitutional limit, may be made for the purpose of paying past indebtedness.'

"See State ex rel. v. Ry. Co., 130 Mo. 243, 248; State ex rel. v. Miss. River Bridge Co., 134 Mo. 321, 338."

Section 12860, R. S. 1919, referred to in the above quoted case, is now Section 11041 of House Committee Substitute for House Bill No. 468 of the 63rd General Assembly.

Your attention is invited to that part of Section 11046 of House Committee Substitute for House Bill No. 468 providing as follows:

" \* \* \* Provided, further, that in any county the maximum rates of taxation as herein limited may be increased for not to exceed four years, when the rate and purpose of the increase are submitted to a vote and two-thirds of the qualified electors of the county voting thereon shall vote therefor."

Under this provision, an additional tax may be voted by a two-thirds vote of the qualified electors voting at an election.

Honorable Harold L. Miller - 5

CONCLUSION

It is the opinion of this department that a tax of three cents on the one hundred dollars for operation, maintenance and repair of the county courthouse and poor farm buildings cannot be ordered by a circuit judge under the authority of Section 11041 of House Committee Substitute for House Bill No. 468 of the 63rd General Assembly.

Respectfully submitted,

C. B. BURNS, Jr.  
Assistant Attorney General

APPROVED:

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J. E. TAYLOR  
Attorney General

CBB:HR

LIBRARIES: Allocation of state aid to tax maintained and supported libraries.

April 22, 1947

FILED

62

4/26

Miss Kathryn P. Mier  
State Librarian  
State Office Building  
Jefferson City, Missouri

Dear Miss Mier:

This is in reply to your recent inquiry wherein you request an official opinion from this department on the following questions:

(1) When a tax supported library has voted a specific levy and they are not collecting the full amount of the levy, are they, in your opinion, operating and maintaining the library under the laws of the state?

(2) Is a library established under provisions in Laws of Missouri, 1943, Section 14752, in your opinion, a legally established library?

In your request, you refer to Section 14752, page 639, Laws of Missouri, 1943. This section was repealed and re-enacted by the 63rd General Assembly by Senate Bill No. 160, which was approved October 10, 1945, and became effective July 1, 1946 (Mo. R. S. A., Vol. 26, Pocket Part, Section 14752, pages 12, 13). This section reads in part as follows:

"The mayor and council, board of aldermen or board of trustees, of any city having a population of less than 25,000, however organized and irrespective of its form of government, may levy a tax of not more than one-half mill on each one dollars of the assessed valuation on all property in said city, for the establishment and maintenance of a free public library in such incorporated city. When one hundred tax-paying voters of any incorporated city shall petition the mayor and common council asking that an annual tax be levied for the establishment and maintenance of a

free public library in such incorporated city, and shall specify in their petition a rate of taxation, not to exceed two mills on the dollar annually, and in cities of over one hundred thousand inhabitants not to exceed two-fifths of one mill annually on all the taxable property in the city, such mayor and common council shall direct the proper officer to give notice in his next legal notice of the annual election, or special election, which may be called for the purpose of voting on such question, that at such election every voter may vote 'for a . . . . mill tax for a free public library.' or 'against a . . . . . mill tax for a free public library,' specifying in such notice the rate of taxation mentioned in said petition; and if the majority of votes cast on such proposition shall be 'for the tax for the free public library,' the tax specified in such notice shall be levied and collected in like manner with other general taxes of such incorporated city, and shall be known as the 'library fund.' Provided, that such tax shall cease in case the legal voters of any such incorporated city shall so determine by a majority vote at any annual election held therein. \* \* \* "

The portion of this section which we have not quoted applies to cities with a population of 600,000 or over.

Senate Bill No. 369, passed by the 63rd General Assembly and approved on July 10, 1946, makes provision for state aid to public libraries. This act is found in Mo. R. S. A., Vol. 26, Pocket Part, page 7, and Section 14736a thereof reads in part as follows:

"The General Assembly may appropriate moneys for State Aid to Public Libraries, which moneys shall be administered by the State Librarian with the assistance of the State Library Advisory Board. At

least 50 per cent of the moneys appropriated for state aid to public libraries shall be apportioned to all public libraries established and maintained under the provisions of the library laws or other laws of the state relating to libraries. The allocation of such moneys shall be based on an equal per capita rate for the population of each city, village, town, township, school district, county, or regional library district in which any such library is or may be established, in proportion to the population according to the latest Federal Census of such cities, villages, towns, townships, school districts, county or regional library districts maintaining tax supported public libraries. Provided, that no grant shall be made to any public library if the rate of tax or the appropriation for said library should be decreased below the rate in force at the time of the enactment of this bill into law and provided further after January 1, 1949 grants shall be made to any public library, according to two alternate standards: (1) to any public library in which the tax rate is one-half or more of the maximum by law; or (2) to any public library for which the tax income yields one dollar or more per capita for the previous year according to the population of the latest Federal Census. The librarian of such tax supported library together with the treasurer of such library shall certify to the State Librarian the annual tax income and rate of tax or the appropriation of said library on the date of the enactment of this bill, and of the current year, and each year thereafter, and the State Librarian shall certify to the Comptroller for his approval the amount to be paid to each library and warrants shall be issued for the amount allocated and approved. \* \* \* "

It will be noted that this act provides that at least 50 per cent of the moneys appropriated for state aid to public

libraries shall be apportioned to all libraries established and maintained under the provisions of the library laws or other laws of the state relating to libraries.

The public libraries referred to in this section are those which are established and maintained under what are now the provisions of Article 5, Chapter 110, R. S. Mo. 1939 and amendments thereto which provide for establishing libraries in cities, villages and townships, Article 6 of said chapter which provides for the establishing of county library districts and Article 7 of said chapter which provides for the establishing of libraries in cities of over 300,000 population.

The case State ex rel. Carpenter et al. v. City of St. Louis et al., 2 S. W. (2d) 713, was before the Missouri Supreme Court en banc in 1928. In this case, the construction of the provisions of the library act as it then existed was before the Court. The origin and development of the public library law was discussed in this opinion at l.c. 716 as follows:

"In 1885 the Legislature passed what is termed the Library Act (Laws 1885, p. 192), now article 5, c. 60, R. S. 1919, and in 1895 it passed another act (Laws 1895, p. 219), now article 6 of that chapter, making some additions to the law and providing details as to the manner of its operation.

"The first section of the act of 1885 (section 7191, R. S. 1919) provides that, when 100 taxpaying voters of any incorporated city shall petition the mayor and common council for an annual tax to be levied, collected, and used for the maintenance of a free public library, then the mayor and common council shall submit the matter to a vote of the people of the city, and, if the majority of the votes cast be for the Free Public Library, then the tax shall be levied and collected in like manner with other general taxes and shall be known as the library fund.

"In 1901 Andrew Carnegie made a proposition to the board of directors of the St.

Louis Public Library that he would donate to the city \$1,000,000 on condition that \$500,000 of the money be used for a main and central library building, and \$500,000 for branches; and the further condition that the city would secure unincumbered sites for said buildings, and provided for an appropriation of \$150,000 annually for the maintenance of the library system in the city."

Libraries were established throughout the state under the Andrew Carnegie plan and various acts of the general assembly were passed for the purpose of establishing and maintaining libraries under this plan. Comparing the provisions of Section 7191, R. S. 1919, referred to in the foregoing opinion, which related to the procedure for establishing and maintaining public libraries, with the present laws relating to the same subject, it will be found that there has been very little change in the law since the court ruled in the St. Louis case. So, the principles announced in that case would be applicable here on similar questions.

In the St. Louis case, the election for the establishment and maintenance of libraries provided for a tax of two-fifths of a mill on the one dollar assessed valuation annually for a free public library fund (l.c. 716). The evidence in that case reveals that the City of St. Louis levied, collected, and allocated the library tax according to the mandate of the election for a number of years, but for the year 1927 they did not levy this library tax but made a levy for municipal purposes up to the maximum amount authorized under the laws and Constitution. The contention of the city officials of that case being that since the levy for municipal purposes was at the maximum, then the "library tax" could not be levied, collected and paid to the library fund. At l.c. 724, the court, in discussing this action, said:

"\* \* \* In this case the city authorities are attempting to avoid a legal levy by absorbing its funds for other purposes. The question is whether the city officials, having thus deliberately violated the law, may be compelled to observe it."

In ruling on the question of whether or not it was the mandatory duty of the city authorities to treat the levy voted



for the library tax as a part of the annual levy and apportion it to the library fund, the court said at l.c. 728:

"The city authorities, no doubt, have a right to contest the constitutionality of the law by refusing to obey it, but in doing so they assume the risk which that course involves. They cannot evade the law by the mere expedient of allowing the time to pass in which they may regularly act, nor can they defeat its purpose by attempting to absorb for other purposes the funds which the law requires them to use for this purpose. They say articles 5 and 6, c. 60, the Library Acts, do not impose upon them the duty to treat any portion of levy for municipal purposes as including the library tax. The effect of that argument is that any official may nullify any law, which he is sworn to execute, by simply ignoring it. A law does not have to provide details by which it may be enforced. The courts have inherent power to enforce it, and, in case of a plain ministerial duty such as this, to command official action. The city authorities have provided means to collect the money, they will have it in control; therefore we can command them to appropriate for the purpose contemplated by the law.

"The return shows that the board of estimate and apportionment submitted and recommended to the board of aldermen, 'a bill establishing the city tax rate for municipal purposes for the year 1927, of \$1.35 on the hundred dollars' valuation, 'making no mention of or provision for any tax for the library fund,' which bill was passed and approved by the mayor. It is therefore apparent that taxes to the constitutional limit have been levied and now are in the process of collection, and the time is passed for making an appropriate levy.

"The peremptory writ is therefore ordered, commanding respondents to treat 4 cents of \$1.35 on the \$100 valuation, collected and to be collected, under the levy made, as for the support of the Free Public Library in the manner commanded in the alternative writ."

Therefore, according to this opinion, the law requires the proper authorities to levy, collect and apportion to the library fund all taxes which are authorized under the election for the establishing and maintaining of the library.

From an examination of said Senate Bill No. 369, it will be noted that no grant of the aid provided for in the bill shall be made to any public library if the rate of tax or the appropriation for such library is decreased below the rate in force at the time the act goes into effect. The act further provides that the librarian and treasurer of such library must certify to the State Librarian the annual tax income and the rate of tax or the appropriation of said library on the date of the enactment of the bill. It also requires this same procedure during each year thereafter in which such library requests state aid. Until January 1, 1949, the only condition under which a public library may be denied this aid is that when the rate of tax or the appropriation for the library is decreased below the rate in force at the time the bill goes into effect. It seems to have been the purpose of the lawmakers in the passage of this bill to give aid in addition to that which the libraries were receiving at the time the act went into effect. We do not think the fact that the public library is not receiving the full amount of taxes authorized by the election in establishing the library would deprive it of the aid under this bill, providing the aid that it is receiving at the time the law goes into effect is not reduced.

#### CONCLUSION

From the foregoing, it is the opinion of this department that in order for a tax supported public library to be authorized to participate in the funds appropriated for "state aid to public libraries," the proper authorities shall not decrease the levy or appropriation for the library fund below the rate or the appropriation in force at the time of the

Miss Kathryn P. Mier

-3-

enactment of Senate Bill No. 369 with an emergency clause thereto, which was approved July 10, 1946.

We are further of the opinion that even though the authorities are not levying and collecting the full amount of the levy adopted at the election creating the public library, that that would not prohibit such library from receiving the aid under said act.

We are further of the opinion that public libraries established under the provisions of Section 14752 of Senate Bill No. 369, which reenacts Section 14752, Laws of Missouri 1943, page 639, are legally established libraries, and such libraries as state aid may be granted to, providing they comply with the provisions of the law relating to aid to public libraries.

Respectfully submitted,

TYRE W. BURTON  
Assistant Attorney General

APPROVED:

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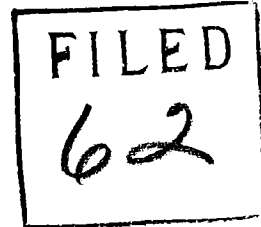
J. E. TAYLOR  
Attorney General

TWB:VLM

COUNTY COURTS: County court is without authority to appoint  
CONSTITUTIONAL LAW: supervising board of road commissioners and  
ROADS AND BRIDGES: prescribe the duties thereof.

June 26, 1947

Honorable Roy C. Miller  
Prosecuting Attorney  
Webster County  
Marshfield, Missouri



Dear Sir:

This is in response to your letter of recent date wherein you request an opinion from this department on the validity of the following order which has been made by the county court of Webster County:

"In the matter of placing in one Unit all the County Roads in Webster County, except such roads as are included in various special road districts in the County, and except that part of the northeast corner of the County recently designated as County Road District No. 4.

"Pursuant to authority given by the Laws of the State of Missouri to the County Court to act upon any question relating to County Roads in the County, the Court, after careful consideration of the matter, believes that it would be to the best interest of Webster County if all County Roads (not included in the various Special Road Districts still existing) were placed in one unit and constructed, maintained and supervised as hereinafter provided.

"Now, therefore it is ordered by the Court that a Supervising Board of Six County Road Commissioners be appointed, three of which are affiliated with one of the two now existing major political parties, and three which are affiliated with the other of the two major political parties, two of the number (one from each of the two now existing major political parties) for a term of two years, two

(one from each of said major political parties) for a term of four years, and two (one from each of said major political parties) for a term of six years, and upon the expiration of the term of any and all Commissioners, the successor shall be affiliated with the same political party as the one whose term expires, and shall be appointed for a term of six years. No person shall be appointed who is not a bonafide resident of Webster County, who is not of lawful age and who is not an advocate of a system of roads and highways constructed and maintained in a way that is to the best interest of all the inhabitants of the County.

"Said Commissioners are hereby given authority by the Court to supervise all road construction and maintenance in a way that will afford the greatest convenience to all the inhabitants of the County, to the fullest extent possible with the road funds which are, or which may hereafter be available; shall have authority to employ a County Road Supervisor who is qualified to lay out, construct and maintain a system of County Roads in a way that will be of the greatest benefit to all the inhabitants of the County as a unit. Said Supervisor to be at all times under the supervision of the Commissioners who shall have authority to remove him at any time. Said Commissioners shall also employ all road hands, or give authority to the Supervisor to employ, subject to their approval, for the length of time and for the salary they shall designate. The salary paid the Supervisor and the salary paid all road hands to be approved by the Court. Said Road Commissioners shall serve without pay, shall meet and organize by electing a chairman, a vice-chairman, and secretary, shall meet the first Monday in each month, at a place agreed upon, and shall at all times as much as is possible keep posted as to road conditions and needs in all parts of the

County over which they have supervision; shall make an inventory of all road machinery and equipment in that part of the county over which they have supervision, and shall also have supervision of the use and maintenance of same. The purchase or disposal of any machinery or equipment to be submitted to the Court for approval."

County courts, under the 1875 Constitution, were created by Section 36 of Article VI of that Constitution, which reads as follows:

"In each county there shall be a county court, which shall be a court of record, and shall have jurisdiction to transact all county and such other business as may be prescribed by law. The court shall consist of one or more judges, not exceeding three, of whom the probate judge may be one, as may be provided by law."

Under the 1945 Constitution, by Section 7 of Article VI thereof, county courts are provided for in the following language:

"In each county not framing and adopting its own charter or adopting an alternative form of county government, there shall be elected a county court of three members which shall manage all county business as prescribed by law, and keep an accurate record of its proceedings. The voters of any county may reduce the number of members to one or two as provided by law."

The order referred to in your letter does not reveal whether it was made when the county court was acting under the 1875 Constitution or the 1945 Constitution. However, in either event, both of these sections of the Constitution direct the county court to manage all county business as prescribed by law.

Apparently it was under authority of the foregoing provisions of the Constitution that the county court assumed that it had authority to make the foregoing order. County courts can only exercise such powers as are expressly given

them by statute or those which necessarily or fairly are implied in or incident to the powers granted or those essential to the declared objects and purposes of the corporation not simply convenient, but indispensable. In the case of Lancaster vs. County of Atchison, 180 S.W. (2d) 706, 708, the court, in passing on the validity of an order made by the county court of Atchison County, laid down the following rules which are applicable here:

"The county courts are not the general agents of the counties or of the state. Their powers are limited and defined by law. These statutes constitute their warrant of attorney. Whenever they step outside of and beyond this statutory authority their acts are void.' \* \* \*"

"Both parties to this suit agree that counties, like other public corporations, can exercise the following powers and no others: (1) those granted in express words; (2) those necessarily or fairly implied in or incident to the powers expressly granted; (3) those essential to the declared objects and purposes of the corporation--not simply convenient, but indispensable. Any fair, reasonable doubt concerning the existence of power is resolved by the courts against the corporation and the power is denied.' \* \* \*"

Following these principles, in order to sustain the validity of the foregoing order, we must find that the authority for the court to make this order has been expressed in a statute or that it is impliedly granted under powers expressly granted the statute or that it is essential to the declared objects and purposes of the county.

Referring to the statutes relating to the subject of roads and highways, road overseers, county highway engineers, we find that Articles 3, 6 and 9 of Chapter 46, R. S. Mo. 1939, and the amendments thereto, contain the laws relating to the duties of the county courts with respect to road overseers, road machinery, county highway engineers, and the construction and maintenance of roads. Section 8516 of said Article 3, as amended, Laws of Missouri 1945, page 1479, provides as follows:

"In all counties of classes 2, 3 and 4 not adopting an alternative form of county government all road overseers shall be appointed by the county court of the county during the month of February."

Since under House Bill No. 476 of the 64th General Assembly, Laws of Missouri 1945, page 1801, Webster County is a class 4 county, then that county would be included within the provisions of said Section 8516.

Under Section 8521, Laws of Missouri 1945, page 1479, it is the duty of the road overseer to make detailed reports to the county court of the moneys received and those expended.

Referring to the foregoing order setting up the supervisory board, which order gives that board authority to employ a county road supervisor, it appears that the same duties are imposed on this board and the road supervisor as are conferred by statute on the road overseer of county highway engineer. We will refer to the following statutes which relate to the road overseers or county highway engineers.

Section 8563, R. S. Mo. 1939, gives the road overseer and county highway engineer control over certain streets and alleys in unincorporated towns and villages.

Section 8576, R. S. Mo. 1939, requires the road overseer to protect trees planted along the highways and to file charges against persons for injury to such trees.

Section 8579, R. S. Mo. 1939, requires the county highway engineer and road overseer to protect fruit, shade and ornamental trees along the public roads and to remove signs and advertisements which might be nailed to such trees.

Section 8581, R. S. Mo. 1939, provides that driveways or crossings over ditches connecting highways with private property shall be under the supervision of the road overseer or commissioner of road districts. This section further prescribes duties of the road overseer or highway engineer in case of obstruction of roads or ditches.

Section 8592, R. S. Mo. 1939, provides that copies of road laws shall be delivered to the road overseers.



Section 8593, R. S. Mo. 1939, prohibits the highway engineer or road overseer from acting as a sales agent of road tools, culverts, bridge materials or machinery, or from being interested in contracts for the building of bridges or culverts or the improvement of public roads. Referring to the order made by the county court, there is no provision in that order which would prohibit the members of this supervisory board from being interested in such contracts as are referred to in said Section 8593, supra.

Section 8661, R. S. Mo. 1939, makes the county highway engineer custodian of tools, materials and machinery belonging to the road districts of the county, and when such tools and machinery are delivered to the road overseer, he is required to take from the overseer an inventory and receipt for such tools and machinery and the overseer is responsible for the proper care and handling of such tools. Again referring to the foregoing order, it seems that the county court has attempted to impose these duties on the board of road commissioners.

Section 8662, R. S. Mo. 1939, gives the highway engineer supervision over the public roads of the county and over the road overseer and the expenditure of county and district funds.

Section 8663, R. S. Mo. 1939, requires the county highway engineer to inspect the conditions of the roads, culverts and bridges of each district as often as practicable and to see that the roads are kept in proper condition.

Section 8664, R. S. Mo. 1939, requires the highway engineer to make reports to the county court showing the condition of the roads in the county and the amount of money available for the districts with his recommendations. This is also a duty which the county court, in the foregoing order, has attempted to impose on the supervising board.

Section 8666, R. S. Mo. 1939, requires the overseers to follow the plans and instructions of the county highway engineer in matters concerning the expenditure of funds and improving roads.

Section 8667, R. S. Mo. 1939, requires the county highway engineer to file an annual report with the county court showing the general conditions of the roads and bridges of the county including improvements together with his recommendations, etc.

Your letter does not indicate whether or not Webster County has dispensed with the highway engineer as was authorized by Sections 8668 and 8669, R. S. Mo. 1939, which were repealed and reenacted, Laws of Missouri 1945, page 1493. However, we do not think that that would be material to the question here for the reason that we have referred to these various sections relating to the road overseers and highway engineers to show that the lawmakers have intended that the construction and maintenance of roads and highways be under the county courts, road overseers and county highway engineers, and that there are no provisions in the statutes whereby county courts are authorized expressly or by implication to appoint a supervising board of road commissioners for general road districts. The statutes do provide for commissioners in said special road districts formed under the provisions of such statutes; however, that type of commissioners would not come within the same class as the board of commissioners which the court has attempted to appoint under the foregoing order. The court in the Atchison County case, supra, announced another rule which would be applicable here, l.c. 709:

"\* \* \* Where the statute (Section 8548) 'limits the doing of a particular thing in a prescribed manner, it necessarily includes in the power granted the negative that it cannot be otherwise done.' \* \* \* In other words, there can never be an implied power given a county or other public corporation when there is an express power."

Following this principle, the power of the county court to appoint road overseers being expressed by the statute, then we do not think that the court has the implied power to appoint the supervising board of road commissioners and to confer on that board the powers and authority set out in the order.

#### CONCLUSION

From the foregoing, it is the opinion of this department that a county court does not have authority to appoint a supervising board of road commissioners and to confer on

Hon. Roy C. Miller

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that board authority to appoint a county road supervisor and to set up a system of road maintenance and construction.

Respectfully submitted,

TYRE W. BURTON  
Assistant Attorney General

APPROVED:

---

J. E. TAYLOR  
Attorney General

*Copy to Mr. Miller*

**SCHOOLS:** County superintendents of schools in  
**COUNTY SUPERINTENDENTS:** counties of the third class may receive  
**SALARIES:** the additional compensation provided for  
in Senate Bill No. 177 of the 64th  
General Assembly.

September 5, 1947

FILED  
62

Honorable Harold L. Miller  
Prosecuting Attorney  
DeKalb County  
Maysville, Missouri

Dear Sir:

This is in response to your letter of recent date wherein you request an official opinion from this department, which is as follows:

"Will you please advise me whether or not the increase in pay of a County Superintendent of Schools for Third Class Counties, under Senate Bill No. 177 of the 64th General Assembly for certain duties connected with the budget comes within the purview of Article 14, Section 8 of the Constitution of the State of Missouri, for a term of office commencing 1 July 1947, thereby prohibiting such increase during said term of office?"

We note from your letter that you refer to Article XIV, Section 8 of the Constitution of Missouri 1945. That provision was in the Constitution of 1875. The Constitution of 1945, Section 13 of Article VII, which contains similar provisions, reads as follows:

"The compensation of state, county and municipal officers shall not be increased during the term of office; nor shall the term of any officer be extended."

The provisions of said Section 8 of Article XIV of the 1875 Constitution had been before the courts of this state on a number of occasions, and courts have uniformly held that where additional duties are imposed upon an officer for which he is compensated that this provision of the Constitution does not prohibit him from receiving such compensation. In the case of Harvey vs. Sheehan, 269 Mo. 421, 190 S.W. 864, the court held that "an act which enjoins on an officer new and additional duties and provides merely a compensation therefor, is not violative of the provision of the Constitution prohibiting any increase in the pay of an officer during his term of office."

Senate Bill No. 177 of the 64th General Assembly, which was approved on June 6, 1947, by Section 1 thereof, insofar as it applies to this question, is as follows:

"For the information and guidance of the officers and qualified voters, in connection with the problem of school tax rates, the county superintendent of schools in each county of the third class shall, not later than the first day of March of each year, in cooperation with the clerk of the board of such district, prepare, or cause to be prepared, for each school district under his supervision, a detailed budget of estimated receipts and disbursements, including the amount of receipts recommended as necessary from district taxes. Such budget shall list estimated receipts by funds and sources, and estimated disbursements by funds and purposes, in such detail as may be prescribed by law and by the State Board of Education; and shall have appended thereto a statement of the rate of levy per hundred dollars of assessed valuation required to raise each amount shown on the budget as coming from district taxes. The district clerk shall add a condensed copy of said budget to each required notice of the annual meeting. In the expenditures of said district during the ensuing year, no variation shall be allowed from the totals shown in the budget estimate except on written authorization of the county superintendent. At the end of each school year, and not later than July 15 of each year, the clerk of each such district shall prepare a detailed report in form as may be prescribed by the State Board of Education showing all expenditures of the preceding year from various funds and sources, and such county superintendent shall audit and examine the same; and if such report is in conformity with the budget, or any modifications or variations therefrom as authorized by such county superintendent, he shall certify his approval thereof to the State Board of Education. In the event that expenditures exceed budget estimates, or modifications thereof, in the various funds in which state funds are made available, the excess

expenditures shall be deducted from the allocation from the state funds for the ensuing year. \* \* \* " (The remaining portion of this section provides for the compensation payable to the county superintendents for their services rendered under this section.)

(Underscoring ours.)

Since the courts have held that the constitutional provision does not prohibit the payment of additional compensation to officers for additional duties, then the question here would be, does this bill impose additional duties on the county superintendents of schools. Referring to the statutes which were in effect at the time this bill was passed and when the present county superintendents were elected, we find that under Section 10612, R. S. Mo. 1939, some duties were imposed on county superintendents which relate to the fiscal affairs of the school districts. This section provides in part as follows:

" \* \* \* he shall furnish, annually, statements to the district clerks showing the assessed valuation of their respective districts; he shall receive, and, if properly made, approve estimates and enumeration lists and turn same over to the county clerk; he shall assist the district clerks, when necessary, in making their reports, and see that all warrants have been duly issued 'by order of the board,' either for services actually rendered or for material actually furnished."

Section 10613, Laws of Missouri 1945, page 1675, also refers to duties of the superintendents of schools. It reads in part as follows:

" \* \* \* He shall examine the records of the county, so far as they relate to school funds and school moneys, see that the law is strictly observed, and shall be present at the August term of the county court, to give such information as may be of importance to said court in the transaction of all business pertaining to the school interests of the county; and the instruction of the State Board of Education shall be his guide in the interpretation and execution of the law."

Comparing the duties of the superintendents of schools as they existed prior to the enactment of Senate Bill No. 177 with the duties which are imposed on them under said Senate Bill No. 177, it will be found that under said Senate Bill No. 177, some of the same duties may be imposed on county superintendents as were imposed prior to the enactment of that bill. However, from reading this bill as a whole, we think that there are additional duties imposed on county superintendents additional to those under the old law. Referring to said Senate Bill No. 177, it will be found that the superintendent of schools, in cooperation with the clerk of the board of the school district, is required to prepare a budget of receipts and disbursements including the amount of receipts recommended as is necessary from district taxes. This budget shall also contain information as to the rate of levy per \$100.00 assessed valuation required to be imposed to raise the taxes required for taking care of budget items. We also find that the county superintendent audits the accounts of the various districts for the preceding year, and if the districts have stayed within the bounds of the budgets, he certifies that fact to the State Board of Education. In case any district does not stay within the bounds of the budget, then it would seem his duty to report that to the State Board of Education which would deduct over-expenditures from allocations to such district for the ensuing year.

From an examination of said Senate Bill No. 177, it would seem that the lawmakers had attempted to make county superintendents of schools the budget officers for the various school districts in the county. The duties of the county superintendent as provided for in this bill are similar to those which are imposed on the county clerks or budget officers in counties which have a budget officer. So, reading this act as a whole, and comparing it with the old law, this office is of the opinion that additional duties have been imposed on county superintendents of schools by said Senate Bill No. 177 of the 64th General Assembly.

Another rule of construction applicable here would be that the constitutionality of statutes must be presumed.

#### CONCLUSION

From the foregoing, it is the opinion of this department that county superintendents of schools in counties of the

Hon. Harold L. Miller - 5

third class would be entitled to the additional compensation provided for in Senate Bill No. 177 of the 64th General Assembly wherein such superintendents were made budget officers of the school districts of such counties and additional compensation for that service was provided therefor.

Respectfully submitted,

TYRE W. BURTON  
Assistant Attorney General

APPROVED:

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J. E. TAYLOR  
Attorney General

TWB:VLM



MAGISTRATE COURTS: Where defendant is unable to pay costs, fee bill for same is prepared  
CRIMINAL COSTS : by magistrate and submitted to the clerk of the Circuit Court.

FILED

June 19, 1947

Honorable E. L. Monroe  
Probate Judge  
Cassville, Missouri

Dear Sir:

Receipt is acknowledged of your request for an official opinion, which reads:

"With regard to the matter of payment of costs in criminal matters in Magistrate Court by the County when defendants are unable to pay said costs.

"Statutory provisions for courts of record provide, in general, that the Clerk of the Court in which any criminal cause shall have been determined shall tax the costs, deliver a fee bill to the prosecuting attorney, who together with the judge shall certify the fee bill to the State Auditor or County Clerk, depending on who shall pay (Secs. 4236, 4237, R.S. Mo. 1939).

"Sec. 4246, R.S. Mo. 1939, provides that when the State or County shall be liable for costs incurred in any criminal matter before any Justice of the Peace, the Justice shall make out, certify and return to the Clerk of the Circuit or Criminal Court of the county a complete fee bill, together with all the papers and docket entries in the case, and the Circuit Clerk shall then proceed in the manner provided for fee bills made out for costs incurred in such a court of record.

"Respectfully request an opinion of your office as to whether the Magistrate Courts should proceed as other courts of record in preparing and collecting such fee bills, or whether the 'catch-all' statute (Sect. 656.1), giving to the words 'Justice of the Peace' the meaning of 'Magistrate' requires that such fee bills be processed through the office of the Circuit Clerk, under Sec. 4246."

The principal question in your letter of inquiry asks the procedure to be followed in the Magistrate Court for handling costs in misdemeanor cases before the Magistrate Court when the defendant is unable to pay same. Section 4222, R.S. Mo. 1939, provides as follows:

"When the defendant is sentenced to imprisonment in the county jail, or to pay a fine, or both, and is unable to pay the costs, the county in which the indictment was found or information filed shall pay the costs, except such as were incurred on the part of the defendant."

In the act providing for the procedure for Magistrate Courts in misdemeanor cases (Senate Bill No. 193, Laws of Missouri 1945, page 750) we find no provisions regarding the preparation and submission of fee bills for costs in misdemeanor cases when the defendant is unable to pay. Section 20 of Article V of the Constitution of 1945, in part, provides:

"Until otherwise provided by law consistent with this Constitution, the practice, procedure, administration and jurisdiction of magistrate courts, and appeals therefrom, shall be as now provided by law for justices of the peace; \* \* \* \*"

Senate Bill No. 281, approved December 7, 1945, Laws of Missouri 1945, page 1079, Section 1, provides as follows:

"Whenever, in any statute, the word 'justice' (referring to justice of the peace) or the words 'justice of the peace' appear, said word or words shall hereafter be deemed to include and refer to 'magistrate,' unless there be something in the

subject or context repugnant to such construction."

Since the present magistrate law, hereinbefore referred to, provides no procedure for the preparation of fee bills in misdemeanor cases before the Magistrate Court when the county is liable for costs, we must abide by the mandate of the above constitutional and statutory provisions and look to the procedure provided by law for Justice of the Peace Courts,

Section 4246, R.S. Mo. 1939, provides as follows:

"Whenever the state or county shall be liable under the provisions of this article, or any other law, for costs incurred in any examination of any felony, or in the trial of any misdemeanor before any justice of the peace, it shall be the duty of such justice to make out, certify and return to the clerk of the circuit or criminal court of the county a complete fee bill, specifying each item of service and the fee therefor, together with all the papers and docket entries in the case; and it shall thereupon be the duty of such clerk to make out a proper fee bill of such costs, which shall be properly and legally chargeable against the state or county, which shall be examined by the prosecuting attorney, and proceeded with in all respects as a fee bill made out for costs incurred in such court of record."

#### Conclusion.

It is, therefore, the opinion of this department that in misdemeanor cases before the Magistrate Court where the defendant is unable to pay the costs and the county is liable for costs, as provided in Section 4222, R.S. Mo. 1939, the magistrate shall prepare, certify and deliver a fee bill for costs, together with all the papers and docket entries in such cases, to the clerk of the Circuit Court or the Criminal

Honorable E. L. Monroe

-4-

Court of the county, as provided in Section 4246, R.S. Mo. 1939. Thereafter, the procedure to be followed shall be governed by Sections 4236 and 4237, R.S. Mo. 1939, relating to courts of record.

Respectfully submitted,

RICHARD F. THOMPSON  
Assistant Attorney General

APPROVED:

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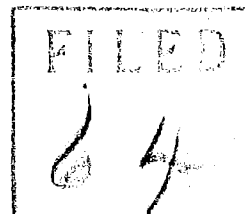
J. E. TAYLOR  
Attorney General

RFT:ml

TOWNSHIP

ATION: "In counties voting out township organization the county assessor and county collector take office immediately upon being appointed and assume powers and duties of ordinary county as provided by law; county takes title to money and property of township and assumes their liabilities; settlement of accounts between township officers and county court.

January 17, 1947



Mr. Bert E. Morgan  
Clerk of the County Court  
Daviess County  
Callatin, Missouri

Dear Sir:

This acknowledges your request for an opinion, based on the following facts:

"Daviess County voted at the last general election to abolish township organization.

"The Governor has appointed a County assessor and a County collector.

"Our questions are:

"Who is to do the assessing for the year 1947 beginning now, the township assessors or the appointed assessor?

"When does the appointed collector begin and what does he take over?

"Our township collectors are collecting now and are making the regular monthly settlements in January for collections made in December 1946.

"To whom should these township collectors pay the taxes collected?

"If the township money and the road and bridge money is paid to the trustees of the townships the county will not have road funds until another year. If the money is deposited with the County treasurer I presume that the county will assume the

liabilities of the townships."

The question of who shall do the assessing for 1947 and when the appointed collector takes office or assumes his duties as county collector is answered by Section 14023, R.S. No. 1939, which provides:

"At any general election holden in this state, in any county having adopted township organization under this chapter, upon the petition of one hundred voters of the county, praying the county court to re-submit the question of township organization to the voters at said election, it shall be the duty of the county court to submit the question again at such election, in like manner as provided in article 1 of this chapter; and if it shall appear, after the canvass of the votes as provided in article 1 of this chapter, that a majority of all the votes cast upon that question shall be against township organization, then township organization shall cease in said county; and all laws in force in relation to counties not having township organization shall immediately take effect and be in force in such county."

The above section provides township organization shall cease immediately upon the canvass of the votes. The court construed this section and a similar provision in the Constitution of 1875 in the case of *The State ex inf. John T. Barker, Attorney General, v. H. I. Duncan, et al.*, 265 Mo. 26, l.c. 50, and said:

" \* \* \* Briefly, we reach this conclusion upon those grounds: The last clause of section 9 of the Constitution, supra, provides that when township organization is voted out, at once thereupon 'all laws in force in relation to counties not having township organization shall take effect and be in force in such county.' The view contended for by relator would have the effect of placing such counties as voted township organization out, back into the category of ordinary counties to be governed by the usual and ordinary laws;

while the insistence of learned counsel for respondent Duncan would make of such a county a thing apart from all ordinary counties, with different laws to govern it. The makers of the Constitution saw no reason apparently, as we see none, why a county which had before had township organization, but which had elected to return to the common fold, should by that fact alone be set apart in a wholly different category. So they provided clearly that all the usual laws governing ordinary counties should reattach to and govern counties relinquishing township organization, immediately upon their voting it out. The 'laws in force in relation to counties not having township organization,' which laws as we see the Constitution, automatically applied to Butler county, provided at the time of the accrual of this vacancy and at the time the Governor filled it and now provide that as to an office like this 'such vacancy shall be filled by appointment by the Governor.' This being the law which at all of said times applied to 'counties not having township organization,' such law applied ipso facto and immediately to Butler county, the moment said county voted out township organization. \* \* \* \*

There can be no question that township organization ceased to exist upon same being voted out, and it necessarily follows that its offices and officers ceased to have any official existence.

The ordinary form of county government would immediately come into being and be operative, so that the assessor and collector appointed to fill the vacancies would assume the duties of their offices immediately upon their appointment. They would take over all the duties placed upon them by law under the ordinary form of county government in counties not having township organization.

As to the question of disposing of the township's money and property and the assumption of its liabilities, we have concluded that the assets immediately accrue to the county and the county likewise assumes its liabilities. This conclusion

is based upon the opinions in the cases of State ex rel. Consolidated School Dist. No. 8 of Pemiscot County et al., v. Smith, State Auditor, 181 S.W. (2d) 160, and Thompson v. Abbott et al., 61 Mo. 176. The court said in the Consolidated School District case, l.c. 162:

"It has long been the rule in this state, and generally throughout the country, that the power of the legislature in the creation of public corporations (which term includes school districts) is absolute except where limited by the constitution. The legislature may also change, divide, consolidate and abolish them as the public welfare demands. Harris v. Am. N. Compton Bond & Mortgage Co., 244 Mo. 664, 149 S.W. 603; State ex rel. School District No. 1, etc. v. Andrae, 218 Mo. 617, 116 S.W. 561; State ex inf. Barnahan, etc. v. Jones et al., 266 Mo. 191, 181 S.W. 50; State ex rel. Richard v. Stouffer, Mo. Sup., 197 S.W. 248; School District of Oakland v. School District of Joplin, 340 Mo. 779, 102 S.W. 2d 909.

"It has also been held to be the general rule in this state that in the absence of constitutional or statutory provisions to the contrary where one corporation goes entirely out of existence by being annexed to or merged in another corporation, then the subsisting corporation will be entitled to all the property and will be answerable for all the liabilities. When the benefits are taken, then the burdens are assumed. This general rule was applied to school districts in the case of Thompson v. Abbott, 61 Mo. 176, which case was cited with approval in Mt. Pleasant v. Beckwith, 100 US. 514, 25 L. Ed. 699, where it is stated that as extinguished municipal corporations have no power to levy taxes to pay debts, the town to which the territory and property of the annulled municipality was annexed should become liable for its outstanding indebtedness. The rule has been repeatedly approved in Hughes v. School District, 72 Mo. 643; Wilson v. Drainage District, 257 Mo. 266, 165 S.W.



734; Id. 237 No. 39, 139 S.W. 136; Alber v. School District, 141 No. App. 189, 124 S.W. 564; Gray v. School District, 224 No. App. 905, 28 S.W. 2d 683; Roswell v. Consolidated School District, No. App., 10 S.W. 2d 665; 43 C.J., Municipal Corporations, p. 143, secs. 122 and 123; 19 R.C.L. 732."

In the Thompson case the court said, l.c. 177:

"\* \* \* Now, where one corporation goes entirely out of existence by being annexed to or merged in another corporation, if no arrangements are made respecting the property and liabilities of the corporation that ceases to exist, the subsisting corporation will be entitled to all the property, and be answerable for all the liabilities. After sub-district No. 3 had ceased to exist, there was then no power remaining as an independent organization in its behalf to control its funds or pay off its indebtedness. Its property passed into the hands of the defendant, and when the benefits were taken, the burdens were assumed. The pleadings admit that plaintiff's claim is a just and honest debt, and that the annexation took place, and that defendant obtained possession of and control over the property of the sub-district which owed the debt. Then manifestly, it became liable for its obligations."

Th se two decisions both deal with school districts, but the Supreme Court holds that generally the rule announced applies to all corporations, that is, when one corporation goes out of existence and is merged into another corporation, the corporation taking over the property of the dissolved corporation becomes liable also for its obligations.

We are unable to find a specific section of the statutes applying to township officers settling their accounts with the county when said organization is voted out, but we believe the general provisions of Section 13615, R.S. No. 1939, apply. This section is broad enough in its terms to cover any person having money in his hands belonging to the county (in this case either township collectors or trustees). Said section is as follows:

"All collectors, sheriffs, marshals, clerks, constables and other persons chargeable with moneys belonging to any county shall render their accounts to and settle with the county court at each stated term thereof, pay into the county treasury any balance which may be due the county, take duplicate receipts therefor, and deposit one of the same with the clerk of the county court within five days thereafter."

Section 13824, R.S. No. 1939, defines the powers of the county court to enforce such a settlement. This section has been amended by the 63rd General Assembly (Senate Bill No. 226), and, as amended, reads as follows:

"The county court shall have power to audit, adjust and settle all accounts to which the county shall be a party; to order the payment out of the county treasury of any sum of money found due by the county on such accounts; to enforce the collection of money due the county; to order suit to be brought on bond of any delinquent, and require the prosecuting attorney for the county to commence and prosecute the same; to issue all necessary process to secure the attendance of any person, whether party or witness, whom they deem it necessary to examine in the investigation of any accounts; and in order to procure the exhibition or delivery to them of any accounts, books, documents or other papers, the said court may issue process directed to the person in whose custody or care the said accounts, books, documents or other papers may be, commanding him to deliver or transmit the same to said court, which process shall be served by the sheriff; and the said court may examine all parties and witnesses on oath, touching the investigation of any accounts, and if any person, being served with such process shall not appear according to the command thereof, without reasonable cause, or if any person in attendance at any hearing or proceeding shall, without reasonable

cause, refuse to be sworn or to be examined, or to answer a question or to produce a book or paper, or to subscribe or swear to his deposition, he shall be deemed guilty of a misdemeanor: Provided, that if the county court finds it necessary to do so, it may employ an accountant to audit and check up the accounts of the various county officers."

Your request mentions only the money of the townships, but you will note that the Consolidated School District case and the Thompson case, supra, provides not only the money but that title to assets and properties of all kinds belonging to the township shall pass to the county.

Conclusion.

It is therefore the opinion of this department that the county assessor and county collector appointed to fill the vacancy created by the county having voted out township organization shall take office immediately upon their being appointed, and assume the powers and duties prescribed by law governing counties not having township organization; that title to all township money and property immediately passes to the county; that the county must assume liability for the township debts, and a settlement of accounts must be had between any persons having township money or property in their hands with the county court of such county and such money paid to the county treasurer.

Respectfully submitted,

A. GRADY DORCAN  
Assistant Attorney General

A. PROVED:

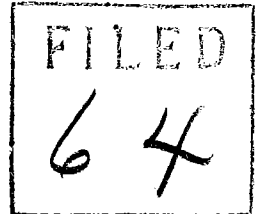
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J. V. TAYLOR  
Attorney General

WED:ml

TAXATION AND REVENUE: Liability for taxation of mail carriers retirement pay as intangible personal property under H.C.S.H.B. No. 868.

January 22, 1947



2/6

Mr. M. E. Morris  
Director of Revenue  
State Capitol Building  
Jefferson City, Missouri

Dear Sir:

This will acknowledge your letter requesting an official opinion which reads:

"Please furnish this department with a written opinion stating whether or not a pension received by retired rural letter carriers would come within the meaning of House Bill 868 for taxation purposes."

H.C.S.H.B. No. 868 enacted by the 63rd General Assembly provides for the collection of a property tax on intangible personal property. Subsection (B), Section 1, defines intangible personal property subject to taxation and reads as follows:

"(B) Intangible personal property means moneys on deposit; bonds (except those which under the constitution or laws of the United States may not be made the subject of a property tax by the State of Missouri); certificates of indebtedness (other than capital notes issued by banks or trust companies); notes, debentures, annuities, accounts receivable; conditional sales contracts (which have incorporated therein promises to pay) and real estate and chattel mortgages."

Therefore, in answering your question we must determine whether or not payments received by a retired rural letter

Jan. 22, 1947

carrier are included within the statutory definition of intangible personal property. Certain items of intangible personal property contained in the statutory definition can be readily eliminated such as "moneys on deposit", "bonds", "certificates of indebtedness", "notes", "debentures", "conditional sales contracts", and "real estate and chattel mortgages." Let us then more closely examine the other forms of intangible personal property subjected to taxation, which may include payments made to retired mail carriers.

The following definition of "Accounts Receivable" is found in Vol. 1, Words and Phrases, Permanent Edition, page 547 citing a Missouri case:

"'Accounts receivable,' which are amounts owing to a creditor on open account, being in the nature of 'credits' and 'personal property,' within Rev. St. 1919, Section 12967, are taxable, under section 12766, as amended by Laws 1923, p. 375, Mo. St. Ann. Sections 9977, 9756, pp. 8015, 7872, providing that certain enumerated property shall be listed for taxation, and that every other species of property not exempt shall be returned for taxation; rule of ejusdem generis being inapplicable. State ex rel. Globe-Democrat Pub. Co. v. Gehner, Mo., 294 S. W. 1017, 1018."

The term "annuity" was defined in the case of Pennsylvania v. Beisel, 338 Pa. 519, 13 Atl. (2d) 419, 128 A.L.R. 978. At A.L.R., l.c. 979-980 the court said:

"'Annuity' is a term somewhat loosely used in financial and legal nomenclature and is perhaps incapable of exact definition. Generally speaking, it designates a right--bequeathed, donated or purchased--to receive fixed, periodical payments, either for life or a number of years. Its determining characteristic is that the annuitant has an interest only in the payments themselves and not in any principal fund or source from which they may be derived. \* \* \* \*"

To determine whether or not the payments received by a retired rural mail carrier come within any of the above

Jan. 22, 1947

quoted definitions we must examine the nature of such payments. A rural letter carrier while actively employed is a civil service employee of the Federal Government.

The Civil Service Retirement Act as incorporated in Sections 691 to 738 inclusive, of Chapter 14, Title 5, U.S.C.A., provides for the retirement of civil service employees. Section 691 of Chapter 14, provides that all officers and employees to whom the chapter applies shall be eligible for retirement on an annuity upon fulfilling certain conditions of age and service.

Section 693 of Chapter 14, paragraph (a) provides:

"(a) This chapter shall apply to all officers and employees in or under the executive, judicial, and legislative branches of the United States Government, and to all officers and employees of the municipal government of the District of Columbia, except elective officers in the executive branch of the Government: \* \* \* \*"

Section 719 of Chapter 14 provides for salary deductions currently fixed at 5 per centum of the basic salary, payable, and further provides for the deposit of said deductions in the "Civil Service Retirement and Disability Fund" out of which the payments of annuities, refunds and allowances are made.

Under the provisions of Section 720, of Chapter 14, the Secretary of the Treasury is required to invest that portion of the fund as in his judgment may not be immediately required for the payment of annuities, refunds and allowances, and the interest earned on such investments becomes a part of such fund.

Under the provisions of Section 724, of Chapter 14, refunds from the fund are authorized together with interest thereon upon the separation or death of the officers or employees under the conditions set forth therein.

Under the provision of Section 719-1 an employee may deposit additional sums to apply toward his retirement pay upon

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which interest at the rate of 3 per cent per annum compounded annually is permitted. Such additional deposits, so increased by such interest, are available at retirement, for the purchase of an additional annuity based on an interest rate of 4 per cent per annum. In the event of death or separation from service of such employee before becoming eligible for a retirement annuity, the total amount of such additional deposits with interest at 3 per cent per annum compounded annually is to be refunded.

In the case of *Dismuke v. U. S.* 297, U. S. 167, 56 Supreme Court 400, petitioner filed a claim with the administrator of Veteran's Affairs for an allowance of an annuity under the Civil Service Retirement Act based on what is now Section 736a, Chapter 14, Title 5, U.S.C.A. The government contended that the claim was one for a "pension" and that under the provisions of the Tucker Act the court did not have jurisdiction to hear such a suit. In affirming the judgment in the lower court the U. S. Supreme Court speaking through Mr. Justice Stone said at Supreme Court 1. c. 402-403:

" \* \* \* \* The proviso withholding jurisdiction of suits on claims for pensions was a part of the original Tucker Act, which became law March 3, 1887, long before the enactment of the Retirement Act of May 22, 1920, and at a time when the term "pensions" commonly referred to the gratuities paid by the government in recognition of past services in the Army or Navy. The annuities payable under the Retirement Act are not gratuities in that sense. The annuitant contributes to them by deductions from his salary or by actual payments into the fund, as in the present case, and the scheme of the act is to provide for payment of annuities, in part at least from contributions by employees, in recognition both of their past services and of services to be performed.

"(3) The act itself, in contradistinction to the numerous pension

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acts, see 38 U.S.C., 38 U.S.C.A., does not refer to the annuities as pensions, and expressly excludes from the service to be counted, in determining the class to which the annuitant is to be assigned, the period for which the employee 'elects to receive a pension under any law.' Section 3, Act of May 22, 1920, 41 Stat. 615, as amended, 5 U.S.C.A.

"Section 707. We conclude that annuities payable under the Retirement Act are not pensions within the meaning of the Tucker Act and that suits against the government to recover them are within the jurisdiction of District Courts, \* \* \* \*"

In the case of Miller v. Commissioners of Internal Revenue (C.C.A. 4, 1944), 144 Fed. (2d) 287, the question presented was whether the amounts withheld from the basic salary of a federal civil service employee, pursuant to the provisions of the Civil Service Retirement Act, constitute income within the meaning of Section 22 (a) of Internal Revenue Act. At l. c. 289 the court said quoting from an opinion of the Tax Court:

" \* \* \* \* As aptly said by the Tax Court in its Opinion, 'These aspects of the retirement plan seem to us to demonstrate that there have been purchased by the employee substantial rights, of a value which can in no event fall materially below the amount of his own contribution, which presently belong to him, and which are unequivocally provided for his ultimate benefit under whatever contingency and in whatever circumstance the occasion for that benefit should arise. They are in that respect comparable to, and for our purposes indistinguishable from, an annuity contract, of which the employer constitutes itself the issuer, setting aside reserves for that purpose and making investments thereof comparable to those which would be employed by companies engaged in that business. \* \* \* \*'"



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Again at l. c. 290 the court said:

"(3) There is no merit in the contention of the petitioners that in 1940, the employee had no vested rights under the Civil Service Retirement Act. In that year he had the right to receive an annuity upon retirement, and to receive a return of the amount withheld from his salary, with interest, upon separation from the service, or death. These rights were secured in consideration of contributions made from his salary, and at least to the extent of such contributions made, they could not be taken from him under the provisions of the Act, and we may not assume that Congress, if it could, would change the law so as to deprive him of the substantial rights acquired thereunder."

From the foregoing it appears that the payments received by retired civil service employees of the Federal Government, which would include rural mail carriers, are in fact payments under annuities owned by such employees from which a definite yield is received, and such annuities would come within the ambit of the statutory definition of intangible personal property subjected to the tax as provided in H.C.S.H.B. No. 868.

#### CONCLUSION

Therefore, it is the opinion of this department that payments received by retired rural letter carriers are payments received under annuities owned by such persons established under the provisions of the Civil Service

Mr. M. E. Morris

Jan. 22, 1947

Retirement Act, Chapter 14, Title 5, U.S.C.A. That such annuities come within the statutory definition of intangible personal property subjected to the tax as provided in H.C.S.H.B. No. 868, and are therefore taxable under the act.

Yours very truly

RICHARD F. THOMPSON  
Assistant Attorney General

APPROVED:

J. E. TAYLOR  
ATTORNEY GENERAL

RFT:MA

STATE PURCHASING AGENT:

Purchases of certain supplies and printing for Missouri State Highway Commission to be made through Division of Procurement.

February 4, 1947

FILED

64

Mr. M. E. Morris  
Director of Revenue  
State of Missouri  
Jefferson City, Missouri

Dear Sir:

Reference is made to your inquiry of recent date, requesting an official opinion of this office, and reading as follows:

"Enclosed herewith please find copy of letter under date of January 27th from Lou C. Lozier, Chief Counsel for the Missouri State Highway Department.

"This letter requests that I officially ask you for an opinion relative to the applicability to the State Highway Commission of the Purchasing Agent provisions of S.C.S.S.B. 297, Sixty-Third General Assembly.

"Since the letter sets out a brief in this connection, I am enclosing a copy herewith and I request your opinion in this connection, as suggested."

Reference to the letter received by you from Mr. Lozier indicates that the Missouri State Highway Commission is primarily concerned at this time with purchases of printing and binding. The following is taken from Mr. Lozier's letter:

"The State Highway Commission respectfully requests you, as Director of Revenue, to request a ruling from the Attorney General relative to the applicability to the State Highway Commission of certain provisions of S.C.S.S.B. No. 297, 63rd General Assembly. This request is prompted by a recent ruling of the State Purchasing Agent reversing his previous ruling under which the State Highway Department was

authorized to procure all or any part of its own printing and binding."

The 63rd General Assembly of Missouri enacted S.C.S.S.B. No. 297, containing among its other provisions one establishing the Division of Procurement. The following sections of the Act mentioned are deemed pertinent to the question presented:

"Section 64. The purchasing agent shall purchase all supplies for all departments of the state, except as in this act otherwise provided. The purchasing agent shall negotiate all leases and purchase all lands, except for such departments as derive their power to acquire lands from the constitution of the state."

"Section 73. The term 'supplies' used in this act shall be deemed to mean supplies, materials, equipment, contractual services and any and all articles or things, except as in this act otherwise provided. Contractual services shall include all telephone, telegraph, postal, electric light and power service, and water, towel and soap service. The term 'department' as used in this act shall be deemed to mean department, office, board, commission, bureau, institution, or any other agency of the state, except the legislative and judicial departments."

"Section 76. The state purchasing agent shall purchase all public printing and binding of the state, including that of all executive and administrative departments, bureaus, commissions, institutions and agencies, the general assembly and the supreme court. In such capacity the state purchasing agent is hereby empowered and authorized to take over as a part of the records of his office, all books, documents, and records which are now in the hands of the Commissioners of Public Printing and the Secretary of State relative to public printing. It shall be the duty of all state officers to order all of their printing and binding through the state purchasing agent. The pur-

chasing agent may authorize any state penal, eleemosynary or educational institution, to procure all or any part of its own printing and binding."

The plain terms of these various provisions would quite definitely require the State Purchasing Agent to negotiate the purchases of all supplies for the State Highway Commission, unless there be other or further constitutional or special statutory provisions having the effect of exempting such department from the application of the statutes quoted.

The provisions of the Constitution of Missouri of 1945 applicable to the Department of Highways are found as Sections 29 to 34, inclusive, of Article IV. These provisions are similar to those contained in Section 44a of Article IV of the Constitution of 1875, adopted in 1928.

Under each Constitution the State Highway Commission has been endowed with broad discretionary powers in the use of the funds provided for enumerated purposes in connection with the location, construction and maintenance of state highways. These provisions are quite lengthy and are not set out here, except that your attention is directed to one significant change appearing as a part of Section 29 of Article IV of the Constitution of Missouri of 1945, relating to the authority of the Highway Commission, and reading as follows:

" \* \* \* It shall have authority over and power to locate, relocate, design and maintain all state highways; and authority to construct and reconstruct state highways, subject to limitations imposed by law as to the manner and means of exercising such authority; \* \* \*" (Emphasis ours.)

You will immediately note that the new matter added in the current Constitution secures to the General Assembly the power to enact laws imposing limitations and conditions upon the manner and means of the exercise of the authority granted to the State Highway Commission.

It is conceded that under the provisions of the Constitution of Missouri of 1875 the State Highway Commission was not subjected to the provisions of the State Purchasing Agent Act of 1933 with respect to its contracts for materials and supplies, etc., incident to the actual construction and maintenance of state highways. It was so held in the case of State

ex rel. v. Smith, 67 S. W. (2d) 50. We quote from the case mentioned:

" \* \* \* In such inquiry it is to be postulated that the Legislature was, in passing the later act, seeking, just as in obedience to the constitutional mandate it sought to do in the enactment of the Highway Act, to observe the intent of the mandate with respect to the control by the commission of its purchases, together with the incidents thereof, of road material, and to aid, not hinder, the carrying out of that intent. The mandatory power conferred by the constitutional amendment is plenary in respect of the commission's power to purchase road construction material for the purposes stated therein. The grant conferring this power contains no delegation to the Legislature, or authority for legislative delegation, of that power or any part of it to any other state officer or agent. Results of the application of the State Purchasing Agent Act upon the commission's purchases of road construction materials, such, among others, as the duplication of work and of records to be kept, which would ensue in both the highway department and in such agent's department will be passed. It need only be noted that the negotiation of a purchase by advertisement for bids and the acceptance of the bid and the entering accordingly into a contract in writing are parts of the transaction and together constitute the purchase, and that the commission cannot be shorn of any part of its plenary discretion and power in the premises. Said Purchasing Agent Act not only purports to apply to supplies, but defines that term to mean 'supplies, materials, equipment,' etc., and is in seeming conflict, in respect of materials, with said Highway Act, and also, if construed to include materials purchased for highway construction, would impinge on said constitutional amendment, a result which should not be regarded as according with the legislative intent. In such situation subsidiary rules of statutory construction need be invoked."

Following this statement, the court cited applicable rules of statutory construction, and thereafter arrived at the follow-

ing conclusion:

"In view of these considerations and the established rules of construction to which reference has been made, it seems altogether clear that the purchase represented by the claim in suit does not come within the operative effect of the State Purchasing Agent Act aforesaid, and that the relator herein was and is, under the controlling law, entitled to the warrant sought at the hands of the respondent."

It will be remembered that this case was decided under a constitutional provision which did not contain the grant of authority found in Section 29 of Article IV of the Constitution of Missouri of 1945, quoted supra. It will also be remembered that the decided case involved only the purchase of certain materials incident to the actual construction of a state highway. The Supreme Court of Missouri recognized this distinction in the case mentioned, as is apparent from the following portion of the opinion, l. c. 57:

"The Purchasing Agent Act discloses on its face that it was intended to apply to some extent to the state highway commission, as the commission is specifically mentioned in the provision which requires that one of its members in conjunction with representatives of other designated departments and institutions act with the state purchasing agent in the adoption and promulgation of certain standards relative to supplies. Also the commission is referred to by necessary implication elsewhere in the act. Granting that, we are in this proceeding concerned with only the effect of the act with respect to its operation vel non upon the purchases by the commission of materials for use in road construction, as only such are involved in the claim in suit." (Emphasis ours.)

Here at least is a strong intimation that had the action then before the court been one in which it was sought to apply the provisions of the State Purchasing Agent Act of 1933 to a purchase of an item not directly connected with actual highway construction, a different result might have been reached. The provision referred to in the above quotation, relative to the requirement that one of the members of the State Highway Com-

mission act in conjunction with representatives of other designated departments and institutions in the adoption and promulgation of certain standards relative to supplies, has been carried forward into S.C.S.S.B. NO. 297, appearing as a part of Section 70. It reads, in part, as follows:

" \* \* \* In the preparation of such rules, regulations, classifications, standards and specifications, the purchasing agent shall consult with and have the assistance of a committee to be appointed by the governor and to consist of one representative from the department of highways, one from the department of education, one from the department of public health and welfare, and two representing other departments. \* \* \*"  
(Emphasis ours.)

The retention of this provision and the fact that at no place in the entire statutory provisions relating to the Division of Procurement has the Department of Highways been exempted indicate to us a legislative intent that, in so far as is permitted by the Constitution of 1945, all purchases of materials and supplies must be made through the Division of Procurement.

#### CONCLUSION

In the premises, we are of the opinion that the State Highway Commission is not required to acquire through the Division of Procurement materials and supplies directly incident to the construction and maintenance of state highways.

We are of the further opinion that all supplies and materials, including printing and binding, which are not to be used directly by the Department of Highways for the actual construction and maintenance of state highways, but which are merely incident to the operation of the department, are to be acquired through the Division of Procurement.

Respectfully submitted,

WILL F. BERRY, JR.  
Assistant Attorney General

APPROVED:

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J. E. TAYLOR  
Attorney General

WFB:HR



TAXATION:  
AND REVENUE:

In re: Five questions on taxing intangible personal  
property under H. C. S. H. B. No. 868.

February 4, 1947



Mr. M. E. Morris  
Director, Department of Revenue  
Capitol Building  
Jefferson City, Missouri

Dear Mr. Morris:

This will acknowledge your letter requesting an official opinion on the questions submitted in an enclosed letter from Prentice-Hall, Inc. The letter from Prentice-Hall, in part, reads:

"Numerous questions are arising concerning interpretation of the new Missouri intangibles tax. We should appreciate your advice concerning a few of these at this time. Please tell us:

"1.-How is yield to be determined on accounts receivable? (Is it based on gross proceeds, or on interest or net earnings exclusively, and if so how is the net figure determined?)

"2.-In the case of equitable or beneficial interests--

"(a) if fiduciary having the intangibles resides in Missouri and beneficiary resides outside Missouri, is the fiduciary required to report and pay? How about the beneficiary?

"b) if fiduciary resides and intangibles are kept outside Missouri, and beneficiary resides in Missouri, who, if anyone, is taxable?

"(c) if intangibles are kept in Missouri but fiduciary and beneficiary reside outside Missouri, does tax apply?

"(d) suppose two of joint fiduciaries reside

in Missouri and two of them outside, which fiduciary or fiduciaries report taxable property?

"(e) Can you illustrate the computation of tax on 'proportionate' amount of yield on underlying intangibles held by fiduciaries as noted in Item 4 of 'Explanation for Taxpayers?'"

In this opinion the questions submitted in the quoted letter will be answered in the order they appear.

I.

The first question relates to the determination of the yield on accounts receivable.

The 63rd General Assembly by the passage of H.C.S.H.B. No. 868 adopted a completely new scheme for the taxation of intangible personal property. Consequently we must look to the provisions of that act to answer the questions herein submitted.

In answer to the first question, we direct your attention to subsection (C), Section 1, of H.C.S.H.B. No. 868 which provides:

"Yield means the aggregate proceeds received as a result of ownership or beneficial interest in intangible property whether received in money, credits or property exclusive of any return of capital."

Section 1 of S. B. No. 466 which was also enacted by the 63rd General Assembly provides:

"The terms 'yield' or 'annual yield' as used in any law heretofore enacted imposing a tax upon intangible personal property pursuant to Article 10, Section 4, of the Constitution of Missouri, shall mean the aggregate proceeds received as a result of ownership or beneficial interest in intangible property whether received in money, credits or property, exclusive of any return of capital, and less the amount of interest required to be credited by the owner thereof, during the preceding calendar year, to reserve liabilities of the owner maintained under the statutes of this state."

We observe that in the above quoted sections the words "aggregate proceeds" are used in defining the term "yield". In Volume 2, Words and Phrases, Perm. Ed., the word "aggregate" is defined at page 801 as follows:

"'Aggregate' is defined as a sum, mass or assemblage of particulars; a total or gross amount.\* \* \*Chapin v. Wilcox, 46 P. 457, 458, 114 Cal. 498."

In view of the above definition we believe that the yield on accounts receivable is based on the gross proceeds of such accounts.

## II.

In answer to part (a) of the second question relating to payment of a tax on intangible personal property held by a fiduciary in this state where the beneficiary resides outside the state, we invite your attention to the relevant provisions of H.C.S.H.B. No. 868.

Subsection (D), Section 1 of said act, in part, provides:

"\* \* \*All intangible property of persons residing in other states used in or arising out of business transacted in this state by, for or on behalf of such non-resident persons shall be taxed on the annual yield thereof, and the taxable situs shall be the location of the business.\* \* \*"

Section 6 of this act, in part, provides:

"Intangible personal property shall be deemed to have a taxable situs in this state for the purpose of being subject to a property tax for the year 1947 and each succeeding year, where, at any time during the calendar year preceding the year for which the property is subject to said tax, the legal title thereto is owned by a person domiciled in this state,\* \* \*"

In reading the above quoted portions of the act we believe that where the intangible property was used in or arose out of business transacted in this state and the legal owner of such property was domiciled in this state, it is subjected to the tax based on its yield and the tax would be paid by the fiduciary who is the legal owner. The beneficiary residing outside the state would not have to file a return or pay any tax.

## III.

In answer to part (b) of the second question relating to payment

of a tax on intangible property located outside the state where the beneficiary resides within the state but the fiduciary and intangibles are outside the state, reference is again made to subsection (D), Section 1 of the act which, in part, provides:

"\* \* \*All intangible property of persons residing in other states used in or arising out of business transacted in this state by, for or on behalf of such non-resident persons shall be taxed on the annual yield thereof, and the taxable situs shall be the location of the business.\* \* \*"

Section 6 of the act further provides:

"\* \* \*In all cases where the legal title is not held in this state the person holding the equitable title or beneficial interest shall be liable for the tax.\* \* \*"

Under the above quoted portions of the act we believe that where the intangible property has acquired a business situs in Missouri, the beneficiary holding the equitable title or beneficial interest would be liable for the tax where the fiduciary holding the legal title resides outside the state.

There is one exception to the taxing of intangible property which is located outside the state. Subsection (D), Section 1 of the act, in part, provides:

"\* \* \*All intangible personal property of persons residing in this state but used in or arising out of business transacted outside of this state by, for or on behalf of such persons and taxed in such other state or states shall not be subject to the intangible property tax in this state.\* \* \*"

Therefore, we conclude that intangible personal property located outside the state would be taxable and the beneficiary residing in the state would be liable for the tax unless the property was used in or arose out of business transacted outside the state and was taxed in such other state or states.

#### IV.

In answer to part (c) of the second question relating to taxing intangible personal property located in Missouri where the

fiduciary and beneficiary reside outside the state, reference is again made to Subsection (D), Section 1 of the act, which, in part, provides:

"\* \* \*All intangible property of persons residing in other states used in or arising out of business transacted in this state by, for or on behalf of such non-resident persons shall be taxed on the annual yield thereof, and the taxable situs shall be the location of the business.\* \* \*"

If the property had a business situs in Missouri it would be taxable on the basis of its yield.

V.

Part (d) of the second question asks who should make the return on taxable intangible personal property which is held jointly by fiduciaries residing within and outside the state.

This department has held in an opinion submitted to Mr. M. E. Morris, Director of Revenue, that where intangible property is held under a joint ownership by persons residing within the state, the return of such property should be made by the joint owners. However, where the intangible property is held by joint fiduciaries residing within and outside the state we believe that the joint fiduciaries residing within the state would be the proper persons to make the return and would be primarily liable for payment of the tax. It is our opinion that such a procedure is indicated in Section 6 of the act, which, in part, provides:

"\* \* \*In all cases where both the persons holding or owning the legal title and the equitable title or beneficial interest in the same property are domiciled in this state, only the holder of the legal title shall be liable for such tax.\* \* \*"

Under the above quoted provision the holder of the legal title to intangible property is primarily liable for the tax, as between him and the person holding the equitable title or beneficial interest, where both reside within the state. We believe that as among joint fiduciaries residing within and outside the state, the fiduciaries residing within the state having under their control intangible personal property used in or arising out of business transacted within the state would be primarily liable for filing the return of such property.

VI.

In part (e) of the second question it is asked that a computation of a tax on the proportionate amount of yield on underlying intangibles held by fiduciaries be illustrated. This question is asked with particular reference to Item 4 under "Explanation for taxpayers" appearing on the back of Form 40-I, which is the intangible property tax return form. Item 4, in part, reads:

"\* \* \* 'Yield' in the case of fixed or stipulated payments made as a result of a beneficial or equitable ownership shall be determined to be the proportionate amount of yield produced on the underlying intangible property held by the fiduciary.\* \* \*"

The above quoted portion of Item 4 was apparently drawn with the provision of Section 5 of H.C.S.H.B. No. 868 in mind.

Section 5 provides:

"The tax for the year 1947 and each succeeding year shall be apportioned among those persons who during the preceding calendar year held or acquired the legal title to or equitable title or beneficial interest in intangible personal property subject to the property tax provided by Section 4 of this Act, according to the part of the entire yield of such property which they respectively received during the preceding calendar year, and each such person shall be liable for his resultant portion of said tax." (Emphasis ours).

Under the above section a person is only required to pay the tax on the yield actually received from intangible personal property held during the preceding calendar year in any capacity as set forth in the section.

For example, assume that a resident of Missouri owns intangible personal property for nine months of the calendar year 1946, during which yield amounting to \$100.00 is received. Further assume that such intangible personal property is transferred during the calendar year 1946 to another resident of Missouri, who subsequently during the calendar year 1946 receives yield upon the same intangible personal property amounting to \$50.00. In these circumstances the first taxpayer mentioned would, for the taxable year 1947, owe intangible personal property tax amounting to 4 per cent of the yield received by him during the calendar year 1946, that is to say, 4 per cent of \$100.00, or \$4.00 in tax. The other taxpayer would, for the taxable year 1947, be subject to tax upon the proportionate part of the

yield received by him during the calendar year 1946, that is to say, 4 per cent of \$50.00, or \$2.00 in tax.

CONCLUSION

Therefore, it is the opinion of this department that: (1) The yield on accounts receivable is based upon the gross proceeds of such accounts. (2) Where the fiduciary holding intangible property resides in Missouri and the beneficiary resides outside of Missouri, the fiduciary would be liable for the tax on the intangible property he holds, provided it has a business situs in the state by being used in or arises out of business transacted within the state. (3) Where the fiduciary and intangible personal property are outside the state the beneficiary residing within the state would be liable for payment of the tax as provided in H.C.S.H.B. No. 868 except when such intangible property was used in or arose out of business transacted outside of the state by, for or on behalf of the beneficiary residing within the state, and is taxed by such other state or states in which it was located. (4) Where the intangible property is located in Missouri but the fiduciary and beneficiary reside outside of Missouri, the property would be taxable if it had a business situs in this state. (5) Where the property is held by joint fiduciaries residing within and outside the state, the joint fiduciaries residing within the state would be primarily liable for filing of the return and payment of the tax.

Respectfully submitted,

APPROVED:

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J. E. TAYLOR  
Attorney General

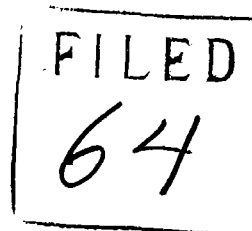
RICHARD F. THOMPSON  
Assistant Attorney General

RFT:mw

DIVISION OF PROCUREMENT:

Purchases of paper from State Paper  
Procurement Revolving Fund.

June 18, 1947



Mr. M. E. Morris, Director  
Department of Revenue  
Jefferson City, Missouri

Dear Sir:

Reference is made to your inquiry of recent date, requesting an official opinion of this office, and reading as follows:

"House Bill 172, enacted by the Sixty-fourth General Assembly, Section 3.161 and 3.162 of Page 11, appropriates \$25,000.00 to be set up as a state paper procurement revolving fund for the use of the State Purchasing Agent for the purpose of paper to be furnished by the State Purchasing Agent, as provided by law, and, further, appropriates from the state paper procurement revolving fund \$200,000.00.

"It is my understanding that House Bill 78, which attempted to provide for the fund mentioned herein, was not finally passed by the General Assembly.

"S.C.S.S.B. 297, Section 76 to 84, inclusive, provides for the purchase of printing, et cetera, by the State Purchasing Agent. It has been determined that it is helpful to the business of the state, in many cases, for the State Purchasing Agent to purchase paper and advertise for the printing. It is the intention of the appropriation to which reference is made to provide funds for the purchase of this paper and, further, that the departments utilizing the same shall pay for it and that the payment shall be placed in the revolving fund for the future use of the State Purchasing Agent for the same purpose.



"Will you please advise by memorandum at your early convenience if it is possible for this operation to function at this time."

Sections 3.161 and 3.162 of House Bill No. 172 of the 64th General Assembly read as follows:

"Section 3.161. There is hereby appropriated out of the State Treasury, chargeable to the General Revenue Fund, the sum of Twenty-five Thousand Dollars (\$25,000.00) to be set up as a State Paper Procurement Revolving Fund for the use of the State Purchasing Agent, for the purchase of paper to be furnished by said State Purchasing Agent as provided by law, for the period beginning July 1, 1947 and ending June 30, 1948.

"Section 3.162. There is hereby appropriated out of the State Treasury, chargeable to the State Paper Procurement Revolving Fund, for the use of the State Purchasing Agent, for the purchase of paper for state printing, the sum of Two Hundred Thousand Dollars (\$200,000.00), or so much thereof as maybe needed during the period beginning July 1, 1947 and ending June 30, 1948."

House Bill No. 78 of the 64th General Assembly, referred to in your letter, failed of final passage. Briefly summarized, its provisions would have repealed Section 83 of Senate Committee Substitute for Senate Bill No. 297 of the 63rd General Assembly, and would have authorized the State Purchasing Agent, upon determination that it would be to the best interest of the State to do so, to enter into paper contracts for paper to be used in the public printing. The proposed bill would have also established a Paper Procurement Revolving Fund, under the administration of the State Purchasing Agent, out of which fund such paper would have been purchased. After purchase, the state-owned paper would have been furnished at cost to the various state agencies, and payment therefor out of the appropriations of such state agencies would have been deposited in the state treasury to the credit of the Paper Procurement Revolving Fund.

The mechanics of this method of handling the purchase of state paper having failed by reason of the failure of the General

Assembly to pass the enabling act, it remains to be determined whether or not existing statutes would authorize the usage of the appropriation made under Section 3.161 of House Bill No. 172 of the 64th General Assembly, quotedsupra, to carry out the purposes of the legislation which failed of enactment.

Section 83 of Senate Committee Substitute for Senate Bill No. 297 of the 63rd General Assembly reads as follows:

"Section 83. The supply of paper now on hand in the office of the secretary of state shall be transferred to the purchasing division. The purchasing agent shall require state printing contractors to use such paper in the performance of printing for the state until September 1, 1946, whichever shall occur first. Thereafter, the contractor shall furnish the paper as a part of the complete printing job unless the purchasing agent shall determine that it would be to the advantage of the state to make separate contracts for the paper." (Emphasis ours.)

The emphasized portion of the statute quoted clearly authorizes the State Purchasing Agent to enter into separate contracts for paper to be used by the various departments. However, such purchases of paper, as all other purchases made for such departments, would necessarily be chargeable to the appropriations made to the several departments. It will necessarily entail sufficient available appropriations for each of such departments to make the contemplated purchases. Under the proposed plan, the State Purchasing Agent would have had at all times available to him amounts sufficient to pay for any purchases, not being dependent upon the several departmental appropriations. The expenditures from the proposed fund would have been replaced by reimbursement from the various state agencies using such paper. However, as has been pointed out heretofore, this procedure may not now be followed in the absence of statutory authority.

It might be thought that the appropriation of \$25,000.00 made under Section 3.161 of House Bill No. 172 of the 64th General Assembly might serve as an initial sum to be expended by the State Purchasing Agent, even though not subject to replacement as a revolving fund. We do not believe this to be true, as a "fund" may not be created as a part of an appropriation bill. Establishment of a "fund" amounts to a legislative act, and this may not be done in an appropriation bill. We quote

from State v. Canada, 113 S. W. (2d) 783, 1. c. 790, wherein the court stated:

" \* \* \* The proviso in the 1935 act which attempts to limit the authority of the board of curators to the payment of the difference between the tuition in Missouri and in the adjacent States is unconstitutional and void. A general statute (section 9622, R. S. 1929 (Mo. St. Ann. sec. 9622, p. 7328)) authorizes the board of curators of Lincoln University to pay the reasonable tuition fees of negro residents of Missouri for attendance at the university of any adjacent state. This statute cannot be repealed or amended except by subsequent general legislation. Legislation of a general character cannot be included in an appropriation bill. To do so would violate section 28 of article 4 of the Constitution, which provides that no bill shall contain more than one subject which should be clearly expressed in its title. There is no question but what the mere appropriation of money and the amendment of section 9622, a general statute granting certain authority to the board of curators, are two different and separate subjects. State ex rel. Davis v. Smith, 335 Mo. 1069, 75 S. W. 2d 828; State ex rel. Hueller v. Thompson, 316 Mo. 272, 289 S. W. 338. \* \* \*"

#### CONCLUSION

In the premises, we are of the opinion that the mechanics of the State Paper Procurement Revolving Fund, as contemplated by the concurrent passage of House Bills Nos. 78 and 172 of the 64th General Assembly, are not operative at this time by reason of the failure of passage of House Bill No. 78.

Respectfully submitted,

APPROVED:

WILL F. BERRY, Jr.  
Assistant Attorney General

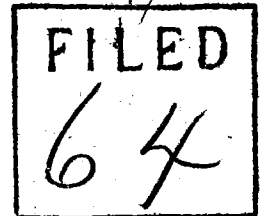
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J. E. TAYLOR  
Attorney General

WFB:HR

DEPARTMENT OF REVENUE: Effect and meaning of Senate Bill No. 143 of the 64th General Assembly relating to the duties and responsibility of the Director of Revenue and the duties of the subordinates thereunder.

July 3, 1947



Mr. M. E. Morris, Director,  
Department of Revenue,  
Jefferson City, Missouri.

Dear Mr. Morris:

This is in reply to your letter of May 29, 1947, wherein you requested an opinion of this department with reference to Senate Bill No. 143 of the 64th General Assembly relating to certain duties of the Director of Revenue. Said letter reads as follows:

"I have read with interest an opinion written by Assistant Attorney General G. W. Crowley, answering certain questions raised by the Director of the Department of Business and Administration in connection with his duties as provided by Senate Bill 348.

"Senate Bill 143 of the 64th General Assembly repeals certain sections of Senate Bill 297, passed by the Sixty-third General Assembly, and sets out the duties of the Director of Revenue. Sub-paragraph (B) of Section 4 provides that the Director of Revenue shall procure supplies, etc., and does not contain the wording 'on requisition of the heads of the various divisions' following the word 'procure', which is the subject of the opinion referred to. Will you please advise if this addition would permit the same interpretations as to the duty of the Director.

"One division of this Department is the Division of Public Buildings, which is controlled by a Board of Public Buildings and administered by a Director, appointed by the Board of Public Buildings. It would seem, therefore that the Director

Mr. M. E. Morris

of Revenue would not be required to procure supplies, approve contractual services, etc., for this Division as a practical matter. I would appreciate information on this point.

"Sub-paragraph (N) of Senate Bill 143 provides that the Director of Revenue 'shall receive all appropriations to the Department..... and shall be responsible for the disbursement and expenditure thereof.'"

"The current appropriation for the Collection Division is made to the State Department of Revenue to the use of the Director thereof. The appropriation for the Procurement Division, the Division of Budget and Comptroller, the Division of Public Buildings, the State Tax Commission and the Board of Fund Commissioners did not contain this provision. The Comptroller and Purchasing Agent are appointed by the Governor with the consent of the Senate and, while Senate Bill 143 places the responsibility for the appropriation upon the Director of Revenue, House Bill 172, which appropriates the money, would seem to indicate that it is the intention of the Legislature to limit this responsibility to the Collection Division.

"I would appreciate an interpretation on this matter."

Your first question contained in the second paragraph may be stated thusly; Under Subsection (b) of Section 4 of Senate Bill No. 143 of the 64th General Assembly is it mandatory that the Director of Revenue procure the items listed, or may he delegate this procurement to the various divisional heads? Subsection (b) of Section 4 of Senate Bill 143 passed by the 64th General Assembly says: The Director of Revenue shall:

" \* \* \* \* (b) procure, either through the purchasing agent, or by other means authorized by law, supplies, material, equipment or contractual services for the department of revenue and for each division in the department; \* \* \* \* "

In your request you referred to an opinion of this department written by Mr. G. W. Crowley under date of April 28, 1947 to

Mr. M. E. Morris

Honorable Bert Cooper, Director, Department of Business and Administration relating to his duties as provided by Senate Bill No. 348 of the 63rd General Assembly. For the purpose of our immediate question the provisions of this bill as it relates to certain duties of the Director of Business and Administration are quite similar to the provisions of Senate Bill No. 143 relating to the duties of the Director of Revenue, and in order to possibly draw an analogy between the two we direct our attention to certain provisions of both bills, and to what the above mentioned opinion held with reference to such provisions. In line with the reasoning of said opinion there is no provision in Senate Bill 143 declaring a penalty against the Director of Revenue, or which renders his actions illegal or void as a consequence of failure to comply literally with the terms of said Subsection (b) of Section 4 of said bill, which there should be in order for said section, or any part thereof, to be mandatory.

We think the above mentioned opinion of G. W. Crowley possesses sufficient authority and has accurately presented the law as to whether in construction of statutes those statutes are to be treated as mandatory. Suffice it to say that we think the rule generally as to such statutory construction may be expressed as was stated by the court in *State v. Bird* 244 S. W. 938 where they said at l.c. 939:

"Under a more general rule, this construction may be sustained, in that, if a statute merely requires certain things to be done and nowhere prescribes the result that shall follow if such things are not done, then the statute should be held to be directory. The rule thus stated is in harmony with that other well-recognized canon that statutes directing the mode of proceedings by public officers are to be held to be directory and are not to be regarded as essential to the validity of a proceeding unless it be so declared by the law. *State v. Cooke*, 14 Barb. (N.Y.) 259. By this we mean that if a fair consideration of the statute shows that, unless the Legislature intended compliance with the proviso to be essential to the validity of the proceeding, which nowhere appears, then it is to be regarded as merely directory. *People v. Thompson*, 67 Cal. 627, 9 Pac. 833; *Kenfield v. Irwin*, 52 Cal. 164; *Westbrook v. Rosborough*, 14 Cal. 180; *Jones v. State*, 1 Kan. 273."

Mr. M. E. Morris

We believe then that the paragraph answering the related question in the opinion directed to the Director of Business and Administration may be used for the purpose of this opinion so as to read: It would be reasonable to conclude, we think, that since there is no other clause or sentence in Section 4 of Senate Bill No. 143 making Section 4, or the results of the authority therein directed to be used, invalid, if not carried out precisely as stated, and under the above cited authority, distinguishing between mandatory and directory statutes, Subsection (b) of Section 4 of said Senate Bill 143 is directory and not mandatory.

In *Kadane v. Clark* 134 S. W. 448 the Texas Court of Civil Appeals said at l.c. 456:

"'Procure' has many meanings as disclosed by the dictionary. Among other things it means 'to bring into possession--to acquire; to cause--to bring about; to solicit--entreat.'"

Such a definition would indicate that the word "procure", as used in the statute, would not necessarily mean to personally acquire.

It would follow then that by applying such construction to Subsection (b) of Section 4, as a practical matter, the Director of Revenue would not be required to personally procure the listed items of said subsection for the various divisions of his department, including the Division of Public Buildings.

The Director of the Department of Revenue would, of course, under Subsection (b) be expected to supervise, and when necessary check the procurement.

This and other sections of the bill would indicate that it was the intention of the Legislature to make the Director of Revenue the over-all authority and supervisor over the various divisions, whereby he may delegate certain authority to the divisional heads and still retain the necessary control and supervision. Any procurement by the divisional heads would in fact be the procurement and responsibility of the director of the department. The division heads in your department are both in effect and authority the agents of the director and as such are acting for him.

The above will in part furnish an answer to your last question, which has to do with the interpretation of Subsection (n) Section 4 of said Senate Bill 143. Subsection (n) says the Director of Revenue shall:

"\* \* \* \* (n) receive all appropriations to the department of revenue for the use

Mr. M. E. Morris

of the department of revenue and the several divisions thereof and shall be responsible for the disbursement and expenditure thereof."

As was pointed out in your letter of request, the current appropriation for the Department of Revenue is provided for in House Bill No. 172. As will be noted from a reading of this bill the current appropriation for the Collection Division is made, "chargeable to the General Revenue Fund, to the State Department of Revenue to the use of the Director thereof, the sum of \* \* \* \* \*," for the purpose of paying salaries, wages, repair and replacement of property, operating expenses, etc. The appropriation for the Procurement Division, the Division of Budget and Comptroller, the Division of Public Buildings, the State Tax Commission and the Board of Fund Commissioners does not contain the provision "to the use of the Director thereof," but merely reads "chargeable to the General Revenue Fund the sum of \* \* \* \* \*," and then provides that such sum is for the purpose of paying salaries, wages, repair and replacement of property, operating expenses of the division. Does the omission of the provision, "to the use of the Director thereof" indicate that it is the intention of the Legislature to limit the director's responsibility to the Collection Division? We feel the same reasoning can be employed here as was above indicated; namely, that the Director of Revenue is in charge of the department and the divisions therein. As such he has the general supervision and responsibility for each division. As we pointed out above with reference to Subsection (b) of Section 4, so in our interpretation of Subsection (n) must we conclude that the statutes are to be interpreted as directory rather than mandatory. As such, the portions of House Bill 172 relating to the appropriations for the Procurement Division, the Division of Budget and Comptroller, the Division of Public Buildings, the State Tax Commission and the Board of Fund Commissioners, which omitted the words "to the use of the Director thereof" would not limit the responsibility of the director but would mean that as to these above named divisions the appropriation would be to the use of the division and the division heads thereof who are in effect and authority the agents of the Director of Revenue subject to his supervisory control and authority. The director may delegate authority to the division heads, but this does not relieve him of the responsibility for the disbursement and expenditure of the appropriations.

#### CONCLUSION

In view of the above, it is the opinion of this department that the terms and provisions of Subsection (b) Section 4, of Senate Bill 143



Mr. M. E. Morris

of the 64th General Assembly are directory and not mandatory. Applying such an interpretation it would follow that the Director of Revenue is responsible for, and must maintain a supervisory control over, the procurement of supplies, materials, equipment or contractual services for the Department of Revenue and for each division in the department, but may delegate the actual procurement thereof to the proper divisional head. The same interpretation would apply as to Subsection (n) Section 4, of said Senate Bill 143, and it would follow that the responsibility for the appropriation and the disbursement and expenditure thereof is not shifted from the director by virtue of the appropriation bill No. 172, but the duties thereunder may be delegated to the divisional heads.

Respectfully submitted,

WM. C. COCKRILL,  
Assistant Attorney General.

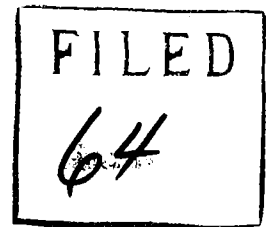
APPROVED:

J. E. TAYLOR  
Attorney General

TAXATION AND REVENUE:

Allowable deductions by resident of Missouri with respect to income subject to Indiana gross income tax.

July 18, 1947



Mr. M. E. Morris  
Director of Revenue  
Jefferson City, Missouri

Dear Sir:

Reference is made to your letter of recent date, requesting an official opinion of this office, and reading as follows:

"It is requested that you furnish this department with a written opinion advising whether or not income on which the Indiana gross income tax has been paid is deductible under Section 11349, R. S., Missouri, 1939, as revised by House Bill No. 1000 passed by the 63rd General Assembly of Missouri."

You have further informed us that your inquiry is directed solely to individual taxpayers, so in the preparation of this opinion we shall disregard provisions peculiarly applicable to other types of taxpayers.

Section 11349, R. S. Mo. 1939, as reenacted in House Bill No. 676, and amended by Senate Committee Substitute for House Bill No. 1000, both of the 63rd General Assembly, reads, in part, as follows:

"In ascertaining net income there may be deducted from gross income derived during the same period the following:

\* \* \* \* \*

"Income on which tax paid in another state: Such part of the income in any taxable year, on which a tax is imposed by any other state and paid to such state, shall be deducted

where such income is included in the taxpayer's return, but this deduction shall not be allowed in any case where the net income applicable to this state shall be determined by multiplying the total net income by a fraction."

The reference in the quoted portion of the statute to the determination of the net income applicable to Missouri being determined by multiplying the total net income by a fraction is inapplicable to individual taxpayers, and therefore we shall disregard it.

The Indiana Gross Income Tax Act is found as Sections 64-2601 to 64-2632, Burns' Indiana Statutes Annotated. Subsequent revisions of the original Act of 1933 have been incorporated herein where germane, the last revision having occurred in the Laws of Indiana of 1945, Chapter 143.

Section 64-2602, providing for the levy of the tax, reads, in part, as follows:

"There is hereby imposed a tax upon the receipt of gross income, measured by the amount or volume of gross income, and in the amount to be determined by the application of rates on such gross income as hereinafter provided. Such tax shall be levied upon the receipt of the entire gross income of all persons resident and/or domiciled in the state of Indiana, except as herein otherwise provided; and upon the receipt of gross income derived from activities or businesses or any other source within the state of Indiana, of all persons who are not residents of the state of Indiana,  
\* \* \*" (Emphasis ours.)

Section 64-2605, relating to deductions which may be allowed, reads, in part, as follows:

"(a) In computing the amount of tax imposed under the provisions of this act, for any year, there shall be deducted by any taxpayer who is a retail merchant as defined in this act, an amount of three thousand dollars (\$3,000) from that part of his income derived from selling at retail, as defined in this act. \* \* \*

"(b) In computing the amount of tax imposed under the provisions of this act for any year, there shall be deducted from the gross income of any taxpayer not provided for in subsection (a), an amount of one thousand dollars (\$1,000). \* \* \*"

Further provisions of the same section provide for prorating the deductions authorized upon the basis of time such taxpayer is subject to the provisions of the Act, compared with a twelve months' period.

From the foregoing, it appears that a resident of Missouri, deriving income from activities conducted within the State of Indiana, is subject to the Gross Income Tax Act of that state, and is authorized to deduct the proportionate part of the total annual deductions allowed computed upon the period of time such taxpayer is subject to the provisions of the Act.

Comes, then, the question of whether or not such income so received from sources in the State of Indiana must be included in the return made to the State of Missouri by residents of Missouri.

Section 11343, R. S. Mo. 1939, as reenacted by House Bill No. 676 of the 63rd General Assembly, provides, in part, as follows:

"There is hereby levied a per centum tax on net income in each year as follows: \* \* \* and for the whole of each succeeding year thereafter, at the times and in the manner now or hereafter provided, a tax shall be levied upon, assessed against, collected from, and paid by every individual, a citizen or resident of this state, upon net income received from all sources during the preceding year in excess of the exemptions now or hereafter provided, \* \* \*"

This clearly indicates that a resident of Missouri must necessarily include in his return to the State of Missouri income derived from sources in the State of Indiana.

Therefore, such income having been included in the return made to the State of Missouri, it may be deducted therefrom in the event that it has been reported to the State of Indiana and the gross income tax of that state paid thereon, as pro-

vided by Section 11349, R. S. Mo. 1939, as reenacted and amended by the 63rd General Assembly, quoted supra.

You will note that the income tax of the State of Indiana is based upon the gross income received by the taxpayer, whereas, under the Missouri Income Tax Act, the tax is computed upon the net income of the taxpayer. It, therefore, seems the proper procedure to be followed by a resident of Missouri who has derived income from sources within the State of Indiana is to include all of such income so received from sources in Indiana, deducting from such total the amount upon which a tax has actually been paid to that state. Further, in view of the fact that the Missouri income tax is based upon net income, such taxpayer should also be permitted to make such other statutory deductions as are permitted under the laws of Missouri in arriving at net income. Such taxpayer should not be permitted to deduct such statutory deductions in toto, but only proportional to the total amount of such statutory deductions as would be permitted under Missouri law in arriving at net income, computed upon the ratio existing between the amount of income exempt under the Gross Income Tax Act of Indiana compared to the total gross income received from sources within that state.

#### CONCLUSION

In the premises, we are of the opinion that a resident of the State of Missouri who has received income derived from sources within the State of Indiana must necessarily include in his return to the State of Missouri the gross amount of such income so received.

We are further of the opinion that such taxpayer may be permitted to deduct from such total of gross income the portion thereof upon which a tax has actually been paid to the State of Indiana, and may further deduct all statutory deductions authorized under the law of Missouri in determining net income, in so far as such statutory deductions are applicable to that portion of the total gross income derived from sources within the State of Indiana upon which the Indiana gross income tax was not paid.

Respectfully submitted,

WILL F. BERRY, JR.  
Assistant Attorney General

APPROVED:

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J. E. TAYLOR  
Attorney General

WFB:HR

ROADS AND BRIDGES: Tax provided for in Sec. 8527, Laws of 1945, page  
TAXATION: 1478, is not a levy to be made by a township board,  
TOWNSHIP ORGANIZA- and is not a levy in excess of the levy provided  
TION: for in Sec. 8820, Laws of 1945, page 1497.

July 18, 1947

FILED

64

Honorable R. E. Moulthrop  
Prosecuting Attorney  
Harrison County  
Bethany, Missouri

Dear Sir:

This is in reply to your letter of recent date, requesting an official opinion of this department, and reading as follows:

"I respectfully submit the following questions upon which I desire an opinion from your office, the questions, being related, are set forth as follows:

"1. A construction of Section 8527 of the Revised Statutes of Missouri as enacted to be effective 1 July, 1946?

"2. Is Section 8527 applicable to a county of the third class having township organization such as Harrison County, Missouri?

"3. Is the tax provided by Section 8527 in excess of the levy provided for in Section 8820 of the Revised Statutes of Missouri also found in the Laws of 1945, this with relation to the limitations provided by Sections 11 and 12 of Article X of the Constitution of Missouri now in force?"

Section 8527, Laws of Missouri, 1945, page 1478, provides as follows:

"In addition to other levies authorized by law, the county court in counties not adopting an alternative form of government and the

proper administrative body in counties adopting an alternative form of government, in their discretion may levy an additional tax, not exceeding thirty-five cents on each one hundred dollars assessed valuation, all of such tax to be collected and turned into the county treasury, where it shall be known and designated as 'The Special Road and Bridge Fund' to be used for road and bridge purposes and for no other purpose whatever; provided, however, that all that part or portion of said tax which shall arise from and be collected and paid upon any property lying and being within any special road district shall be paid into the county treasury and four-fifths of such part or portion of said tax so arising from and collected and paid upon any property lying and being within any such special road district shall be placed to the credit of such special road district from which it arose and shall be paid out to such special road district upon warrants of the county court, in favor of the commissioners or treasurer of the district as the case may be; Provided further, that the part of said special road and bridge tax arising from and paid upon property not situated in any special road district and the one-fifth part retained in the county treasury may, in the discretion of the county court, be used in improving or repairing any street in any incorporated city or village in the county, if said street shall form a part of a continuous highway of said county leading through such city or village."

Section 8820, Laws of Missouri, 1945, page 1497, provides as follows:

"In addition to other levies authorized by law, the township board of directors of any township in their discretion may levy an additional tax not exceeding thirty-five cents on each one hundred dollars assessed valuation in their township for road and bridge purposes. Such tax shall be levied by the township board, to be collected by the township collector and turned into the county treasury, where it shall be known and design-

nated as a special road and bridge fund. The county court of any such county may in its discretion order the county treasurer to retain an amount not to exceed five cents on the one hundred dollars assessed valuation out of such special road and bridge fund and to transfer the same to the county special road and bridge fund; and all of said taxes over the amount so ordered to be retained by the county shall be paid to the treasurers of the respective townships from which it came as soon as practicable after receipt of such funds, and shall be designated as a special road and bridge fund of such township and used by said townships only for road and bridge purposes: Provided, that the amount retained, if any, by the county shall be uniform as to all such townships levying and paying such tax into the county treasury: Provided, further, that the proceeds of such fund may be used in the discretion of the township board of directors in the construction and maintenance of roads and in improving and repairing any street in any incorporated city, town or village in the township, if said street shall form a part of a continuous highway of the township running through said city, town or village."

Section 8820 has been amended by House Bill No. 42 of the 64th General Assembly, which bill will become effective ninety days after June 12, 1947, by adding the following provision:

" \* \* \* except that amounts collected within the boundaries of road districts formed in accordance with the provisions of Article 18, Chapter 46, Revised Statutes of Missouri, 1939, shall be paid to the treasurers of such road districts; \* \* \* "

Section 12 (a) of Article X of the Constitution of Missouri provides, in part, as follows:

"In addition to the rates authorized in section 11 for county purposes, the county court in the several counties not under township organization, the township board of directors in the counties under township organization, and the proper administrative body in counties



adopting an alternative form of government, may levy an additional tax, not exceeding thirty-five cents on each hundred dollars assessed valuation, all of such tax to be collected and turned in to the county treasury to be used for road and bridge purposes.

\* \* \* "

From this constitutional provision it is clear that the designation of "township organization" as an alternative form of government in Section 13928, Laws of Missouri, 1945, page 1972, could not have the effect of providing that the alternative form of government legislated for in Section 8527, supra, refers to township counties, since both Sections 8527 and 8820 were enacted pursuant to the first clause of Section 12 (a) of Article X of the Constitution, above set out. The reference to alternative form of county government in Section 8527 refers to the form of county government in counties which are neither under township organization nor in which the governing body is the county court.

#### CONCLUSION

It is the opinion of this department that:

(1) Section 8527, Laws of Missouri, 1945, page 1478, does not authorize the township board of a county under township organization to levy a special road and bridge tax.

(2) Section 8820, Laws of Missouri, 1945, page 1497, is the only authorization for the tax levy of a maximum of thirty-five cents for road and bridge purposes to be levied by the township board, and the tax provided for in Section 8527 is not a tax in addition to that provided for in Section 8820.

Respectfully submitted,

C. B. BURNS, Jr.  
Assistant Attorney General

APPROVED:

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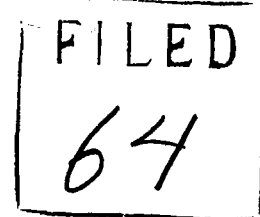
J. E. TAYLOR  
Attorney General

CBB:HR

TAXATION AND REVENUE:

Duty of the Director of Revenue  
with regard to distribution of  
moneys collected under House Bills  
Nos. 868, 869, 888 and 948 of the  
63rd General Assembly.

August 13, 1947



Mr. M. E. Morris  
Director of Revenue  
Jefferson City, Missouri

Dear Sir:

Reference is made to your request for an official opinion  
from this office, reading as follows:

"Please advise in a written opinion whether  
or not it is possible for the Department of  
Revenue to distribute the money collected  
under House Bills 868, 869, 888, and 948 as  
passed by the 63rd General Assembly according  
to the certifications received from the vari-  
ous county clerks."

The various statutory enactments referred to in your let-  
ter of inquiry now appear as Sections 11456.1 to 11456.15, Mo.  
R.S.A., Sections 10963.1 to 10963.7, Mo. R.S.A., Sections  
11456.101 to 11456.112, Mo. R.S.A., and Sections 11456.201 to  
11456.213, Mo. R.S.A.

For reasons which will appear subsequently, we will dis-  
cuss the provisions of Sections 10963.1 to 10963.7, Mo. R.S.A.,  
separately.

Each of the other acts require the collection of the vari-  
ous taxes described therein and their distribution to the vari-  
ous political subdivisions of their origin by the Director of  
Revenue. Similar provisions are incorporated in the various  
acts with respect to such distribution.

Section 11456.12, Mo. R. S.A., reads, in part, as follows:

" \* \* \* Such returns shall include a state-  
ment of the exact amount due each political  
subdivision as determined by applying the  
local rates of levy. \* \* \* " (Emphasis ours.)

Section 11456.110, Mo. R.S.A., reads, in part, as follows:

" \* \* \* Such returns shall include a statement of the exact amount due each political subdivision as determined by applying the local rates of levy. \* \* \*" (Emphasis ours.)

Section 11456.211, Mo. R.S.A., reads, in part, as follows:

" \* \* \* Such returns shall include a statement of the exact amount due each political subdivision as determined by applying the local rates of levy. \* \* \*" (Emphasis ours.)

From the foregoing, it becomes apparent that it is the duty of the Director of Revenue to determine the respective local rates of levy of the various political subdivisions entitled to share in the distribution of such tax moneys. The manner of obtaining such information has been left to the Director of Revenue by the General Assembly, as no provision has been made in any of the taxation statutes requiring the person, or persons, having control of the records of the various political subdivisions relating to their respective local rates of levy to certify such rates to the Director of Revenue. However, without going into detail and enumerating the many statutes relative thereto, we do note that the county clerk, as custodian of the records of the county court, does have a record of the levies made by that body; that other statutes require the various tax levying boards and bodies to certify their local rates of levy to the county clerk; and that in most instances the county clerk does have, through the official records kept in that office, information relative to the various local rates of levy. It becomes a question of the willingness of the Director of Revenue to accept the certifications of the various county clerks, which is a matter upon which we do not express any opinion.

We have deferred consideration of House Bill No. 869 of the 63rd General Assembly, found as Sections 10963.1 to 10963.7, Mo. R. S.A. This for the reason that at no place in these various sections does a requirement appear similar to those set out, supra, requiring the distribution of the tax moneys collected thereunder to the various political subdivisions.

However, we do note that Section 10963.7, Mo. R. S.A., does classify the accounts of savings and loan associations and building and loan associations as intangible property. We further note that Sections 10963.2 and 10963.3 place the tax upon such accounts upon the owners thereof. The only difference in the treatment of such accounts and the method provided for in the

general intangible personal property tax law is that savings and loan and building and loan associations are required to compute, withhold and pay such tax directly.

From the foregoing, we reach the conclusion that the tax provided for in the sections mentioned is one falling within Class 3 as defined in the Constitution of 1945, and therefore the moneys collected should be treated in the same manner as those collected under other intangible personal property tax laws.

Section 4 (c) of Article X of the Constitution of 1945 reads as follows:

"All taxes on property in Class 3 and its subclasses, and the tax under any other form of taxation substituted by the general assembly for the tax on bank shares, shall be assessed, levied and collected by the state and returned as provided by law, less two per cent for collection, to the counties and other political subdivisions of their origin, in proportion to the respective local rates of levy."

This, we believe, necessarily requires the distribution of such tax money to the various political subdivisions of their origin, in proportion to the respective local rates of levy, even though the General Assembly has not specifically provided a method for doing so. We believe, however, that the Director of Revenue should follow the procedure outlined with respect to the distribution of other intangible personal property taxes collected, particularly since in each of those other acts identical requirements with respect to distribution have been incorporated.

#### CONCLUSION

In the premises, we are of the opinion that intangible personal property taxes collected under the provisions of House Bills Nos. 868, 869, 888 and 948 of the 63rd General Assembly are to be distributed by the Director of Revenue to the various political subdivisions of their origin, in proportion to their respective local rates of levy.

Mr. M. E. Morris

-4-

We are further of the opinion that it is the duty of the Director of Revenue to ascertain such respective local rates of levy, and that in doing so he should obtain such information by means of a certified copy of the public records wherein such levies have been established.

Respectfully submitted,

WILL F. BERRY, JR.  
Assistant Attorney General

APPROVED:

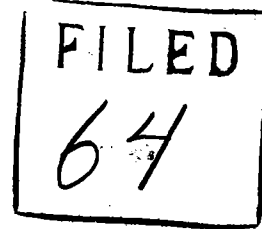
.....  
\_\_\_\_\_  
J. E. TAYLOR  
Attorney General

WFB:HR

STATE TREASURY:

Proceeds of sale of surplus property belonging to Missouri Training School for Boys to be deposited in the "Missouri Training School for Boys Fund."

September 5, 1947



Mr. M. E. Morris, Director  
Department of Revenue  
Jefferson City, Missouri

Dear Sir:

Reference is made to your request for an official opinion, reading as follows:

"The office of the Cashier in the Division of Collection of this Department has received from the State Purchasing Agent a number of checks representing the receipts from the sale of cattle from the Boonville Training School for Boys.

"Will you please advise what fund in the State Treasury this money should be properly deposited with, and oblige."

Section 20 of an act found in Laws of Missouri, 1945, page 1428, reads, in part, as follows:

"The state collector of revenue shall promptly record all sums of money collected or received by him and shall immediately thereafter deposit the same with the state treasurer. \* \* \*" (Emphasis ours)

Responsibility for determining the proper fund into which money so received into the State Treasury shall be placed has been enjoined upon the State Treasurer under the provisions of Section 15 of Article IV of the Constitution of Missouri of 1945, which reads, in part, as follows:

" \* \* \* Immediately on receipt thereof the state treasurer shall deposit all moneys in the state treasury to the credit of the state \* \* \* and he shall hold them for the benefit of the respective funds to which they belong and disburse them as provided by law.  
\* \* \*"

The institution located at Boonville, Missouri, under the provisions of Section 8993, R. S. Mo. 1939, has been designated as the "Missouri Training School for Boys." For such institution a fund has been created in the Treasury Department under the provisions of Section 9363, R. S. Mo. 1939, which reads, in part, as follows:

"There are hereby established and created in the treasury department of this state the following named funds: \* \* \* 'Missouri Training School for Boys,' \* \* \* Whenever any moneys are paid into the state treasury under the provisions of this article, they shall be receipted for by the state treasurer and placed to the credit of the fund to which they respectively belong, so that money derived from each institution may be placed to the credit of the fund herein provided for that institution."

Under the further provisions of Section 9366, R. S. Mo. 1939, moneys received from the sale of property belonging to such institution are to be transmitted to the State Treasurer. This section reads as follows:

"Whenever any sum or sums of money shall be paid into the treasury of any such institution under the provisions of the preceding section, or any law of this state, and all moneys which may be received into the treasury, or by any officer or officers of any such institution, derived from the employment of the inmates thereof, or from the use or disposition of any property belonging to such institution, and all moneys coming into the treasury, or into the hands of any officer or officers of any such institution from any other source whatever for the support or improvement of such institution, shall be forthwith entered on the books kept by the treasurer or other financial officer of such institution, so as to show the source from whence derived and from whom and upon what account it was received, and the same shall then be forthwith transmitted by such treasurer or other financial officer to the state treasury, and the state treasurer shall give his receipt therefor." (Emphasis ours.)

Mr. M. E. Morris

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The funds referred to in your letter of inquiry, having arisen from the disposition of property owned by the Missouri Training School for Boys, are clearly within the purview of the sections quoted.

#### CONCLUSION

In the premises, we are of the opinion that funds derived from the sale of property belonging to the Missouri Training School for Boys are to be deposited in the State Treasury to the credit of the "Missouri Training School for Boys Fund."

Respectfully submitted,

WILL F. BERRY, Jr.  
Assistant Attorney General

APPROVED:

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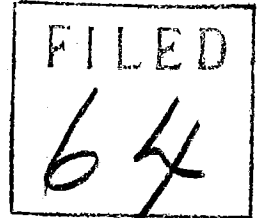
J. E. TAYLOR  
Attorney General

WFB:HR



CRIMINAL LAW: Construction of Section 4854, R. S. Mo. 1939,  
known as Habitual Criminal Act.

October 16, 1947



Honorable Roscoe E. Moulthrop  
Prosecuting Attorney  
Harrison County  
Bethany, Missouri

Dear Sir:

This will acknowledge receipt of your request for an  
opinion which reads:

"An official opinion is respectfully  
requested from your office covering the  
following question:

"May Section 4900 (g) of the Revised  
Statutes of Missouri for 1939 form the  
basis of a prosecution under the Section  
4854 of the Revised Statutes of Missouri  
for 1939, commonly known as the "Habitual  
Criminal Act"?"

"This question has been raised by Circuit  
Judge V. C. Rose wherein a motion for a  
new trial is involved following a convic-  
tion in this Court under the sections out-  
lined above. That portion of Section 4854,  
which reads as follows; 'If such subsequent  
offense be such that, upon a first convic-  
tion, the offender would be punished by  
imprisonment for a limited number of years,  
then such person shall be punished by im-  
prisonment in the penitentiary for the  
longest term prescribed upon a conviction  
for such first offense;' \*\*\*, is questioned  
in this case because Section 4900 (g) of  
the Revised Statutes of Missouri for 1939  
provides a minimum penalty of a fine and  
the Circuit Judge is inclined to believe  
that the Habitual Criminal Statute may  
apply only where the crime charged comes  
within the meaning of a statute setting  
forth imprisonment in the penitentiary  
only as the penalty."

Originally, the second offense statute, or what has been referred to so often as the Habitual Criminal Act, will be found in the Revised Statutes of 1835, page 211, i.e. 212. Section 7 of that act reads:

"If any person convicted of any offence, punishable by imprisonment in the penitentiary, or of petit larceny, or any attempt to commit an offence, which, if perpetrated, would be punishable by imprisonment in the penitentiary, shall be discharged, either upon pardon or upon compliance with the sentence, and shall subsequently be convicted of any offence committed after such pardon or discharge, he shall be punished as follows:

"First, If such subsequent offence be such, that, upon a first conviction, the offender would be punishable by imprisonment in the penitentiary for life, or for a term which, under this act, might extend to imprisonment for life, then such person shall be imprisoned in the penitentiary during life.

"Second, If such subsequent offence be such, that, upon a first conviction, the offender would be punishable by imprisonment for a limited term of years, then such person shall be punished by imprisonment in the penitentiary for the longest term prescribed upon a conviction of such first offence.

"Third, If such subsequent conviction be for petit larceny, or for an attempt to commit an offence, which, if perpetrated, would be punishable by imprisonment in the penitentiary, the person convicted of such subsequent offence shall be punished by imprisonment in the penitentiary for a term not exceeding five years."

We shall not show every amendment to the foregoing provision since it is not necessary. However, Section 3959, R. S. Mo. 1889, reads:

"If any person convicted of any offense punishable by imprisonment in the penitentiary, or of petit larceny, or of any attempt to commit an offense which, if perpetrated, would be punishable by imprisonment in the penitentiary, shall be discharged, either upon pardon or upon compliance with the sentence, and shall subsequently be convicted of any offense committed after such pardon or discharge, he shall be punished as follows: First, if such subsequent offense be such that, upon a first conviction, the offender would be punishable by imprisonment in the penitentiary for life, or for a term which, under the provisions of this law, might extend to imprisonment for life, then such person shall be punished by imprisonment in the penitentiary for life; second, if such subsequent offense be such that upon a first conviction the offender would be punishable by imprisonment for a limited term of years, then such person shall be punished by imprisonment in the penitentiary for the longest term prescribed upon a conviction for such first offense; third, if such subsequent conviction be for petit larceny, or for an attempt to commit an offense which, if perpetrated, would be punishable by imprisonment in the penitentiary, the person convicted of such subsequent offense shall be punished by imprisonment in the penitentiary for a term not exceeding five years."

Subsequent to the enactment of Section 3959, supra, the 38th General Assembly amended that provision and it will be found on pages 153-154, Laws of Missouri, 1895, which was approved on April 11, 1895, and reads:

"AN ACT to amend section 3959, of article 9, of the Revised Statutes of Missouri, in relation to crimes and punishments.

SECTION I. SECOND OFFENSE, HOW PUNISHED.

Be it enacted by the General Assembly of the State of Missouri, as follows:

"SECTION I. That section 3959, of article 9, of the Revised Statutes of Missouri, be amended by striking out the words commencing on second line, 'or of petit larceny,' and the words commencing on the fifteenth line, 'third, if such subsequent conviction be for petit larceny;' so that said section, when amended, shall read as follows:

"Section 3959. If any person convicted of any offense punishable by imprisonment in the penitentiary, or of any attempt to commit an offense which, if perpetrated, would be punishable by imprisonment in the penitentiary, shall be discharged, either upon pardon or upon compliance with the sentence, and shall subsequently be convicted of any offense committed after such pardon or discharge, he shall be punished as follows: First, if such subsequent offense be such that, upon a first conviction, the offender would be punishable by imprisonment in the penitentiary for life, or for a term which under the provisions of this law might extend to imprisonment for life, then such person shall be punished by imprisonment in the penitentiary for life; second, if such subsequent offense be such that, upon a first conviction, the offender would be punished by imprisonment for a limited term of years, then such person shall be punished by imprisonment in the penitentiary for the longest term prescribed upon a conviction for such first offense; third, if such subsequent conviction be for an attempt to commit an offense which, if perpetrated, would be punishable by imprisonment in the penitentiary, the person convicted of such subsequent offense shall be punished by imprisonment in the penitentiary for a term not exceeding five years.

Approved April 11, 1895."

One of the primary rules of construction of statutes is to ascertain and give effect to lawmakers' intent and this should be done from words used, if possible, considering the

language honestly and faithfully. See City of St. Louis vs. Senter Commission Company, 85 S.W. (2d) 21, 377 Mo. 238.

It is somewhat easier to determine the legislative intent in amending Section 3959, R. S. Mo. 1889, by reading that section along with the title and Section 1 of the amendment to said section as passed by the 38th General Assembly. Section 1 of that amendment merely deletes in the second line the words "or petit larceny," and the words commencing on the fifteenth line, "third, if such subsequent conviction be for petit larceny;", which would designate the only amendments intended to be enacted at that time. If this be true, then Section 3959, R. S. Mo. 1889, as amended in the Laws of 1895, should read as it did prior to said amendment with the exception of the underscored hereinabove deleted therefrom. But that is not the case. Following the word "second" in the amendment of 1895, we find the word "punishable" has been changed to "punished." We are inclined to believe that such a change was never contemplated by the Legislature and that in all probability, it is a stenographic error, or to say the least, an error in printing same. For your information, we attempted to find the engrossed bill as passed by the 38th General Assembly, but same was apparently destroyed by a fire in 1912, so we have no sure way of determining if the amendment of 1895 was actually passed in its present form as Section 4854, R. S. Mo. 1939.

In State vs. Dalton, 23 S.W. (2d) 1, 1.c. 3, the defendant was charged under the Habitual Criminal Act of a prior conviction and an alleged offense of transporting hootch, moonshine. The punishment under the law at that time for such an alleged offense was imprisonment in the penitentiary or jail or fine or both jail and fine. The jury in that case returned a verdict assessing punishment at five years in the penitentiary, and while the information was never attacked for the reason that the alleged offense merely constituted a graduated felony and the defendant might not receive a penitentiary sentence, the Supreme Court did in fact uphold said information.

However, in State vs. Brinkley, 189 S.W. (2d) 314, 1.c. 334-335, the Supreme Court said:

"He contends first that Sec. 4854 has reference only to such prior offenses as were in contemplation when it was originally passed in substantially the present form, as R. S. 1835, Section 7, p. 212; and contends larceny from the person of less than \$30 in value was unknown in that day as an offense punishable by imprisonment in the penitentiary. This contention

is wholly without merit. The habitual criminal statute, Sec. 4854, is not limited to prior convictions punishable by imprisonment in the penitentiary in 1835, but covers offenses since created by statute for which penitentiary punishment was enforceable at the time of conviction. People ex rel. Kruger v. Snyder, 261 App. Div. 352, 25 N.Y.S. 2d 644, 645 (2).

"As we understand, appellant further contends the statute declaring the prior crime must impose penitentiary punishment absolutely, and not merely make it punishable that way. Sec. 4460, the larceny statute, supra, fixes the punishment at imprisonment in the penitentiary not exceeding 7 years, or in the county jail not exceeding one year; and defendant in this instance received a jail sentence of only five months. But the crime is covered by the habitual criminal statute because penitentiary punishment is authorized. In this connection it should be noted that the habitual criminal statute, Sec. 4854, in clause 'second' thereof does use the word 'punished' instead of the word 'punishable,' which appears everywhere else in the section. But this evidently was an inadvertence. The word 'punished' first appeared in the amendment of the statute by Laws No. 1895, p. 153. But Section 1 of that Act shows its sole purpose was to eliminate the offense of petit larceny therefrom." (Underscoring ours.)

You will note the underscoring follows our line of reasoning in the foregoing decision, that it was evidently an inadvertence in inserting the word "punished" instead of the word "punishable."

#### CONCLUSION

Therefore, in view of the foregoing, it is the opinion of this department that we must answer your request in the

Hon. Roscoe E. Moulthrop - 7

affirmative, that a person charged under Section 4900 (g), R. S. Mo. 1939, may be also charged under Section 4854, R. S. Mo. 1939, known as the Habitual Criminal Act.

Respectfully submitted,

AUBREY R. HAMMETT, Jr.  
Assistant Attorney General

APPROVED:

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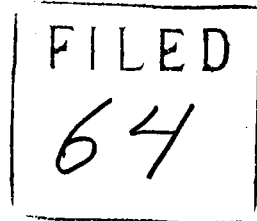
J. E. TAYLOR  
Attorney General

ARR;VLM

PUBLIC RECORDS:

Availability of intangible personal  
property tax returns to public  
inspection.

October 21, 1947



Mr. M. E. Morris, Director  
Department of Revenue  
Jefferson City, Missouri

Dear Sir:

Reference is made to your request for an official opinion  
of this office, reading as follows:

"It is requested that you furnish this de-  
partment with a written opinion stating  
whether or not the lists of individuals,  
partnerships, corporations, etc. who pay  
intangible taxes under House Bills 888,  
869, 868, 948 and 407 may be furnished or  
made available to persons, corporations  
or political subdivisions requesting same."

Under the provisions of House Bills Nos. 868, 869, 888 and  
948 of the 63rd General Assembly, and House Bill No. 407 of the  
64th General Assembly, individuals, partnerships, corporations  
and other taxable entities affected by the various bills are  
required to file returns of the tax due upon their intangible  
personal property with the Director of Revenue. We think that  
upon the filing of such returns they then become "public  
records," in accordance with the general rule defining records  
of this type, as found in 53 C. J., page 604, reading as fol-  
lows:

" \* \* \* A public record has been defined as  
one required by law to be kept, or necessary  
to be kept in the discharge of a duty imposed  
by law, \* \* \* "



October 21, 1947

We note that no statute specifically makes such returns public records; therefore, we think the additional rule found at page 605 of the same volume to be applicable. This rule reads as follows:

" \* \* \* In the absence of statute, the nature and purpose of the record, and possibly, custom and usage, must be the guides in determining the class to which it belongs.  
\* \* \*"

Considering the past history of the taxing of intangible personal property and the procedure followed under previous statutes under which the lists of intangible personal property owned by taxpayers of the various categories became public records in the office of the collector of revenue in the various counties, we believe that the returns made under the present scheme for the taxation of intangible personal property are "public records." This view is further strengthened by the fact that the lists of real property and tangible personal property have been continued as public records in the office of the collector of revenue in the various counties under present statutes. We also note that in neither of the intangible personal property taxing acts has the General Assembly seen fit to impose secrecy upon such returns specifically, as has been done with respect to certain other types of returns for tax purposes.

The Supreme Court of Missouri has followed this rule, saying in *State ex rel. v. Henderson*, 169 S. W. (2d) 389, 1. c. 392:

"In all instances where, by law or regulation, a document is required to be filed in a public office, it is a public record and the public has a right to inspect it. 53 Corpus Juris, Section 1, Pages 604 and 605; *Clement v. Graham*, 78 Vt. 290, 63 A. 146. Ann. Cas. 1913E, 1208; *Robison v. Fishback*, 175 Ind. 132, 93 N. E. 666, L. R. A. 1917B, 1179, Ann. Cas. 1913B, 1271; *State ex rel. Eggers v. Brown*, 345 Mo. 430, 134 S. W. 2d 28."

A similar question was before the same court in *State ex rel. v. Brown*, 134 S. W. (2d) 28, and in that case a similar decision was reached. However, it was pointed out in the last-mentioned case that such right of inspection of public records is not an unqualified right and that certain restrictions and limitations are applicable thereto. We quote, 1. c. 32:

October 21, 1947

" \* \* \* The special commissioner did not hold, and neither do we, that relator's right to inspect and copy the records is an unlimited right. It is subject to such reasonable regulations as respondents may impose to prevent undue interference with the work of the employees of the office, and to prevent undue interference with members of the public being served at the office."

#### CONCLUSION

From the foregoing, we are of the opinion that the returns of intangible personal property made by taxpayers under the provisions of House Bills Nos. 868, 869, 888 and 948 of the 63rd General Assembly, and House Bill No. 407 of the 64th General Assembly, are "public records" and are available to inspection by the public, subject, however, to such reasonable regulations and restrictions as may be imposed by the officer having charge of such public records so that such inspection shall not interfere with the operation of the ordinary business of such officer.

Respectfully submitted,

WILL F. BERRY, Jr.  
Assistant Attorney General

APPROVED:

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J. E. TAYLOR  
Attorney General

WFB:HR

374  
10.16.  
TAXATION: No authority for refunding proportionate part  
MANUFACTURERS: of manufacturers' tax for 1946.

October 30, 1947

FILED

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Mr. M. E. Morris, Director  
Department of Revenue  
Jefferson City, Missouri

Dear Sir:

This is in reply to your letter of recent date wherein you request an official opinion from this department on the following statement of facts:

"Would a taxpayer be entitled to a refund, or to a credit, of five-twelfths of his manufacturers' license tax paid in 1946 because of a general failure of collectors to recognize the apparent intent of a change in the law made by House Committee Substitute for House Bill No. 539, on the taxation of manufacturers?"

The law applicable to taxation of manufacturers is found in Laws of Missouri, 1945, pages 1855 to 1954. H.C.S.H.B. No. 539 of the 64th General Assembly, to which you refer in your letter, is found at page 1855 of said laws. This bill was approved November 30, 1945. Section 1 of this bill was amended by the 63rd General Assembly, and this section, as amended, is found in Laws of Missouri, 1945, at page 1954. However, the section as amended contains the same provisions in so far as your question is involved as it did in said H.C.S.H.B. No. 539. Section 1 of the act, Laws of Missouri, 1945, page 1954, provides in part as follows:

"All manufacturers in this state shall be licensed and taxed on all raw material and finished products, as well as all the tools, machinery and appliances used by them, in the same manner as is or may be provided by law for the taxing and licensing of merchants; and no county, city, town, township, or municipal authority thereof, shall ever levy any greater amount of tax against a manufacturer than

is levied against merchants for the same period. On the first Monday in May in each year it shall be the duty of each person, corporation or copartnership of persons, as provided by this article, to furnish to the assessor of the county, or township, in which such license may have been granted a statement of the greatest amount of raw material and finished products, as well as all the tools, machinery and appliances used by him or them, which he or they may have had on hand at any one time between the first Monday in January and the first Monday in April next preceding; said statement shall include raw material and finished products owned by such manufacturer, as well as all the tools, machinery and appliances used by him or them. \* \* \*

Section 3 of said H.C.S.H.B. No. 539, Laws of Missouri, 1945, at page 1858, provides in part as follows:

"Nothing in this act shall be so construed as to apply to manufacturers whose raw material, finished products, tools, machinery and appliances, in the aggregate amount, be less than one thousand dollars. Licenses issued under this act shall be for one year, ending on the thirty-first day of December of the then current year, except that licenses shall be issued to cover all or any part of the period beginning June 1, 1946 and ending December 31, 1946. \* \* \*

It will be noted that under this section the license and taxes imposed on the manufacturer are for one year ending on the 31st day of December of the year in which the tax is assessed.

Under the old law as it existed prior to this 1945 act (Section 11339, R. S. Mo. 1939), it provided that the license would be for one year ending on the first day of June of the then current year.

By the provisions of said Section 3, supra, the period of the license ends on December 31 instead of June 1 as was provided in said Section 11339. Therefore, it would seem that

the taxpayer who paid the manufacturers license for the year beginning June 1, 1945, was being deprived of the period of license from January 1, 1946, to June 1, 1946, and as is stated in the letter accompanying your request, there is a question as to whether or not the taxpayer is entitled to a refund of the license tax for five-twelfths of the license period.

Section 3 of Article X of the Constitution of Missouri, 1945, provides that "taxes shall be levied and collected by general laws and shall be payable during the fiscal or calendar year in which the property is assessed."

For the purpose of conforming to this provision of the Constitution, the laws applicable to taxation of merchants and manufacturers were changed so that the tax is assessed, levied and collected in the same year. Under the old law, they were assessed in one year, and levied and collected in the following year.

Since said Section 1 of the Manufacturers' Tax Act, Laws of Missouri, 1945, page 1954, provides that the manufacturers shall be licensed and taxed on raw materials in the same manner as merchants, we will refer to the act relating to licensing and taxing of merchants which is found at page 1838, Laws of Missouri, 1945. Section 11304 of this act requires the merchants to obtain a license to sell merchandise. Section 11305 of the act provides in part as follows:

"Merchants shall pay an ad valorem tax equal to that which is levied upon real estate, on the highest amount of all goods, wares and merchandise which they may have in their possession or under their control, whether owned by them or consigned to them for sale, at any time between the first Monday in January and the first Monday in April in each year; \* \* \* "

Under Section 11314 of said Merchants' Tax Act, Laws of Missouri, 1945, page 1843, it is provided that the collector shall charge the fee of fifty cents for issuing the license to the merchant or manufacturer.

In the case of State ex rel. vs. Tracy, 94 Mo. 217, the court, in discussing the nature of these two taxes, said, l.c. 224:

" \* \* \* The license, when issued, gives the merchant the right to engage in a mercantile pursuit; for that he pays a nominal sum, fifty cents to the clerk for issuing the license, and twenty-five cents to the collector for approving the bond. The tax which the merchant is required to pay is another and a different thing. It is perfectly clear, from the provisions of the statute in question, that the tax is one upon the stock in trade, not upon the occupation. If a tax upon the stock in trade, it must be a personal property tax. The law adopts the method of taking the largest amount on hand between given dates as the best means of arriving at the volume of the stock in trade. \* \* \* "

In the case of State ex rel. Lane vs. St. Louis-S. F. Ry. Co., 92 S.W. (2d) 644, the court, in discussing the nature of the tax imposed on merchants and manufacturers, said, l.c. 645:

" \* \* \* The property subject to this tax is assessed, on the basis of the highest valuation, between March and June of each year. The county board of equalization meets in September to make such adjustments as may be necessary with reference to the assessments of the merchants' and manufacturers' property. The assessment is made after the 1st of June. The assessed valuation thus completed becomes a valuation upon which to base the tax levy for the following year. \* \* \* "

According to the holdings in these two cases, the taxes imposed upon the merchant and manufacturer under the law are of two types, namely, the license tax for which he is charged fifty cents per year and the ad valorem tax which is the tax upon the value of the property which such merchant or manufacturer has at the certain period during the year in which the tax is collected. Also according to these cases, and if the law had not been changed in 1945, the valuation for the 1946 manufacturers' tax would have been the value of raw materials on and between the first Monday in March and the first Monday in June, 1945; but since the Constitution and laws have stepped up the levying and collecting of taxes so that all are done in the same year, then it was necessary for the lawmakers to enact legislation in accordance therewith, which has been done by the 1945 acts hereinbefore referred to.

These acts do not require the manufacturer or the merchant to pay a double ad valorem tax for the same period--they simply change the period for determining the valuation of an assessment and provide that the ad valorem tax be collected in the same year of the assessment and levy. Therefore, the fact that the license year is changed from the fiscal year ending on the first day of June to the calendar year which ends on the 31st day of December does not cause the taxpayer to pay anymore ad valorem tax. The only amount which the taxpayer might be deprived of would be five-twelfths of the fifty cents license fee which he paid for the period beginning June 1, 1945, and ending June 1, 1946. Since this is such a small amount, however, we do not deem it necessary to go into the question of whether or not a refund for this amount could be made. From the question submitted, we are assuming that a refund of the ad valorem tax is the tax to which you refer.

Then we finally come to the question of authority of the county court to refund a portion of the ad valorem tax which has been imposed on the manufacturers for the year 1946. Even if it were found that the manufacturer, when he paid his 1945 tax, did pay the tax up until June 1, 1946, and then the lawmakers by the 1945 act taxed him again, still, unless the lawmakers have made provision for the county court to refund a tax which has been illegally or erroneously collected or doubly imposed, such court would have no authority to make a refund of such taxes. In the case of State ex rel. School District vs. Jackson, 84 S.W. (2d) 988, in discussing the jurisdiction of county courts, the court said:

" \* \* \* Such court is a creature of the Constitution, and its powers are limited by the terms of the various statutes defining its powers. It has no common-law or equitable jurisdiction."

The only statute which we find that applies to refund of taxes by county courts is Section 11215, R. S. Mo. 1939, which provides in part as follows:

"Wherever, in any county in this state, money has been collected under an illegal levy, the county court of such county or counties is hereby authorized to refund the same by issuing warrants upon the fund to which said money had been credited, in favor of the person or persons who paid the same as shown by the collector's books:

Provided, that should the person in favor of whom any warrant or warrants are issued be dead or unable to appear in person, then the same shall be paid to his heirs or legal representatives: Provided further, that said county court or courts may, in their discretion, refund, in addition to the money collected, interest which may have accrued upon the same, not to exceed six per cent: Provided further, that before any levy shall be considered illegal, it shall have been so declared by the supreme court of the state of Missouri: Provided further, that the provisions of this section shall only apply to those counties in which the money collected under said illegal levy is either in the county treasury or within the control of the county court: \* \* \* "

Even conceding that the tax in question has been illegally and erroneously collected, still under the foregoing section the county court could not refund these taxes if they were not in the county treasury or within the control of the county court. Under Section 11219, R. S. Mo. 1939, the county treasurer when the revenues come into his hands is required to separate and divide the revenues and set them off to the subdivisions to which they are entitled. This would include the taxes for county revenue purposes, special road district purposes, school districts and any other political subdivision which is authorized to receive tax moneys. For the purpose of this opinion, we are assuming that the 1946 manufacturers' taxes have been collected and distributed, and are no longer in the county treasury or within the control of the county court.

#### CONCLUSION

From the foregoing, it is the opinion of this department that a taxpayer would not be entitled to a refund or a credit of five-twelfths of his manufacturers' license tax paid in 1945.

Respectfully submitted,

APPROVED:

TYRE W. BURTON  
Assistant Attorney General

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J. E. TAYLOR  
Attorney General

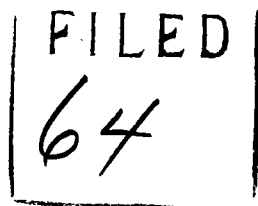
TWB:VLM



TAXATION AND REVENUE:

Federal credit unions not required to collect the tax imposed upon the accounts of their members.

December 11, 1947



Mr. M. E. Morris, Director  
Department of Revenue  
Jefferson City, Missouri

Dear Sir:

Reference is made to your inquiry of recent date as to whether or not Federal credit unions may be required to collect and remit the tax imposed upon the accounts of their members under H.C.S.H.B. No. 407 of the 64th General Assembly.

The act mentioned relates to the taxation of the accounts of members of credit unions. Such accounts have been by the act classified as intangible personal property and the literal meaning of the phraseology employed in the act makes its provisions applicable to both credit unions organized under State laws and those organized under Federal laws. A portion of two sections of the act are deemed pertinent:

"Section 3. There is hereby imposed upon each person, either natural or corporate, holding personally or in trust, an account in a credit union, an annual tax of two per cent (2%) of the taxable portion of the dividends declared and credited by such credit union to such account in the preceding year. \* \* \*

"Section 4. \* \* \* The credit union shall compute, withhold and pay to such director on or before such dates the amounts of all taxes imposed hereby upon its members, such payment to be made in one remittance, and the credit union to have the right, at its option, to absorb such taxes without charging the same to the particular accounts."

In view of the fact that your inquiry relates to the applicability of the latter provision to Federal credit unions, we believe it germane to point out the provisions relative to State taxation of the accounts of such Federal instrumentalities. Title 12, U.S.C.A., Section 1768, reads as follows:

"The Federal credit unions organized hereunder, their property, their franchises, capital, reserves, surpluses, and other funds, and their income shall be exempt from all taxation now or hereafter imposed by the United States or by any State, Territorial, or local taxing authority; except that any real property and any tangible personal property of such Federal credit unions shall be subject to Federal, State, Territorial, and local taxation to the same extent as other similar property is taxed. Nothing herein contained shall prevent holdings in any Federal credit union organized hereunder from being included in the valuation of the personal property of the owners or holders thereof in assessing taxes imposed by authority of the State or political subdivision thereof in which the Federal credit union is located: Provided, however, That the duty or burden of collecting or enforcing the payment of such tax shall not be imposed upon any such Federal credit union and the tax shall not exceed the rate of taxes imposed upon holdings in domestic credit unions." (Emphasis ours.)

That the Congress has the power to exempt the property of Federal instrumentalities and their shares and shareholders from State and other local taxation has long been well settled. Having such power to grant exemption, it seems that the Congress may attach reasonable restrictions upon the taxing authorities when exemption is waived. A similar waiver is found with respect to the taxation of national banks, under which only one of four prescribed methods may be followed by States in taxing such banks. Title 12, U.S.C.A., Section 548. Logically, then, it follows that the restrictions embodied with respect to the taxation of Federal credit unions are within the power of the Congress and that they take precedence over State taxing statutes.

CONCLUSION

In the premises, we are of the opinion that the provisions of H.C.S.H.B. No. 407 of the 64th General Assembly, requiring credit unions to compute, withhold and pay to the Director of Revenue of the State of Missouri the tax imposed upon the accounts of members of such credit unions, are inapplicable to Federal credit unions.

Respectfully submitted,

WILL F. BERRY, Jr.  
Assistant Attorney General

APPROVED:

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J. E. TAYLOR  
Attorney General

WFB:HR

DIVISION OF MENTAL DISEASES: Under appropriation of \$100,000.00  
POSTWAR FUND: for storeroom and \$15,000.00 for  
bakery, contract may be let in the  
amount of \$115,000.00 for con-  
structing both as a unit.

October 22, 1947

23  
FILED  
65

Dr. Orr Mullinax, Director  
Division of Mental Diseases  
Dept. of Public Health and Welfare  
Jefferson City, Missouri

Dear Sir:

This is in answer to your request for an opinion as to whether under the provisions of House Bill No. 283, Section 3, 64th General Assembly, the bakery and storeroom may be built as one building, and part of the building be used as a storeroom and the remainder as a bakery.

The following pertinent items appear in House Bill No. 283, Section 3, B. ADDITIONS: "For constructing a storeroom to house all commodities, \$100,000.00 \* \* \* For constructing and equipping a bakery, \$15,000.00 \* \* \*."

A storeroom is ordinarily a room in a building set apart and having conveniences especially adapted for the storage and conservation of materials. The word, "storeroom," being defined by Webster as a room in a storehouse or repository; a room in which articles are stored. In distinction to the definition by Webster that the word "storehouse" is defined as a building for keeping goods of any kind and not a storeroom.

5 Words and Phrases, page 76, defines bakery as follows:

"A 'bakery' is any place used for the purpose of mixing, compounding, or baking for sale or for purposes of a restaurant, bakery or hotel, any bread, biscuit, pretzels, crackers, buns, rolls, macaroni, cake, pies, or any food products of which flour or meal is a principal ingredient. Continental Baking Co. v. Campbell, 55 P. 2d 114, 116, 176 Okl. 218."

Therefore, we see from the definitions of storeroom and bakery above that they are not necessarily in terminology to require separate buildings.

Dr. Orr Mullinax

-2-

CONCLUSION

Therefore, in our opinion, a contract may be let in the amount of \$115,000.00 for constructing a storeroom to house all commodities and to construct and equip a bakery under the provisions of House Bill No. 283, supra, as long as the contract includes the construction of a storeroom to house all commodities and the construction and equipment of a bakery.

Respectfully submitted,

ARVID OWSLEY  
Assistant Attorney General

APPROVED:

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J. E. TAYLOR  
Attorney General

AO:LR

SECRETARY OF STATE: Secretary of State authorized to  
fix compensation of all employees  
in his department.

FILED

66

October 14, 1947

Honorable Edgar C. Nelson  
Secretary of State  
Jefferson City, Missouri

Dear Mr. Nelson:

This will acknowledge your letter requesting an opinion from this department, respecting your authority under Senate Bill No. 99 of the 64th General Assembly to fix the compensation of all employees of your department. Your letter is as follows:

"Will you please give me the opinion of your office as to the provision of Senate Bill No. 99? Does it give me authority to fix the compensation of all employees of this department, including that of Chief Clerk, Supervisor of Corporation Registration and Commissioner of Securities, Foreign Corporations Attorney, and Domestic Corporations Attorney?

"I would like to make some changes in my salary bracket if the new law so permits. Therefore, I would appreciate your prompt advice in the matter."

Senate Bill No. 238 enacted by the 63rd General Assembly and now appearing in Laws of Missouri, 1945, page 1724, repealed all of Sections 12994 to 13009, inclusive, of Chapter 86, R.S. Mo. 1939, relating to the Secretary of State, and enacted in lieu of said sections so repealed sixteen new sections to be known as Sections 12994, 12995, 12996, 12997, 12998, 12999, 13000, 13001, 13002, 13003, 13004, 13005, 13006, 13007, 13008 and 13009.

The General Assembly did not disturb Chapter 86 in repealing the above enumerated sections, so that when enacted, the new sections above enumerated still fall within Chapter 86.

Senate Bill No. 99, enacted by the 64th General Assembly, repealed Section 12998 of Senate Bill No. 238, Laws of Missouri, 1945, page 1724, l.c. 1726, and enacted in lieu thereof a new section to be known as Section 12998.

The particular question you submit in your request for this opinion is whether Section 12998 of Senate Bill No. 99 gives the Secretary of State the authority to fix the compensation of all employees of his department, including that of Chief Clerk, Supervisor of Corporation Registration and Commissioner of Securities, Foreign Corporations Attorney and Domestic Corporations Attorney.

Both Senate Bills Nos. 238 and 99 give the Secretary of State the power to appoint or select or to employ such clerks and employees as may be necessary for the performance of the duties of his office.

Section 12998 of Senate Bill No. 238, Laws of Missouri, 1945, 1724, l.c. 1726, and Section 12998 of Senate Bill No. 99 differ as to the extent of the power granted the Secretary of State to fix the salaries of his appointees or employees. Section 12998 of Senate Bill No. 238 gave the Secretary of State the authority to "select, remove and fix the compensation except as otherwise provided by law of such clerks and employees as may be necessary \* \* \*"

Senate Bill No. 99 omits the proviso, "as otherwise provided by law," from its terms, and states:

" \* \* \* to fix the compensation of such clerks and employees as may be necessary in the performance of the duties of his office. \* \* \*"

Regardless, however, of said conflict in Senate Bills Nos. 238 and 99 on the question of fixing salaries for the employees of the Secretary of State's office, we are confronted with the terms of Section 129, Laws of Missouri, 1945, l.c. 709, 710, a new section, enacted as a part of House Committee Substitute for House Bill No. 511, to take the place of Section 129, Laws of Missouri, 1943, l.c. 475, which was repealed by said substitute Bill No. 511, and which said Section 129, Laws of Missouri, 1945, l.c. 709, 710, definitely fixes the salaries of a number of the employees who were therein contemplated to be and who are employees in the Secretary of

State's office. Said new Section 129, Laws of Missouri, 1945, l.c. 709, 710 of the new Business and Corporation Code, is as follows:

"The Secretary of State is hereby empowered to employ a registration clerk, at an annual salary of twenty-four hundred dollars (\$2,400.00) per year, and such clerical help during the months of June, July, August and September, of each year, as may be necessary to administer this law, at the salary now paid by law to clerks in the state department, and some suitable person, who shall be an attorney at law, as supervisor of corporation registration, whose duty it shall be, under the direction of the Secretary of State, to aid in the supervision of the registration of corporations. The supervisor of corporation registration for his services as supervisor of corporation registration and as commissioner of securities shall receive a salary of forty-five hundred dollars (\$4,500.00) per annum. The salary of the Foreign Corporations Attorney shall be thirty-two hundred dollars (\$3,200.00) per year and the salary of the Domestic Corporations Attorney shall be twenty-eight hundred dollars (\$2,800.00) per year. The salary of the supervisor corporation registration and corporation attorneys and clerks shall be paid in equal monthly installments out of the fund arising from the administration of this article, by warrants drawn by the state auditor upon such fund; in addition all traveling expenses of the Secretary of State, or the supervisor of corporation registration, shall be paid out of such fund on voucher approved and audited by the state auditor, with warrants drawn on the treasurer by the state auditor. All attorneys employed pursuant to the provisions of this section, shall be duly licensed under the laws of this state."

This section provides for the administration, insofar as it relates to the Secretary of State's office, of the new



Corporation Code of this State. It relates to the duties of the Secretary of State solely for that purpose. Said section was in complete harmony with Section 12998 of Senate Bill No. 238, since that section, in granting the Secretary of State power to fix the compensation of his clerks and employees, except as otherwise provided by law, recognized the compensation provision found in Section 129 relating to certain employees of the corporation department.

However, when Section 12998 was reenacted in Senate Bill No. 99, the proviso, "as otherwise provided by law," was omitted. In the absence of said proviso, Section 12998 as it now stands is the sole provision relating to the compensation of clerks and employees of the Secretary of State's office. It is apparent that the Legislature, in omitting said proviso, intended to disregard the compensation provision found in Section 129 of the Business and Corporation Code, and vested in the Secretary of State the power and authority to fix the compensation of all clerks and employees employed in his department. Whenever the Legislature amends a statute in a certain manner, we must proceed on the theory that the Legislature intended something by the amendment. In the case of *State v. Hughes*, 173 S.W. (2d) 877, the court said at pages 880 and 881:

"What is the effect of these legislative changes? The general rule is that when part of a statute is repealed by an amendatory act, the provisions retained are regarded as a continuation of the former law, while those omitted are treated as repealed. \* \* \* Such amendments have been accepted as controlling evidence of the legislative intent. \* \* \* The presumption is that the Legislature intended the unamended part to remain operative and effective as before, \* \* \* But the whole statute as amended should be construed on the theory that the law-makers intended to accomplish something by the amendment. \* \* \*

"Consider these canons in connection with the facts here. When Sec. 4906 was first enacted it contained an express provision making it say what respondents hold it still means, namely that the licensee must be a voter and taxpayer of the county, town, city or village - wherein he seeks a license.

Those last words and another provision (barring alien licensees) were stricken out in 1935; and at the same time and in the next section of the same Act it was provided that a retail dealer in liquor by the drink (who, also, is a licensee under Sec. 4906) may have not more than three licenses, nor shall he sell at more than three places in the state. Obviously such a licensee could not be a voter and resident taxpayer of three counties, towns, cities or villages at the same time.  
\* \* \*

"It seems very clear to us that the words 'wherein such person seeks a license hereunder,' appearing in Sec. 27 of the original Liquor Control Act must be considered as having been repealed when that section was re-enacted without them in 1935, especially in view of the added Section 27a.  
\* \* \*

\* \* \*

" \* \* \* We have the conviction that the statute does not and cannot still mean the licensee must be a voter and taxpayer of the county, town, city or village wherein he seeks the license, when that last adverbial clause was stricken from it eight years ago and another provision added which by clear implication permits him to have more than one license at the same time at different places in the state. \* \* \*"  
(Emphasis in last sentence in first paragraph ours.)

See also *Holt v. Rea*, 52 S.W. (2d) 877, l.c. 878, and *Smith v. Equitable Life Assur. Soc. of U. S.*, 107 S.W. (2d) 191, l.c. 195.

When significant words are omitted from the reenactment or amendment of a statute, it is clear that the Legislature intended to exclude the object there accomplished by the abandoned words. In the Missouri case of *United States v. Bashaw*, 50 Fed. 749, the United States Circuit Court of Appeals for the Eighth Circuit said at pages 753 and 754:

" \* \* \* It is a fundamental rule of construction that, if possible, force must be given to all the words used therein, and also that, when a previous statute is amended by an alteration of the terms used therein, it is to be presumed that it was the intent to alter the meaning of the previous act in that particular. If it was the intent of congress, in passing the amendatory act of 1873, to leave the question of compensation to the attorney unchanged, why was it that congress struck out the words 'for expenses incurred and services rendered in prosecutions for such fines and personal penalties,' etc., and inserted the words found in section 838? The natural presumption is that the phraseology of the statute was changed in order to change its meaning. The very fact that the prior act is amended demonstrates the intent to change the pre-existing law, and the presumption must be that it was intended to change the statute in all the particulars touching which we find a material change in the language of the act. \* \* \* In our judgment, the change in the language used in the amendatory act of 1873 must be given its legitimate force, and the fair and natural meaning of the words used in the section ought not to be narrowed in the attempt to make its meaning conform in this particular to the previous statute."

(Reversed in 152 U. S., 436, 38 L. Ed. 505, but on other grounds.)

See also *Wills v. Russell*, 100 U. S. 621, 25 L. Ed. 607, and *San Marcos Baptist Academy v. Burgess*, 292 S.W. 626.

The Secretary of State therefore is authorized to fix the compensation of the Chief Clerk, Supervisor of Corporation Registration and Commissioner of Securities, Foreign Corporations Attorney, and Domestic Corporations Attorney, as well as that of all other clerks and employees in his department.

Conclusion.

In view of the foregoing, it is the opinion of this department that the Secretary of State is, under the provisions of Section 12998 of Senate Bill No. 99 of the 64th General Assembly, authorized to fix the compensation of all employees in his department, including that of Chief Clerk, Supervisor of Corporation Registration and Commissioner of Securities, Foreign Corporations Attorney, and Domestic Corporations Attorney.

Respectfully submitted,

DAVID DONNELLY  
Assistant Attorney General

APPROVED:

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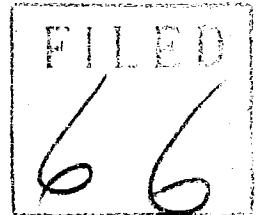
J. E. TAYLOR  
Attorney General

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SECRETARY OF STATE: It is his duty under Senate Bill No. 196, Missouri Laws of 1945, to compile, index, and publish all rules adopted by each agency. Also, it is his duty to publish the monthly bulletin, as required in said bill, setting forth the text of all rules filed during the preceding month by the state agencies.

October 27, 1947

Honorable Edgar C. Nelson  
Secretary of State  
Jefferson City, Missouri



Dear Sir:

This is in reply to your letter dated October 16, 1947, wherein you requested an opinion of this department relative to the compilation of rules for the various state agencies. Said letter reads as follows:

"Senate Bill 196, enacted by the General Assembly (1945 Session Acts, Page 1505), provides for a monthly bulletin setting forth the text of all rules filed during the preceding month, excluding rules now in effect. It further provides that "the proper state officer" shall, as soon as possible after the effective date of this act, compile, index, and publish all rules adopted by each agency and remaining in effect.

"Will you please advise me if "the proper state officer" refers to the Secretary of State.

"In view of the fact that the Section provides that each state agency shall file its rules with the Secretary of State, it would appear, by implication, that Section 3 intends to impose upon the Secretary of State the duty of publishing the monthly bulletin."

Senate Bill No. 196, passed by the 63rd General Assembly, and found in Missouri Laws of 1945, page 1504, made provisions relating to rules and regulations of the various administrative agencies of the state government. Section 2 reads as follows:

"(a) Each state agency shall file forthwith in the office of the Secretary of State a certified copy of each rule

adopted by it, including all rules now in effect. The Secretary of State shall keep a permanent register of such rules open to public inspection.

"(b) Each rule hereafter adopted shall become effective ten days after such filing unless a later date is required by statute or specified in the rule."

Section 3 reads as follows:

"(a) For the state agencies there shall be a monthly bulletin in which it shall set forth the text of all rules filed during the preceding month, excluding rules now in effect.

"(b) The proper state officer shall, as soon as possible after the effective date of this act, compile, index, and publish all rules adopted by each agency and remaining in effect. Compilations shall be supplemented or revised as often as necessary, and at least once every two years.

"(c) Bulletins and compilations shall be made available upon request to state and local officials free of charge, and to other persons at a price fixed by the proper state authority to cover publication and mailing costs. The costs of such printing and publication shall be paid out of the funds for the operation of the agency filing such rules."

From Section 2, we find the provision that a copy of all rules of each state agency is to be filed in the office of the Secretary of State. Immediately following Section 2, we find Section 3 providing for the publication of a monthly bulletin for the state agencies, which shall set forth the text of all rules filed during the preceding month, excluding rules then in effect. Then paragraph (b) of Section 3 says that the "proper state officer" is to compile and publish all rules adopted by each agency.

The justification and reasoning back of such legislation as quoted herein is to provide a centralized point for the filing and keeping of a permanent register of such rules. This is not only for the purpose of maintaining a record, but is also for the general information of the various departments and the interested public. Such a duty is in line with many of the other functions of the office of Secretary of State; as for example, the printing and disposition of the laws enacted by the General Assembly.

Although it is ambiguous as to just what state officer is referred to, we cannot help but feel it was intended to mean the Secretary of State. By the terms of Section 2, it is provided that the rules relating to the agencies are to be filed in the office of the Secretary of State. In view of this, then, it would logically follow that the only state officer contemplated as having convenient access to these rules for the purpose of publishing the monthly bulletin, and compiling, indexing, and publishing all rules adopted by each agency would be the Secretary of State. This, we feel, is but an application of the fundamental rule in the construction of statutes to the effect that attempt is to be made to ascertain and give effect to the purpose of the Legislature. State ex rel. Consolidated School District No. 1 v. Hackmann, 302 Mo. 558.

#### CONCLUSION

It is, therefore, the opinion of this department that, in accordance with Section 3 of Senate Bill No. 196, Missouri Laws of 1945, page 1504, the Secretary of State is the proper state officer, as intended by the terms of paragraph (b), Section 3, thereunder, who is to compile, index, and publish all rules adopted by each agency and remaining in effect.

It is further the opinion of this department that it is intended by Section 3 of said Bill No. 196 to place upon the Secretary of State the duty of publishing the monthly bulletin.

Respectfully submitted,

Wm. C. COCKRILL  
Assistant Attorney General

APPROVED:

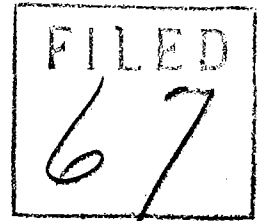
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J. E. TAYLOR  
Attorney General

*Criminal Law*

MAGISTRATES: Prosecuting attorney may file information for a misdemeanor in the circuit court and may file a delinquency case in the circuit court. Defendant cannot take a change of venue from circuit court to magistrate court.

March 5, 1947



Honorable Joel B. Norman  
Magistrate of Stone County  
Galena, Missouri

Dear Sir:

This will acknowledge receipt of your letter of recent date in which you have requested an opinion of this department in regard to the following questions:

- (1) May the prosecuting attorney file information for misdemeanors in the circuit court?
- (2) May a defendant take a change of venue from a circuit court to a magistrate in a misdemeanor case?
- (3) May the prosecuting attorney file delinquency cases in the circuit court rather than the magistrate court?

In answer to question one, we direct your attention to Section 1 of Senate Bill 193, which provides:

"Magistrates shall have concurrent original jurisdiction with the circuit court, coextensive with their respective counties in all cases of misdemeanor, except in cities having courts exercising exclusive jurisdiction in criminal cases, or as otherwise provided by law."

It is clear from the above section that the circuit courts also have original jurisdiction in all cases of misdemeanors. Therefore, the prosecuting attorney may file any misdemeanor case in the circuit court if he so desires.



Your second question is whether or not a change of venue may be taken from a magistrate court to a circuit court. There are provisions for taking a change of venue from one magistrate court to another and from the magistrate court to the circuit court in Senate Bill 193 and Senate Bill 207 of the 63rd General Assembly, but there is no provision in said bills for taking change of venue from the circuit court to the magistrate court. Change of venue from the circuit court is provided for by Section 4015, R. S. Mo. 1939, which reads as follows:

"Any criminal cause pending in any circuit court may be removed, by the order of such court or the judge thereof, to the circuit court of another county in the same circuit, whenever it shall appear, in the manner hereinafter provided, that the minds of the inhabitants of the county in which the cause is pending are so prejudiced against the defendant that a fair trial cannot be had therein."

And Section 4017, R. S. Mo. 1939, which reads as follows:

"Whenever it shall appear, in the manner hereinafter provided, that the inhabitants of the entire circuit are so prejudiced against the defendant that a fair trial cannot be had therein, the cause shall, by order of the court or judge thereof, be removed to another circuit, in which such prejudice is not alleged to exist."

Therefore, since the above sections provide that the case shall be transferred to another circuit court, a change of venue cannot be taken by a circuit court to a magistrate court.

The last question you ask is whether or not the prosecuting attorney may file delinquency cases in the circuit court. Section 11 of Senate Bill 207, provides:

"Magistrate courts, in counties of less than 70,000 inhabitants, shall have concurrent juvenile jurisdiction with the circuit court, and the powers of the circuit judge in chambers when the circuit judge is absent from the county."

You will note under the above section that the magistrate and circuit courts have concurrent juvenile jurisdiction. Therefore, the prosecuting attorney can file a delinquency case either in the circuit court or the magistrate court as he so desires.

Conclusion

It is, therefore, the opinion of this department that (1) a prosecuting attorney may file an information for a misdemeanor in the circuit court; (2) a defendant cannot take a change of venue in a misdemeanor case from a circuit court to a magistrate court; and (3) a prosecuting attorney may file a delinquency case in either the circuit court or a magistrate court.

Respectfully submitted,

PERSHING WILSON  
Assistant Attorney General

APPROVED:

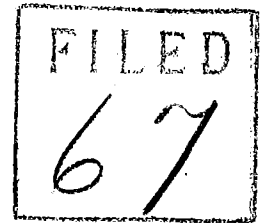
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J. E. TAYLOR  
Attorney General

EW:MG

TOWNSHIPS: In county under township organization county court  
ROADS AND BRIDGES: may levy special tax for road and bridge purposes  
TAXATION: only under provisions of Sec. 8529, Laws of 1945,  
ELECTION: p. 1478. Township board cannot call election for  
purpose of voting tax for road purposes.

December 8, 1947



Honorable Wayne Norman  
Prosecuting Attorney  
Putnam County  
Unionville, Missouri

Dear Sir:

This is in reply to your letter of recent date, requesting an official opinion of this department and reading as follows:

"I shall appreciate your opinion on the following matters:

"May a County Court of a county having township organization levy a special tax for road and bridge purposes, either upon its own motion or by a special election called for such purpose?

"May a township board call a special election for the purpose of voting an addition tax for road purposes?"

In answer to the questions contained in your request, we are enclosing official opinions of this department rendered under date of February 4, 1947, to Herbert S. Brown, July 8, 1947, to R. E. Moulthrop, and July 25, 1947, to C. E. Ernst. We believe that the enclosed opinions fully answer the questions contained in your request.

#### CONCLUSION

It is the opinion of this department that in a county under township organization the county court has authority to levy a special tax for road and bridge purposes only under the provisions of Section 8529, Laws of Missouri, 1945, page 1478, and

Honorable Wayne Norman

-2-

that such tax can be imposed only in the special or general road districts voting for the imposition of such tax at a special election.

It is further the opinion of this department that a township board has no authority to call a special election for the purpose of voting an additional tax for road purposes.

Respectfully submitted,

C. B. BURNS, Jr.  
Assistant Attorney General

APPROVED:

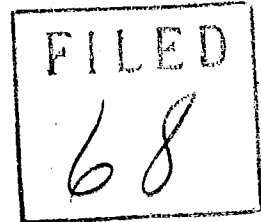
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J. E. TAYLOR  
Attorney General

CBB:HR

MAGISTRATES: Magistrate is required by law to appoint a clerk within a reasonable time after being sworn in as magistrate. Magistrate cannot appoint as clerk a school teacher who is employed full time as school teacher and unable to work during office hours as clerk of the magistrate court except on Saturdays and week ends.

January 18, 1947



Honorable Ben W. Oliver, Member  
Missouri House of Representatives  
63rd General Assembly  
6209 East 15th Street  
Kansas City, Missouri

Dear Sir:

This will acknowledge receipt of your request for an official opinion, which reads:

"I am very desirous of obtaining some information pertaining to the appointment of a magistrate's clerk in a fourth-class county.

"In this county, the clerk desired is teaching school and her term will not be completed until five months after January 1st.

"The information desired is whether or not the magistrate is compelled to appoint the magistrate's clerk in January, 1947 or whether it would be possible for the magistrate to hold up such an appointment until May or June, 1947. If this is not possible, can the magistrate appoint the desired clerk in January, and this clerk work evenings and weekends until May or June and then devote full time to the office."

We are assuming for the purpose of this opinion that the party under consideration for the appointment of clerk of the magistrate court is now employed full time as a school teacher. Furthermore, that, if she is appointed to this office, the plan is for her to work some evenings after business hours and on week ends. This is a rather unusual request, in that the applicant for this position does not contemplate spending at least some time during business hours. This department has

had numerous similar requests, but in most every instance, the applicant spent some time during business hours performing the duties of the office.

You first inquire if the magistrate is required to appoint a clerk in January, 1947. Section 21, Senate Bill 207, passed by the 63rd General Assembly, specifically requires each magistrate shall appoint and fix the salary of a clerk of his court and he may appoint such deputies and employees as may be necessary and fix their salaries. Said section reads as follows:

"In all counties each magistrate shall by an order duly made and entered of record appoint and fix the salary of a clerk of his court and may appoint such deputies and employees as may be necessary for the proper dispatch of the business of his court and fix their salaries at such sum as in his discretion may seem proper. The total salaries of clerk, deputies and other employees paid by the state shall in no event exceed the annual amount fixed in this act for clerk and deputy clerk hire of such courts, provided that in any county where need exists, the county court is hereby authorized, at the cost of the county, to provide such additional clerks, deputy clerks or other employees as may be required. All such clerks, deputies and employees shall serve at the pleasure of the magistrate. Each clerk of the magistrate court shall take the oath required of other clerks of courts in this State. Before entering upon the duties of his office, the clerk and deputy clerk shall enter into a bond to the State of Missouri, with good and sufficient sureties, to be approved by the magistrate, in the sum of \$1,000.00, conditioned that he will faithfully discharge all of the duties of his office; which bond shall be filed and recorded in the office of the county clerk of the county. For breach of any of the conditions of such bond suit may be brought as upon other penal bonds. Any magistrate or clerk of the magistrate court

failing or refusing in his receipts for fees to give an itemized account of such charge, with date, shall upon conviction, be deemed guilty of a misdemeanor. In all counties where magistrates organize into a court with divisions there shall be but one clerk of the magistrate court who may act as clerk for one of the magistrates. There shall not be more than one deputy clerk for each magistrate and all deputies shall be under the direction of the clerk but shall be appointed by the court."

As a general rule, when the word "shall" is used, it is mandatory, and when the word "may" is used, it is permissive. In *State ex inf. McKittrick v. Wymore*, 119 S.W. (2d) 941, 343 Mo. 98, the court said, l.c. 944:

"Respondent argues that the remedy provided by this statute is an exclusive remedy against respondent for misconduct. On reading the article it will be noted that the words 'may' and 'shall' are used many times in the several sections. They were used advisedly and must be given their usual and ordinary meaning. It is the general rule that in statutes the word 'may' is permissive only, and the word 'shall' is mandatory.\* \* \*"

By use of the word "shall" in Section 21, supra, relative to the appointment of the clerk and the use of "may" for the appointment of the deputy clerks, we are of the opinion the foregoing rule of construction is applicable. Had the Legislature left the appointment of both the clerk and deputy clerks to the discretion of the magistrate, it would have in all probability used the word "may" in both instances. Therefore, by using "shall" instead of "may," under the foregoing rule of statutory construction, the Legislature made it mandatory upon the magistrate to appoint a clerk and left it to the discretion of the magistrate in the appointment of deputy clerks.

Your second inquiry as to whether you may employ the school teacher as clerk of the magistrate court, is a little difficult to answer on the limited facts stated in your request. The clerk of the magistrate court has several specific statutory duties such as taking the fee upon filing any cause of action in the magistrate court; also the clerk has all of the administrative power and authority vested in the magistrate under the

law, and is required to make certain reports, etc. Section 23, Senate Bill 207, supra, in part reads:

"Upon the commencement of any proceedings in the magistrate court the party commencing the same shall pay to the clerk of said court a magistrate fee of five dollars (\$5.00.)  
\* \* \* \* \*

Section 145, Senate Bill 207, supra, reads:

"All acts of an administrative nature including issuance of process, herein required of the magistrate may be performed by the clerk or deputy clerk of the magistrate court."

We do not contend that the duties of the school teacher in this instance and that of the clerk of the magistrate court are incompatible in so far as the duties of one office conflict with the duties of the other. But where it definitely is shown to be a physical impossibility to perform the duties of both offices at the same time and during school and office hours, then we certainly think that it is beyond the stretch of imagination to say that an appointive officer, who has certain statutory duties that cannot possibly be performed except during business hours and while at the office, can hold both offices. In *Perkins v. Manning*, Superintendent of Public Health, 122 P. (2d) 857, 1.c. 861, the court, in holding that it is against public policy for a public officer to accept another public office not only when the duties of the two offices are incompatible but also when it is a physical impossibility for him to perform the duties of both offices, said:

"We think that public policy requires that anyone accepting and retaining a public office should not place himself, by the accepting of another office, in such a position that it is physically impossible for him properly to perform the duties of both offices, and if the nature of the two offices is such that this impossibility does appear, the offices are incompatible and the acceptance of the second office, ipso facto, vacates the first. Applying that rule, is it possible that petitioner can properly perform the duties of major in the United States army and of superintendent of public health in the state of Arizona? We think it is obvious that he cannot.



As was said in *State v. Buttz*, supra, 'Here are two offices held under two distinct governments; the duties of the one are to be performed in Washington, while those of the other are to be performed in this State.' In the present case, petitioner's duties as a major in the United States army not only called him out of the state of Arizona, but may call him out of the United States itself, while the great majority of his duties as superintendent of public health must be performed within the state.

\* \* \* \* \*

"We hold, therefore, that the doctrine of incompatibility of offices depends upon the public policy of the state; that offices are incompatible not only when the duties thereof are in conflict, but when it is physically impossible that they may be performed properly by the same person; that on the facts as shown it was physically impossible for petitioner to perform properly the duties of the two offices which he attempted to retain, and that his acceptance of the duties and emoluments of the second office was, ipso facto, a vacation of the first."

We are not unmindful of certain decisions holding that certain public officers do not forfeit their offices by reason of being inducted into the armed forces of this country in time of war. (See *State v. Grayston*, 163 S.W. (2d) 335, and *State v. Wilson*, 166 S.W. (2d) 499.) The question that arose in those cases was whether said officers forfeit their offices by becoming a member of the armed forces of this country. In one case the officer was a circuit judge, and the other a circuit clerk. In *State v. Grayston*, supra, the court recognized the incompatibility of the office of circuit judge and service in the regular army, but not with a militiaman. In so holding, the court said, l.c. 340:

"We would recognize as incompatible service in the Regular Army as we understand that term to denote the professional, permanent soldiery, those who have chosen the military service as a career. They should be distinguished from the militiamen who are ordinarily occupied in the pursuits of civil life but are

organized for discipline and drill and called into the field for temporary military service when the exigencies of the country require it and from the citizen-soldiers who are in the military services only in time of war or emergency."

Regarding the conflicting duties of the two offices in the above case, we are of the opinion the duties of one in the service of the regular army in all probability conflict no more than one in the militia, with the office of circuit judge or circuit clerk. Especially is this true during a war. The principal distinction between one in the service in the regular army and the militia, as stated by the court, is that those in the former are considered more as professional soldiers and most of the time away, whereas the one in the militia is a greater part of the time carrying on the duties as a civilian, such as circuit judge or circuit clerk, except when called into the service in time of war or emergency. Therefore, our court in the above decision must also have considered, at least to some extent, offices to be incompatible when unable to properly perform the functions of the two offices at the same time.

One of the primary rules of statutory construction is to ascertain, if possible, from words used in a statute the legislative intent and to give effect to the lawmakers intent. (See City of St. Louis v. Pope, 126 S.W. (2d) 1201, 344 Mo. 479.) Also, another cardinal rule of statutory construction is that statutes must be given a sensible construction and should not be construed so as to make it unreasonable where it can be given reasonable construction. (See Lambur v. Yates, 148 Fed. (2d) 137; State ex rel. St. Louis Public Service Co. v. Public Service Commission, 34 S.W. (2d) 486, 326 Mo. 1169; also Chrisman v. Terminal R.R. Association of St. Louis, 57 S.W. (2d) 230, 237 Mo. App. 181.)

Section 12828, R.S. Mo. 1939, provides that any person elected or appointed to any county office shall be subject to removal who shall fail personally to devote his time to the performance of the duties of such office, and reads:

"Any person elected or appointed to any county, city, town or township office in this state, except such officers as may be subject to removal by impeachment, who shall fail personally to devote his time to the performance of the duties of such office, or

who shall be guilty of any willful or fraudulent violation or neglect of any official duty, or who shall knowingly or willfully fail or refuse to do or perform any official act or duty which by law it is his duty to do or perform with respect to the execution or enforcement of the criminal laws of the state, shall thereby forfeit his office, and may be removed therefrom in the manner hereinafter provided."

While our courts have held that it is not necessary to go to such trouble in removing said officers when they are not appointed for a definite term of office, (see State ex rel. v. Sartorius, 95 S.W. (2d) 873), we are of the opinion that it may be applicable in case such officer should appoint some person and then refuse to remove his appointee from office although under the law said appointee may be subject to removal.

The clerk to be appointed by the magistrate is not appointed for any specific statutory period of time. Therefore, said clerk may be removed at the pleasure of the officer appointing him, in this case it is the magistrate. In State ex rel. Mincke et al. v. Sartorius, 95 S.W. (2d) 873, l.c. 875, the court, in so holding, said:

"\* \* \* \* Where the appointment is for a definite term, the appointment logically confers on the officer the right to serve out his full official period unless forfeited by his own misconduct, since the very fact of the definiteness of the official tenure necessarily negatives any idea of a reservation of power and authority on the part of the appointing power to remove the officer at will. On the other hand, where the law conferring the authority under which the appointment is made is silent as to any limitation upon the right of removal and the duration of the official term is thus left unlimited except by the will and pleasure of the appointing power, then under such circumstances the unqualified power of removal is an incident to the very power of appointment itself, which may be invoked and applied at pleasure without

Honorable Ben W. Oliver

-8-

notice, the making of charges, or a hearing thereon. State ex inf. v. Hedrick, 294 Mo. 21, 241 S.W. 402; State ex rel. v. City of St. Louis, 90 Mo. 19, 1 S.W. 757; Horstman v. Adamson, 101 Mo. App. 119, 74 S.W. 398; 46 C.J. 989; 22 R.C.L. Section 287, p. 576."

(Also, see State ex rel. Brokow v. Board of Education of the City of St. Louis, 171 S.W. (2d) 75.)

In view of the foregoing decisions, the magistrate could appoint a clerk until such time as the school teacher could assume the duties of the office of clerk and then remove said clerk and appoint the school teacher to the office.

#### CONCLUSION

Therefore, it is the opinion of this department that, as magistrate of the court, it is his mandatory duty to appoint a clerk of said court. Furthermore, that to appoint a school teacher employed full time as school teacher and unable to be at the office of the magistrate during office hours, except on Saturdays and week ends, as clerk of the magistrate court, would be against public policy and not a valid appointment under the law.

Respectfully submitted,

AUBREY R. HAMMETT, Jr.  
Assistant Attorney General

APPROVED:

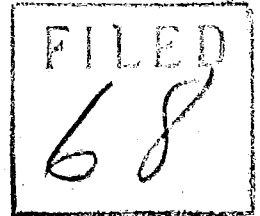
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J. E. TAYLOR  
Attorney General

ARR:LR

RECORDER OF DEEDS: No provision is made under the laws for payment  
of deputy recorder of deeds in counties where  
DEPUTIES: the circuit clerk is ex officio recorder of deeds.

February 6, 1947



2  
1  
2  
Smith  
Honorable Don W. Owensby  
Prosecuting Attorney  
Dallas County  
Buffalo, Missouri

Dear Sir:

This is in reply to your letter of recent date wherein  
you submit the following statement of facts and question:

"House Bill #774 of the 63rd General  
Assembly relating to the office of Circuit  
Clerk and Recorder in counties of the  
fourth class provides in Section 6 there-  
of for the appointment of deputy record-  
ers by the elected recorder to be approved  
by the county court. Said bill however  
makes no provision for the payment of a  
salary to a deputy recorder except in the  
general terms of section 7 of said bill.

"QUERY: Is the county court in a county  
of the fourth class authorized to pay out  
of class four funds a salary to a deputy  
county recorder appointed under the pro-  
visions of Bill #774 and in an amount set  
by the county court?"

Section 5 of House Bill No. 774 of the 63rd General  
Assembly, approved on April 10, 1946, seems to be the provision  
of the law covering the subject of deputies in the office of  
circuit clerk and recorder in counties of the fourth class.  
This section reads as follows:

"The circuit clerk and recorder in counties  
of the fourth class shall be entitled to  
such number of deputies and assistants,  
to be appointed by such official, with the  
approval of the judge of the circuit court,  
as such judge shall deem necessary for the  
prompt and proper discharge of the duties  
of his office. The judge of the circuit  
court, in his order permitting the circuit  
clerk and recorder to appoint deputies or

assistants, shall fix the compensation of such deputies or assistants which order shall designate the period of time such deputies or assistants may be employed. Every such order shall be entered on record, and a certified copy thereof shall be filed in the office of the county clerk. The circuit clerk and recorder may at any time, discharge any deputy or assistant, and may regulate the time of his or her employment and the circuit court, may at any time modify or rescind its order permitting an appointment to be made."

Section 6 of the same Act contains the following provisions, relative to deputy recorders in such counties. It reads as follows:

"The circuit clerk and recorder in counties of the fourth class, as recorder of the county, may appoint in writing one or more deputies, to be approved by the county court, which appointment with the like oath of office as their principals, to be taken by them and indorsed thereon shall be filed in the office of the county clerk. Such deputy recorders shall possess the qualifications of clerks of courts of record, and may, in the name of their principals, perform the duties of recorders of deeds, but all circuit clerk and recorders and their sureties shall be responsible for the official conduct of their deputies."

It will be noted from Section 5 of this Act that the judge of the circuit court fixes the compensation of deputies or assistants to the circuit clerk and recorder. Section 6, while it does make provision for the appointment of deputy recorders, subject to the approval of the county court, it makes no provision for the compensation of such deputies. Since the lawmakers have made no provision for compensation to deputy recorders in such counties, applying the principles applied in the Hodaway County v. Kidder case, 344 Mo. 795, 129 S.W. (2d) 857, the county court would not be authorized to appropriate and pay compensation to such deputies. At l.c. 860, the court restated the rule in the following language:

"The general rule is that the rendition of services by a public officer is deemed to be gratuitous, unless a compensation therefor is provided by statute. If the statute provides compensation in a particular mode or manner, then the officer is confined to that manner and is entitled to no other or further compensation or to any different mode of securing same. Such statutes, too must be strictly construed as against the officer. State ex rel. Evans v. Gordon, 245 Mo. 12, 28, 149 S.W. 638; King v. Riverland Levee Dist., 218 Mo. App. 490, 493, 279 S.W. 195, 196; State ex rel. Wedeking v. McCracken, 60 Mo. App. 650, 656.

"It is well established that a public officer claiming compensation for official duties performed must point out the statute authorizing such payment. State ex rel. Buder v. Hackmann, 308 Mo. 342, 265 S.W. 532, 534; State ex rel. Linn County v. Adams, 172 Mo. 1, 7, 72 S.W. 655; Williams v. Chariton County, 85 Mo. 645."

The question here is not similar to the one presented in the case of Rinehart v. Howell County, 153 S.W. (2d) 381, because this is a question of compensation to a public officer, and in the Rinehart case, the question before the court was one of reimbursement to an officer for necessary expenditures.

#### CONCLUSION

From the foregoing, it is the opinion of this department that a county court in a county of the fourth class would not be authorized to pay out of class four funds a salary to a deputy county recorder in counties in which the office of circuit clerk and recorder are combined. It is further the opinion of this department that only deputies and assistants to the circuit clerk and recorder may be paid the salary which is fixed by the judge of the circuit court under authority of Section 5 of said House Bill No. 774.

Respectfully submitted,

APPROVED:

J. E. TAYLOR  
Attorney General

TYRE W. BURTON  
Assistant Attorney General

TWB:VLM

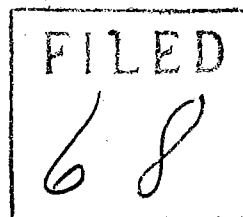
MISSOURI TRAINING SCHOOL  
FOR BOYS:

CONTAGIOUS DISEASE:

ADMISSION:

Boy affected with contagious disease  
not to be admitted to Missouri Train-  
ing School for Boys at Boonville,  
Missouri.

March 13, 1947



4/3

Honorable Woodson Oldham  
Judge of Division No. 2  
Circuit Court of Jasper County  
Webb City, Missouri

Dear Judge Oldham:

Your letter of recent date asking for an opinion of this  
department, reads as follows:

"I would appreciate having the opinion of your  
office on the following situation:

"One Aubrey Rogers, a colored sixteen year old  
boy of Joplin, was sentenced to a term of three  
years at Boonville for car theft and some bur-  
glaries. He was given a blood test, which  
returned negative, for syphilis and then pa-  
roled. While on parole he apparently contracted  
syphilis and when finally delivered to the in-  
stitution a blood test showed positive. After  
keeping him about two weeks the institution  
delivered him back to our jail refusing to keep  
him under Section 9000 R.S. No. 1939. While we  
felt that, since our records showed a commitment  
and delivery to the institution and acceptance  
there, we had no authority to keep the boy, we  
did send him to St. Louis to the Federal Hospi-  
tal there for treatment. After treatment he was  
taken back to Boonville and they refused to  
accept him. We have a letter from the hospital  
that the disease is no longer infectious although  
a blood test will show positive for some period  
of time.

"My questions are:

"1. Can the institution refuse to accept this  
boy? If they cannot refuse to accept does your  
office take the necessary steps to force accep-  
tance?



"2. Is syphilis, an infectious disease, and not contagious, a contagious disease under Section 9000 R.S. Mo. 1939?

"3. Having once accepted a boy committed can the institution deliver him back to this county without parole or similar action?

"4. Are there any other circumstances under which the institution can arbitrarily refuse to accept persons committed from this county aside from the reasons set out in Section 9000?

"I would appreciate an immediate opinion."

Your four questions, pertaining more or less to the same subject matter, are being consolidated and answered as one, and by our answer we will endeavor to cover all the circumstances raised by your questions relative to the committing of boys to the Missouri Training School for Boys at Boonville, Missouri.

Section 9000, R.S. Mo. 1939, provides:

"No person who is neglected or dependent or who is idiotic or insane, or who has any contagious disease, shall be committed to or received by the superintendent into said Missouri training school for boys."

Section 9008, R.S. Mo. 1939, provides:

"It shall be the duty of the said commission to provide for the separation of the inmates in said Missouri training school for boys into different classes and to provide an entirely separate department for each class, so that the younger and less vicious shall not come in contact with the older and more hardened class. Each department shall be entirely separate from any other department and shall have different subordinate officers in control thereof, and said commission shall provide rules whereby the inmates may be transferred

from one department or class to another department or class from time to time, as their conduct may merit or require; and in order that there shall be separate departments so that the inmates may be classified according to their desserts and each class kept in its appropriate department, said commission shall cause suitable buildings and enclosures to be erected for the department or class containing older or more hardened offenders, and those who cannot be controlled except by closer confinement and sterner discipline than in the school department. Said buildings and enclosures shall be erected upon a different part of the grounds from the buildings now located thereon, and shall constitute a distinct department of the institution."

Section 8992.32, Laws 1945, p. \_\_\_\_\_, S.C.S.S.B. No. 347, Sec. 32, Mo. R.S.A. Vol. 19, Cum. Pocket Part, p. 50, provides:

"It shall be the duty of the board of training schools and of the director to formulate and execute plans for the classification of all juvenile inmates committed to their charge as may be necessary to accomplish the proper training and moral rehabilitation of such juvenile inmate. There shall be such classification into groups according to age, mental ability and other pertinent characteristics as may be necessary for segregation of such inmates, as, in the opinion of the superintendent and the staff, may be potentially vicious or criminally inclined from those who are readily amenable to discipline and correction. The superintendent of each training school shall assign one building at said training school for the purpose of a receiving cottage, where inmates shall be received upon commitment and sheltered while being classified and studied by members of the staff so authorized."

These three sections are not conflicting, and their meaning should be harmonized and read together.

Section 9000, supra, recites that no person who has a contagious disease shall be committed to, or received by, the superintendent of the Missouri Training School for Boys.

Section 9008, supra, provides for the classification of the inmates received at the Missouri Training School for Boys, as also, Section 8992.32, supra, provides for the classification and receiving of inmates at training schools.

According to the Division of Health of the Department of Public Health and Welfare, the disease of syphilis is both infectious and contagious, and, being a contagious disease, it therefore falls within the prohibition of Section 9000, supra, and, by this section a boy suffering from a contagious disease cannot be committed by the court, in the first instance, to the institution, and, if committed, then the superintendent of the institution cannot legally receive him.

The provisions of Sections 9008 and 8992.32, supra, fix a period of time for classifying boys committed to the training schools, and such classification includes physical examination, as well as mental, in order to determine the best way to bring about rehabilitation and the proper training that should be given. The receiving period therefore, should be interpreted to mean a period of time in which a boy is held under observation at the Missouri Training School for Boys before he is finally booked as an inmate; so, if any legal reason be found, during the receiving period, why such boy is not a proper subject for admission, then he is to be rejected and referred back to the sentencing court for further consideration. During this time a blood test is made by the Division of Health, at the request of the institution, and a report made according to the finding. When a blood test shows positive the medical staff at the institution advises against the acceptance of the boy, because they contend that as long as the blood test shows positive the disease is contagious. This, therefore, is a question of medical science.

No boy is officially admitted into the Missouri Training School for Boys until he has passed through the classification period, which varies as to the number of days according to the individual, and, if all tests measure up to the requirements of the law for such admission, then he is definitely booked in and becomes an inmate of the institution under the law and can only be released therefrom by due course of law.

The above sections, and particularly Section 9000, R.S. Mo. 1939, are the sections stating the grounds or causes for which,

and under what conditions, a boy cannot be committed to or received by the training schools, and this department does not take any steps to have the training schools accept such person when the law prohibits him from being received. It was the intention of the Legislature, in passing Section 9000, supra, that one affected with a contagious disease should not be accepted at the Missouri Training School for Boys.

CONCLUSION

Therefore, it is the opinion of this department that the Missouri Training School for Boys at Boonville, Missouri, can legally refuse to receive one who has been committed to that institution by a court, when the medical report shows such person is affected with the disease of syphilis. It is further the opinion of this department that the acceptance of a boy committed to the institution is not definite until the examinations made during the period of classification determine that he can legally be admitted.

Respectfully submitted,

GORDON P. WEIR  
Assistant Attorney General

APPROVED:

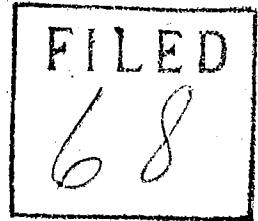
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J. E. TAYLOR  
Attorney General

GPW:CP

MISSOURI REAL ESTATE  
COMMISSION:

Effect of conviction under Sec. 51, Title 18,  
U.S.C.A., upon right to procure real estate  
broker's or salesman's license.

May 2, 1947



Honorable Michael W. O'Hern  
First Assistant Prosecuting Attorney  
Jackson County  
Kansas City, Missouri

Dear Sir:

Reference is made to your letter of recent date, request-  
ing an official opinion of this office, and reading as follows:

"A citizen of this County was convicted in the United States District Court for the Western District of Missouri charging violation of Section 51, Title 18, U. S. Code, in the early part of 1938 and on February 2nd, 1938, was sentenced to imprisonment for four years and to pay a fine of \$100.00; on July 18th, 1938, the sentence was modified to two years and a fine of \$100.00. He was received at the United States Penitentiary at Leavenworth, Kansas July 18th, 1938, was released on parole July 18th, 1939, and discharged therefrom by expiration of sentence July 18th, 1940 - fine of \$100.00 was paid July 18th, 1938. In March of 1947 this party was granted a full and unconditional pardon by President Harry S. Truman. He does not have a real estate broker's license in the State of Missouri.

"Question- Would the Missouri Real Estate Commission be acting within the powers granted to the Commission to refuse to grant a license to a person to transact the business of a real estate broker, or real estate salesman because of the conviction of the applicant, after the pardon by the President of the United States? This calls for a legal

construction of the powers of the Commission by virtue of Section 8300.14, Revised Statutes of Missouri, Annotated."

Section 51, Title 18, U.S.C.A., forms a part of the Criminal Code of the Federal Government relative to offenses against elective franchise and civil rights of citizens. The section reads as follows:

"If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same, or if two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured, they shall be fined not more than \$5,000 and imprisoned not more than ten years, and shall, moreover, be thereafter ineligible to any office, or place of honor, profit, or trust created by the Constitution or laws of the United States."

You have referred specifically to Section 8300.14, Mo. R.S.A., and therefore we shall not in this opinion consider other matters which might be considered by the Missouri Real Estate Commission in determining whether or not the applicant should be granted a license. The statute mentioned reads as follows:

"Where during the term of any license issued by the commission the licensee shall be convicted in a court of competent jurisdiction in the state of Missouri or any state (including federal courts) of forgery, embezzlement, obtaining money under false pretenses, extortion, criminal conspiracy to defraud, or other like offense or offenses and a duly certified or exemplified copy of the record in such proceedings shall be filed with the commission, the commission shall revoke forthwith the license by it theretofore issued to the licensee so convicted."

"No license shall be issued by the commission to any person known by it to have been con-

victed of forgery, embezzlement, obtaining money under false pretenses, extortion, criminal conspiracy to defraud, or other like offense or offenses, or association or copartnership of which such person is a member, or to any association or copartnership of which such person is an officer, or in which as a stockholder such person had or exercises a controlling interest either directly or indirectly."

Your particular question, then, will be controlled by the construction to be placed upon the second paragraph of the statute quoted. By its terms it authorizes the Missouri Real Estate Commission to deny a license to any person known by the Commission to have been convicted of forgery, embezzlement, obtaining money under false pretenses, extortion, criminal conspiracy to defraud, or other like offense or offenses. At this point, may we observe that the offenses specifically enumerated are those containing elements of fraud, fraudulent misrepresentation, forgery, breaches of trust, and matters of like import.

Examination of the section of the Federal Criminal Code, quoted supra, discloses that it deals only with offenses against the civil rights guaranteed to persons under the Constitution or laws of the United States. Cases arising thereunder generally are those relating to the rights of citizens to vote, to personal liberty, to have protection against violence, to speedy and public trials, the right to testify, and matters of similar import. It does not cover any of the offenses specifically enumerated in Section 8300.14, Mo. R.S.A.

From the foregoing, it is readily apparent that before a conviction under Section 51, Title 18, U.S.C.A., may serve as the basis for denial of a license to an applicant, it must necessarily be determined that offenses thereunder would be construed to be included within the phrase "or other like offense or offenses" found in the Missouri statute quoted.

To this end, it is a canon of statutory construction that the intent of the Legislature in enacting a statute must be ascertained and due regard given to that intent. We quote from *Donnelly Garment Co. v. Keitel*, 193 S. W. (2d) 577, wherein the Supreme Court of Missouri said:

" \* \* \* And a primary rule of construction of a statute is to ascertain from the language used the intent of the lawmakers if possible,  
\* \* \* "

To ascertain such intent, the rule of ejusdem generis is applied by the courts. We quote from *Zinn v. City of Steelville*, 173 S. W. (2d) 398, wherein the Supreme Court of Missouri said:

"Where general words in a statute follow specific words, designating special things, the general words will be considered as applicable only to things of the same general character as those which are specified."  
\* \* \*

Further, in ascertaining such legislative intent, another rule of construction which is applied is that where express power is granted to do an act in a certain manner, such act may not be done in any other manner. We quote from *Lancaster v. County of Atchison*, 180 S. W. (2d) 709:

"\* \* \* Where the statute (Section 8548) 'limits the doing of a particular thing in a prescribed manner, it necessarily includes in the power granted the negative that it cannot be otherwise done.' *Keane v. Strodtman*, 323 Mo. 161, 18 S. W. 2d 896, 898. See, also, *Dougherty v. Excelsior Springs*, 110 Mo. App. 623, 85 S. W. 112; *Taylor v. Dimmitt*, 326 Mo. 330, 78 S. W. 2d 841, 98 A.L.R. 995."  
\* \* \*

Applying these rules of construction to the statute now under consideration, we perceive that the incorporation of the phrase "or other like offense or offenses" would have the effect only of authorizing the Missouri Real Estate Commission to deny a license upon a conviction of an offense similar to those specifically enumerated. As has been pointed out previously, offenses under Section 51, Title 18, U.S.C.A., are completely different in their characteristics and elements than those which have been enumerated. We, therefore, come to the conclusion that such offenses are not within the scope of the quoted phrase "or other like offense or offenses."

As was pointed out at the beginning of this opinion, we are not determining in any manner the effect which might be given such conviction by the Missouri Real Estate Commission in so far as such conviction might affect the reputation of the person for honesty, integrity or fair dealing, or other causes for which a denial of license might properly be made. Neither have we considered the effect of the pardon granted the person referred to in your letter by the President of the



Honorable Michael W. O'Hern - 5

United States, as the conclusion we have reached has rendered it unnecessary to do so.

CONCLUSION

In the premises, we are of the opinion that the Missouri Real Estate Commission may not deny an applicant a license as a real estate broker or salesman upon the sole ground that such applicant has been convicted of an offense under Section 51, Title 18, U.S.C.A.

Respectfully submitted,

WILL F. BERRY, Jr.  
Assistant Attorney General

APPROVED:

---

J. E. TAYLOR  
Attorney General

WFB:HR

5/28  
ROADS AND BRIDGES: "General road districts" must be established by county court.

May 16, 1947

FILED  
68

Honorable Julian L. O'Malley  
Prosecuting Attorney  
Clinton County  
Plattsburg, Missouri

Dear Sir:

This is in reply to your letter of recent date wherein you request an opinion from this department based upon the following statement of facts:

"In Clinton county we have three special road districts formed under Art. 10, Ch. 46, R.S. Mo. 1939. We have no benefit assessment districts formed under Art. 11, Ch. 46, R.S. Mo. 1939. At the present time we have no 'common road districts' organized, set up or numbered as provided in Art. 3, Ch. 46, R.S. Mo. 1939. No road overseers are serving by appointment in this county as directed by Sec. 8516, R.S. Mo. 1939, as reenacted, H.C.S.H.B. 784, 63rd Gen. Assembly. Since no colorable compliance has been had with the provisions of Art. 3, Ch. 46, R.S. Mo. 1939, the law which recognizes common road districts, in this county, it is my opinion that an election may not be called throughout this county, exclusive of the three special road districts, in an effort to authorize the levy provided for in Sec. 8529, H.C.S.H.B. 784, 63rd Gen. Assembly.

"May I have your opinion touching this question for submission to the county court of this county."

It appears from the first paragraph of your request (not quoted here) that the qualified voters and taxpayers residing in the purported "general road districts" in your county are petitioning the county court for an election to authorize an additional levy for road purposes under authority of Section

8529 of H.C.S.H.B. No. 784, passed by the 63rd General Assembly. The part of the section pertinent to your question reads as follows;

"Whenever ten or more qualified voters and taxpayers residing in any general or special road district in any county in this state shall petition the county court of the county in which such district is located, asking that such court call an election in such district for the purpose of voting for or against the levy of the tax provided for in the second sentence of the first paragraph of Section 12 of Article X of the Constitution of Missouri, it shall be the duty of the county court, upon the filing of such petition, to call such election forthwith to be held within 20 days from the date of filing such petition.\* \* \*

The court, as we understand your question, is planning to call the election for the "general road district" which, it is claimed, constitutes all territory in that county except that which is in special road districts.

The question here is "is there any territory in the county in a general road district?" It seems to be conceded in your letter that there is some territory in the county not embraced in special road districts, but according to your letter you do not think this territory is in a general road district because there is no general or common road district formed in the county as is provided by Article 3, Chapter 46, R. S. Mo. 1939.

Under Section 8514, Article 3, Chapter 46, R. S. Mo. 1939, provisions for establishing common or general road districts are as follows:

"The county courts of all counties, other than those under township organization, shall, during the month of January, 1918, with the advice and assistance of the county highway engineer, divide their counties into road districts, all to be numbered, of suitable and convenient size, road mileage and taxable property considered. Said courts shall, during the month of

January biennially thereafter, have authority to change the boundaries of any such road district as the best interest of the public may require."

As to whether or not the county court has organized the general or common road districts in the county would depend upon what the record of the county court reveals. Without any record that the county court has followed the provisions of said Section 8514 and organized or divided the county into common road districts, we think you are correct in your contention that there are no such districts. On the question of the necessity of a record, we find that in the case of Boatright vs. Saline County, 169 S.W. (2d) 371, the court quoted and applied the principle that " \* \* \* a county court may speak through its records. \* \* \* " For the purpose of this opinion, we are assuming that if any record of the action of the county court, with respect to dividing the county into road districts, has been made that it was made prior to the adoption of the Constitution of 1945 and prior to the repeal of Section 1990, R. S. Mo. 1939, which provided that county courts were courts of record.

You do not state in your letter whether or not the county court has done anything by record or otherwise towards organizing or recognizing the territory here in question as a common road district. Of course, if there is any record of the court which would indicate the creation of such district or districts and if the county court by its action has recognized the district or districts as such, then we think the district would be held to have been validly created. It appears from the cases that the courts have liberally construed actions of county courts or administrative bodies in passing upon the acts of such bodies. In the case of Greenfield vs. Petty et al., 145 S.W. (2d) 367, 371, the court applied the foregoing principle in the following language:

" \* \* \* It has been said many times that orders of boards or courts administered by men not trained in the law must be construed not strictly but according to their intent. \* \* \* "

If there is a record which tends to show that the county court has attempted to divide the county into road districts or even to make a portion of the county into one district, and if such record is incomplete, we think the court at this time would have authority to make a nunc pro tunc entry showing the facts.

In the case of Farris vs. Burchard, 262 Mo. 334, 342, the court, in applying the foregoing principle, made the following statement with respect to the statute of limitations in making such orders:

"\* \* \* No Statute of Limitations applies to and bears the right of the court to put in proper form at any time that which appears from its records to have been done and to have been imperfectly or informally recorded. \* \* \*"

In that case the court held that a nunc pro tunc entry could be made to correct a record which had been made some 45 years prior thereto.

We also note from your letter that in support of your contention that no district has been organized that no road district has been numbered and no overseers have been appointed. In regard to the point that the court has failed to appoint road overseers, we do not think that would be conclusive on the question of whether or not the district has been organized. On this particular question, I find that the Attorney General's Office in 1935 rendered an opinion covering this question. The opinion is dated January 25, 1935, and addressed to Mr. W. W. Crockett, Prosecuting Attorney of Ralls County, and written by Mr. Edward H. Miller, Assistant Attorney General. We are enclosing a copy of this opinion for your information.

Nor do we think that the failure to number the districts would be conclusive on the question of whether or not the county had organized a common road district. In connection with this thought, we are enclosing a copy of an opinion to Mr. E. H. Stark, Judge of the County Court of Miller County, dated February 1, 1944, holding that the county court might form all of the common road districts into one district.

#### CONCLUSION

From the foregoing, it is the opinion of this department that if there is no record made by the county court of the dividing of the county into common road districts, that is that portion of the county which is not in special road districts, then there would not be a "general road district" in such county within the meaning of said Section 8529 of H.C.S.H.B.

Hon. Julian L. O'Malley

-5-

No. 784, such as would authorize the taxpayers in such territory to petition the county court for the election to vote the levy provided for in said section.

We are further of the opinion that if the county court has at some previous time taken any action towards dividing the county into common road districts or into one common road district, that is the territory outside of special road districts, and if there is any record which might tend to show such action that the county court can now by a nunc pro tunc entry make its record conform to the facts, and if in such a case the record reveals that a common road district has been formed, then the voters and taxpayers in such district would be qualified to petition the county court for the election authorized by said Section 8529 of said H.C.S.H.B. No. 784.

Respectfully submitted,

TYRE W. BURTON  
Assistant Attorney General

APPROVED:

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J. E. TAYLOR  
Attorney General

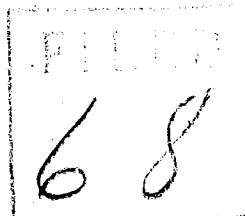
TWB:VLM

Enc.

COUNTY COURTS:  
PROSECUTING ATTORNEY:  
COUNTY TREASURER:  
HIGHWAY ENGINEER:

County court of third-class county may hire stenographer for prosecuting attorney, county treasurer and highway engineer, such stenographer to divide her time among said officers.

November 21, 1947



Honorable Julian L. O'Malley  
Prosecuting Attorney  
Clinton County  
Plattsburg, Missouri

Dear Sir:

This is in answer to your letter of recent date, requesting an official opinion of this department, which reads, in part, as follows:

"I would like to have an opinion from your office on the following question:

Is it within the discretion of the County Court of a Third Class county to hire a stenographer to divide her time between the offices of Prosecuting Attorney, County Treasurer and Highway Engineer, provided such officers budget for such services?

\* \* \* \* \*

"It is extremely difficult to obtain stenographic assistance on a part time basis. The work in the three offices mentioned in my inquiry stated above will not justify a full time stenographer in any one of those offices."

We are enclosing official opinions of this department rendered under date of October 3, 1945, to George A. Spencer, and January 23, 1947, to John F. Edmundson. These opinions hold that prosecuting attorneys and county treasurers are entitled to be reimbursed for clerk and stenographic hire necessarily expended by such officers in connection with the official duties of their offices.

Under the doctrine of the case of Rinehart v. Howell County, 348 Mo. 421, 153 S. W. (2d) 381, quoted in both of the above opinions, the county highway engineer is also entitled to such stenographic help as may be necessary in the discharge of his official duties.

Under the holding in the Rinehart case, it is clear that the matter of the necessity of such stenographic assistance to such county officers is a matter of fact to be determined by the county court. Therefore, if it be determined by the county court of a third-class county that one stenographer would be sufficient to take care of all of the stenographic work necessary to the proper functioning of the offices of prosecuting attorney, county treasurer and highway engineer, the county court may provide only the one stenographer for the three officers mentioned.

#### CONCLUSION

It is the opinion of this department that the county court of a third-class county, if it be determined that one stenographer is sufficient for the stenographic work necessarily incident to the offices of prosecuting attorney, county treasurer and highway engineer, may provide only one stenographer for such officers.

Respectfully submitted,

C. B. BURNS, Jr.  
Assistant Attorney General

APPROVED:

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J. E. TAYLOR  
Attorney General

CBB:HR



**DELINQUENT TAXES:** The date for determining penalty on delinquent  
**PENALTIES:** taxes, as provided in Section 11085, House Bill  
No. 765, applies to the City of Liberty.

January 8, 1947



Mrs. Temple M. Payne  
City Treasurer  
Liberty, Missouri

Dear Mrs. Payne:

This department is in receipt of a letter from you, in which you request an opinion in regard to the date when the penalties shall be added to delinquent taxes. Your letter is as follows:

"Re: House Bill 765, Section 11085.

"Will you please advise me whether or not the above mentioned law applies to the City of Liberty regarding the date when the penalties shall be added to delinquent taxes?"

Section 11085, House Bill No. 765, provides:

"If any taxpayer shall fail or neglect to pay such collector his taxes at the time and place required by such notices, then it shall be the duty of the collector after the first day of February then next ensuing, to collect and account for, as other taxes, an additional tax, as penalty, the amount provided for in Section 11124.  
\* \* \* \* \*

It is to be noted that the date fixed for the collector to collect an additional tax as penalty is changed from first day of January to first day of February.

In the case of City of Westport ex rel. v. McGee, 128 Mo. 152, the Supreme Court of Missouri said, l.c. 158:

"Appellant's point as to the rate of interest charged is not well taken. Section 7605, Revised Statutes of Missouri, 1889, provides

that, as to state and county taxes, any taxpayer who fails to pay his taxes on a fixed date is chargeable by the collector with a 'penalty' (sometimes also called 'interest') of one per cent. per month. The statute calls this an 'additional tax,' or 'penalty.' Section 1604, Revised Statutes of Missouri, 1889, provides that the payment of all taxes in such cities shall be enforced by the collection in the same manner and under the same rules and regulations, as may be provided by law, for collecting and enforcing the payment of state and county taxes. The imposition of a penalty is a regulation for the collection of the tax and ordinarily the most effective."

The city dealt with in the McGee case, supra, was a fourth class city. Section 1604 referred to in that case was a provision of the statutes of 1889, which is substantially the same as Section 7145, Revised Statutes of Missouri, 1939, which is the analogous provision applicable today as to fourth class cities. Said Section 7145 provides:

"Upon the first day of January of each year all unpaid city taxes shall become delinquent, and the taxes upon real property are hereby made a lien thereon. The enforcement of all taxes authorized by this article shall be made in the same manner and under the same rules and regulations as are or may be provided by law for the collection and enforcement of the payment of state and county taxes, including the seizure and sale of goods and chattels, both before and after said taxes shall become delinquent: \* \* \* \* \*

Section 7605, Revised Statutes of Missouri of 1889, referred to in the McGee case, supra, is substantially the same provision as Section 11085, House Bill No. 765, supra, except that in said bill the date fixed for the collector to collect an additional tax as penalty is changed from first day of January to first day of February.

Liberty, Missouri, is a city operating under a special charter. The analogous provision to Section 7145, Revised Statutes of Missouri, 1939, as relates to cities operating under special charter, is Section 7477, Revised Statutes of Missouri, 1939, which provides as follows:

"Cities under special charters now or hereafter having a population not exceeding 6,000, are hereby invested with and given all the powers, rights and remedies in the matter of the collection of delinquent taxes by suit and the establishment and enforcement of liens on real estate in connection therewith as are now authorized and provided by existing statutes for the collection of delinquent state and county taxes by suit and the establishment and enforcement of liens on real estate in connection therewith; and to that end the provisions of article 9 of chapter 74, in so far as they are applicable, are hereby declared to be in force and to govern the proceedings in suits for delinquent taxes due such cities and in the establishment and enforcement of liens on real estate in connection therewith. \* \* \*"  
(Emphasis ours).

It is to be observed that Sections 7145 and 7477, Revised Statutes of Missouri, 1939, and Section 1604, Revised Statutes of Missouri, 1889, to which the court referred in the McGee case, are substantially the same as regards the provision that the enforcement of such taxes shall be made in the same manner and under the same rules and regulations as are or may be provided by law for the collection and enforcement of the payment of state and county taxes. The McGee case, supra, said that appellant's point, as to there being no law authorizing cities of the fourth class to charge interest on taxes, was not well taken. We must, therefore, come to the conclusion from that case that Section 1604, R.S. Mo. 1889, brought that fourth-class city within the provision for adding a penalty to delinquent taxes as set out in Section 7605, R.S. Mo. 1889. Therefore, it is only reasonable to assume that Section 7477, R. S. Mo. 1939, should bring cities operating under a special charter within the provisions of Section 11085 of House Bill 765, which is the analogous provision today to Section 7605 of the 1889 statutes.

Mrs. Temple M. Payne

-4-

We feel that the case of Siemens v. Shreeve, 296 S. W. 415 will further uphold our view that a city, in the collection of its taxes, is subject to the rules and regulations governing county and state collections. In that case the Supreme Court of Missouri said at l. c. 416:

"\* \* \* A city has no inherent power to tax. This power rests primarily in the state and may be delegated by constitutional provision or by statutory enactment. The authority to tax must be expressly granted or necessarily incident to the powers conferred, and in case of doubt the power is denied. \* \* \* \* \*

#### CONCLUSION

It is, therefore, the opinion of this department that Section 11085 of House Bill No. 765 does apply to the City of Liberty, and that the date when the penalty shall be added to delinquent taxes is governed by the provisions of that section.

Respectfully submitted,

WILLIAM C. COOKRILL  
Assistant Attorney General

APPROVED:

J. E. TAYLOR  
Attorney General

**PROSECUTING ATTORNEYS:**

Prosecuting Attorneys may be reimbursed for actual and necessary traveling expenses in the investigation of crimes and the county court is authorized to provide for such expenses.

**MAGISTRATES:**

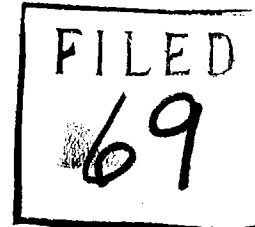
Magistrate shall set salaries of his clerk, deputy clerks and employees.

January 23, 1947

FILED

69

Honorable James L. Paul  
Prosecuting Attorney  
McDonald County  
Pineville, Missouri



Dear Sir:

We hereby acknowledge receipt of your letter of recent date requesting an opinion of this department, reading as follows:

"As Prosecuting Attorney elect of this County, I have had some questions submitted to me, and I would like to have your opinion before rendering my opinion after January 1st.

"Can the County Court set any salary it desires so long as it does not exceed the limit provided for by statute for clerks in the Magistrates' Courts in the Counties of the fourth class?

"Are the County Courts authorized to allow the Prosecuting Attorney actual mileage and expenses incurred in the investigation of any crime committed in his County?"

In answer to your first question we direct your attention to Section 21 of Senate Bill 207 of the 63rd General Assembly, which reads in part as follows:

"In all counties each magistrate shall by an order duly made and entered of record appoint and fix the salary of a clerk of his court and may appoint such deputies and employees as may be necessary for the proper dispatch of the business of his court and fix their salaries at such sum as in his discretion may seem proper. \*\*\*"

It is noted that McDonald County in 1940 had a population of 15,749 and an assessed valuation in 1944 of \$6,313,825. In Section 22 of Senate Bill 207, wherein a limitation is placed on the above salaries fixed by the magistrate, it is provided in part as follows:

"\* \* \* The total amount that may be paid by the state in any one year for such clerks, deputy clerks and employees of the magistrate courts in the different counties shall not exceed the following sums:

"\* \* \* in all counties now or hereafter having a population of more than 11,000 inhabitants but not more than 17,000 inhabitants with an assessed valuation of \$11,000,000 or less, the sum of \$1200; \*"

Therefore, the magistrate shall fix the salaries of his clerk, deputy clerks and employees within the limits provided for in Section 22 of Senate Bill 207 of the 63rd General Assembly.

In answer to your second question, we have found no specific statutory authority authorizing the county court to allow mileage and actual expenses incurred by the prosecuting attorney for the investigation of crimes. However, it is our opinion that a situation of this nature is distinguishable from those cases announcing the rule that officials may not receive any other compensation than that authorized by law. Maxwell v. Andrew County, 146 S. W. (2d) 621; Smith v. Pettis County, 136 S.W. (2d) 282.

In the case of Rinehart v. Howell County, 153 S. W. (2d) 381, the court held that the prosecuting attorney could be reimbursed for reasonable sums paid for necessary stenographic services in addition to that authorized by law. In arriving at this decision the court stated, at l. c. 382-383:

"\* \* \* The instant case was submitted on the theory, as disclosed by the stipulated facts and undisputed testimony, that the outlays, as contradistinguished from income, were bona fide, reasonable and actual expenditures for indispensable expenses of the office

by respondent (not on the theory that compensation to an officer was involved) and falls within the ruling in Ewing v. Vernon County, 216 Mo. 681, 695, 116 S.W. 518, 522(b). That case quoted with approval a passage from 23 Am. and Eng. Ency. Law, 2d Ed., 388, to the effect that prohibitions against increasing the compensation of officers do not apply to expenses for fuel, clerk hire, stationery, lights and other office accessories and held a recorder entitled to reimbursement for outlays for necessary janitor service and stamps, stating: 'Fees are the income of an office. Outlays inherently differ. An officer's pocket in no way resembles the widow's cruse of oil. Therefore those statutes relating to fees, to an income, and the decisions of this court strictly construing those statutes, have nothing to do with this case relating to outgo.' (Emphasis ours.)

In arriving at this conclusion the court pointed out that in certain counties the General Assembly has specifically provided that stenographic services should be furnished a prosecuting attorney. We have the same situation here in that Section 12986, R. S. Mo. 1939, provides for expenses to be paid to the prosecuting attorneys in larger counties for the investigation of crimes, but, as we have stated before, there is no provision for the payment of such expenses in the smaller counties. In discussing this situation, the court stated at l. c. 383:

"Appellant points out that \* \* \* the General Assembly authorized and established salaries for stenographic services to prosecuting attorneys in the larger counties of the State, did not provide for like services in counties of the population of Howell county, and contends for the application of the maxim expressio unius est exclusio alterius.  
\* \* \* \* \*

"Appellant's statutory citations constitute legislative recognition of the propriety of expenditures for stenographic

services in the discharge of the present-day duties of prosecuting attorneys in the communities affected--an approved advance in proper instances for the administration of the laws by county officials and the business affairs of the county and for the general welfare of the public. Such enactments, in view of the constitutional grant to county courts, should be construed as relieving the county courts in the specified communities from determining the necessity therefor and, by way of a negative pregnant, as recognizing the right of county courts to provide stenographic services to prosecuting attorneys in other counties when and if indispensable to the transaction of the business of the county, and not as favoring the citizens of the larger communities to the absolute exclusion of the citizens of the smaller communities in the prosecuting attorney's protection of the interests of the state, the county and the public. \* \* \*

The Rinehart case is authority, we think, for the conclusion that if a county court determines that the investigation of crimes is necessary for the proper conduct of the duties of the office of the prosecuting attorney, mileage and expenses can be paid for by the county court out of the county revenue, and, further, that if such expenses are indispensable to the proper functioning of the prosecuting attorney's office, and the county court refuses to provide same and the prosecuting attorney is compelled to provide it himself, then said prosecuting attorney can recover from the county his reasonable and actual expenses. It should be noted that what is a bona fide, reasonable and actual expenditure is a matter of fact to be determined by the county court. However, if the prosecuting attorney is of the opinion the county court has acted arbitrarily in its determination and that he is obliged to make such investigations in order to properly carry on his office, and he does in fact carry on said investigations, then he may bring suit against the county to recover for his necessary expenditures in that regard, but the duty would be upon him in such an action to prove that the investigations were indispensable to the proper conduct of his office.

#### Conclusion

Therefore, it is the opinion of this department that the magistrate shall set the salaries of his clerk, deputy clerks



and employees within the limits provided in Section 22 of Senate Bill 207 of the 63rd General Assembly.

It is further our opinion that (1) mileage and actual expenses incurred in the investigation of crimes may be provided by the county court for a prosecuting attorney if the county court finds as a fact that said expenses for the investigations are necessary for the proper conduct and administration of the affairs of said office, and (2) that if a county court refuses to provide mileage and actual expenses for the investigation of crimes for the prosecuting attorney, then, if in fact they are indispensable to the proper conduct and the administration of the affairs of his office and he does carry on said investigations, he may recover his actual and reasonable expenses for same.

Respectfully submitted,

PERSHING WILSON  
Assistant Attorney General

APPROVED:

J. E. TAYLOR  
Attorney General

PW:EG

PARKS;

STATE PARK BOARD:

State Park Board unauthorized to dispose of  
present transmission system in Cuivre River  
State Park.

May 6, 1947

FILED

69

5-14

State Park Board  
Jefferson City, Missouri

Attention: Mr. Abner Gwinn  
Chief of Parks

Gentlemen:

We are in receipt of your request for an opinion as to the validity of a transfer of the present transmission system located in Cuivre River State Park to the Missouri Edison Company as part consideration for the State Park Board entering into an agreement with said electric company to furnish electric service at said park.

An examination of the bill of sale transferring personal property at Cuivre River State Park to the State of Missouri discloses that no part of the transmission line was included in said bill of sale. However, in all probability, such transmission line constitutes real property and is a part of the real estate. (See Vol. 50 C.J., page 750, Section 21.)

The quit claim deed conveying Cuivre River Recreational Demonstration Area to the State of Missouri, after describing the various tracts contained in said area, contains in part the following:

"\* \* \* together with the equipment situated on the lands hereby conveyed and more particularly set forth and described in a bill of sale of even date, to be filed for recordation in Lincoln County, Missouri. \* \* \* Provided always, that this deed is made upon the express condition that the State of Missouri shall use the said property exclusively for public park, recreational, and conservation purposes, and a further express condition that the United States of America assumes no obligation for the maintenance or operation of said property after the acceptance of this deed. \* \* \* Provided further, that the title and right to possession of said lands, together

with the improvements and equipment thereon, shall revert to the United States of America upon a finding by the Secretary of the Interior, after notice to the State of Missouri and after an opportunity for a hearing, that the said state has not complied with the aforesaid conditions during a period of more than three years, which finding shall be final and conclusive."

In view of the foregoing quotation from the quit claim deed conveying said Recreational Demonstration Area, we seriously doubt if the State Park Board would be fully complying with the provisions of said deed in transferring said transmission line to the Missouri Edison Company. Technically speaking, such a transfer would not be considered as using said property exclusively for public park, recreational and conservation purposes.

It might be possible that the State Park Board could obtain a waiver from the Secretary of the Interior and the President of the United States, who, under the act authorizing the transfer of said recreational area, is required to approve said transfer, and thereby the state would be fully authorized to dispose of said transmission line as contemplated.

#### CONCLUSION

Therefore, it is the opinion of this department that in the absence of a waiver from the Secretary of the Interior and President of the United States of America granting the State Park Board authority to dispose of the present transmission line now located in Cuivre River Recreational Demonstration Area, said Park Board is unauthorized to enter into an agreement with the Missouri Edison Company and, under said agreement, transfer the present transmission line to said company.

Respectfully submitted,

AUBREY R. HAMMETT, Jr.  
Assistant Attorney General

APPROVED:

J. C. Taylor  
J. C. TAYLOR  
Attorney General

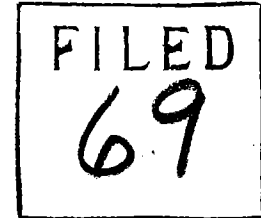
ARH:LR

ELECTION: Sheriff to perform duties formerly performed  
SHERIFF: by constable during elections.  
CONSTABLE:

Filed: #69

August 26, 1947

Honorable James L. Paul  
Prosecuting Attorney  
McDonald County  
Pineville, Missouri



Dear Mr. Paul:

This is in reply to your letter of August 19, 1947, requesting an opinion from this department, which reads as follows:

"Confirming my telephone request this date, I would appreciate your office rendering me an opinion on the following question:

"Since the office of the constable has been abolished, who appoints the officers at the various polling places and is the expense of this officer chargeable as an election item?

From your letter we assume that the officers referred to are those law enforcement officers who are required to be present at the various polling places on election day. Section 11494, Mo. R.S.A., provides as follows:

"The constable shall attend the elections in his township, and perform such duties as are enjoined on him by law, under the direction of the judges."

It will be noted that Chapter 97, Mo. R.S.A., creating the office of constable, was repealed by Senate Bill No. 361 of the 63rd General Assembly, which is found in the Laws of 1945 at page 680. Said statute has the effect of abolishing the office of constable.

The question, of course, now arises as to the proper officer to perform such duties relative to elections as were enjoined by law on constables. Senate Bill No. 362 of the 63rd General Assembly, found at page 1079 in the Laws of 1945, provides:

"Whenever the word 'constable' appears in any statute, except insofar as any such statute applies to the City of St. Louis and to counties of the first class, the same shall hereafter be deemed to refer exclusively to and to mean 'sheriff' unless such construction is plainly repugnant to the context of any such statute."

According to the above provision it is clear that the Legislature intended the sheriff of the county and his duly appointed deputies to perform said duties.

Section 13399, Mo. R.S.A., found in Article 2 of Chapter 99, the chapter on salaries and fees, provides that constables shall be allowed a fee of \$3.00 per day "for each day or part thereof required in erecting the booths, taking them down, and attending any election in his township, when required to do so by the judges of election." Said section is still in effect even though the office of constable was abolished. Therefore, under the provisions of Senate Bill No. 362 of the 63rd General Assembly, supra, the sheriff is entitled to said fee.

While it is true that sheriffs of fourth class counties are now compensated on a salary basis, such salary contemplates only official duties in regard to criminal matters. Section 3 of House Bill No. 872 of the 63rd General Assembly, found on pages 1548 and 1549 of the Laws of 1945, provides that the sheriffs of fourth class counties shall retain all fees collected by them in civil matters. It was also held by this department in an opinion to Honorable W. V. Mayse, Prosecuting Attorney of Harrison County, dated July 16, 1946, that the sheriffs of third class counties, where a similar provision is found, are entitled to fees as members of their county boards of equalization since their duties are entirely civil in nature.

The sheriff is entitled to the fee provided in Section 13399, supra, for his services in performing the duties

Honorable James L. Paul

-3-

relative to elections which were formerly enjoined upon constables. When the sheriff acts in said capacity his duties have no connection with his duties in criminal matters, but are entirely a civil matter. Said fee should be treated as an election expense in the same manner as when constables were in existence.

Conclusion.

Therefore, it is the opinion of this department that the sheriff of a fourth class county is the proper officer to perform such duties relative to elections as were formerly enjoined by law on constables.

Respectfully submitted,

DAVID DONNELLY  
Assistant Attorney General

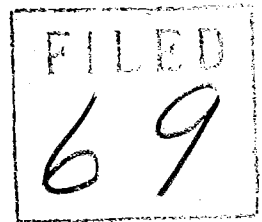
APPROVED:

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J. E. TAYLOR  
Attorney General

FEDERAL: Right to enforce laws, rules and regula-  
CONSERVATION COMMISSION: tions pertaining to wildlife at Camp  
OFFICERS: Crowder.

October 7, 1947



Honorable James L. Paul  
Prosecuting Attorney  
McDonald County  
Pineville, Missouri

Dear Sir:

This will acknowledge receipt of your request for an opinion which reads:

"I respectfully request the opinion of your office on the following question:

"Does the wildlife and forestry code act of this state apply on federal-owned reservations and if so do the conservation agents have a right to enter upon said reservations for the purpose of enforcing the fish and game laws?"

"This question has come up relative to the Camp Crowder Reservation located in the North end of this county."

Your request applies to federal-owned reservations which is very broad and one opinion might not apply alike to each and every reservation. Since you are particularly interested in Camp Crowder, we believe it better to have this opinion apply only to that camp.

Article I, Section 8, Clause 17 of the Constitution of the United States reads:

"The Congress shall have power:

"To exercise exclusive legislation, in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular States, and the acceptance of Congress, become the seat of government of the United States, and to execute like authority over all places purchased by the consent of the legislature of the State in which the same shall be,

for the erection of forts, magazines, arsenals, dock yards, and other needful buildings; and "

The foregoing provision authorizes the United States government to assume exclusive jurisdiction over land in this state when the State of Missouri cedes certain land to the United States government. It has been held that such action on the part of the state is a necessary adjunct to the federal government assuming exclusive jurisdiction over such land.

It is our understanding that the federal government purchased land comprising Camp Crowder for military purposes and that the federal government did use the land for military purposes and assumed an exclusive jurisdiction over same. So far as we are able to determine at this date, the United States government still owns said land. Therefore, we are assuming for the purpose of this opinion that the federal government to some extent is still using Camp Crowder for military purposes.

The Supreme Court of the United States has held that the national government and state government may make satisfactory arrangements as to jurisdiction of territory within the border of the state and adjust problems, and that the courts will recognize such arrangements. See *Collins et al. vs. Yosemite Park & Curry Co.*, 58 S. Ct. Rep. 1009, l.c. 1013. It has also been held that Article I, Section 8, Clause 17 of the Constitution of the United States should not be construed to mean that consent of the state to purchases must be made without reservations. See *Silas Mason Co. vs. Tax Commission*, 58 S. Ct. Rep. 233, l.c. 242. However, in this instance, the state practically ceded exclusive jurisdiction over land now known as Camp Crowder. The 62nd General Assembly enacted legislation ceding to the United States government exclusive jurisdiction over land acquired by the United States government for military purposes, prior to and subsequent to said legislation becoming effective; however, reserving the right to serve civil and criminal process in certain actions and for any crime committed in the state but outside the boundaries of such land with the further reservation that such exclusive jurisdiction shall continue only so long as said land is used for the purpose for which it was acquired. Sections 1, 2 and 3, pages 627-628, Laws of Missouri, 1943, read:



"Sec. 1. The consent of the State of Missouri is hereby given, in accordance with the seventeenth clause, eighth section, of the first article of the Constitution of the United States, to the acquisition by the United States by purchase, condemnation, or otherwise, of any land in this State which has been acquired, prior to the effective date of this Act, as sites for customhouses, courthouses, post offices, arsenals, forts, and other needful buildings required for military purposes."

"Sec. 2. Exclusive jurisdiction in and over any land so acquired, prior to the effective date of this Act, by the United States shall be, and the same is hereby, ceded to the United States for all purposes, saving and reserving, however, to the State of Missouri the right of taxation to the same extent and in the same manner as if this cession had not been made; and further saving and reserving to the State of Missouri the right to serve thereon any civil or criminal process issued under the authority of the State, in any action on account of rights acquired, obligations incurred, or crimes committed in said State, but outside the boundaries of such land, but the jurisdiction so ceded to the United States shall continue no longer than the said United States shall own such lands and use the same for the purposes for which they were acquired."

"Sec. 3. Whereas, there now exist within the boundaries of this State large areas of land occupied for military purposes, among which are those occupied by Lake City Ordnance Plant, Weldon Spring Ordnance Works, St. Louis Ordnance Plant, St. Louis Powder Farm, St. Louis Medical Depot, Fort Leonard Wood, Camp Crowder, Missouri Ordnance Works, Vichy Airport, and Kansas City Quartermaster Depot, and there exists in the said areas uncertainty as to complete jurisdiction, which is resulting in duplication and misunderstandings between the

State and Federal law enforcement agencies, and an emergency exists within the meaning of Article IV of the Constitution of this State, this act shall be in force from and after its passage and approval by the Governor."

#### CONCLUSION

In view of the foregoing, it is the opinion of this department that if Camp Crowder is still being used to some extent for military purposes that laws of this state and rules and regulations of the Conservation Commission pertaining to wildlife can not be enforced at Camp Crowder by agents of the Conservation Commission or officers of the county and state. However, if said camp is not used for military purposes, then such laws, rules and regulations may be enforced by Conservation Commission agents, county and state officers at Camp Crowder.

Respectfully submitted,

AUBREY R. HAMMETT, Jr.  
Assistant Attorney General

APPROVED:

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J. E. TAYLOR  
Attorney General

ARH:VLM

MOTOR VEHICLES: Motor vehicle registered in Iowa operating in Missouri intrastate in transporting passengers for compensation must register with Commissioner of Motor Vehicles and pay fee.

October 9, 1947

FILED

69

Missouri State Highway Patrol  
Jefferson City, Missouri

Attention: Mr. Edmund I. Hockaday, Captain  
Commanding General Headquarters

Gentlemen:

This will acknowledge receipt of your request for an opinion which reads:

"Attached is copy of letter received from D. E. Harrison, Lieutenant, Acting Commander Troop H, Missouri State Highway Patrol, St. Joseph, Missouri, which is self-explanatory.

"You will note in paragraph two that J. Harry Latham, Prosecuting Attorney, Andrew County, requests an official opinion from your department, concerning this matter.

"If you will favor us with your opinion we would appreciate an extra copy for our files."

The attached copy of letter referred to from Lt. D. E. Harrison reads:

"1. On August 8, 1947 George Edward Null, driver for the Burlington Transportation Company, was arrested at Post One for 'improper registration.' He was driving a 1947 Aero coach, Iowa licence OO-310. The point of origin was Omaha, Nebraska, destination Kansas City, Missouri, and the operation was being made on a Public Service Commission travel order. The bus driver admits picking up nineteen passengers at Burlington Junction, Missouri, discharged fourteen of them at Maryville, Missouri and discharged the other five passengers at St. Joseph, Missouri and Kansas City, Missouri.

"2. The Prosecuting Attorney of Andrew County, J. Harry Latham, is doubtful of this being a violation of the Motor Vehicle Law and desires an opinion from the Attorney General on this case as soon as possible."

The attached letter does not disclose the nature of the offense committed other than for improper registration. Upon inquiring what was meant by improper registration, you informed the writer that said coach was being operated in this state without registering same with the Commissioner of Motor Vehicles and paying the required fee for operating same in this state.

A well recognized rule of statutory construction is that in construing two or more statutes relating to the same subject, the courts should read them together and if possible harmonize them and give force and effect to each. This not only applies to statutes passed at the same session of Legislature but also to acts passed at prior and subsequent sessions. See State ex rel. Central Surety Insurance Corporation vs. State Tax Commission, 153 S.W. (2d) 43, 348 Mo. 171, Section 8367, R. S. Mo. 1939, defines "owner", "motor vehicle" and "nonresident" as used in the Motor Vehicle Act as follows:

"Wherever in this article, or in any proceeding under this article, the following words or terms are used, they shall be deemed and taken to have the meanings ascribed to them as follows: \* \* \* \* \*

'Motor vehicle.' Any self-propelled vehicle not operated exclusively upon tracks, except farm tractors. \* \* \* \* \*

'Nonresident.' A resident of a state or county other than state of Missouri. \* \*

'Owner.' The term owner shall include any person, firm, corporation or association, owning or renting a motor vehicle, or having the exclusive use thereof under lease, or otherwise, for a period greater than ten days successively. \* \* \* "

Section 8369, R. S. Mo. 1939, requires the owner of every motor vehicle not otherwise excepted therein to register said motor vehicle with the Commissioner of Motor Vehicles and pay the registration fee, whereupon the Commissioner will issue a certificate of registration to said owner and a plate, or set of plates, bearing a particular number assigned to him. Said section reads in part:

"(a) Every owner of a motor vehicle or trailer, which shall be operated or driven upon the highways of this state, shall except as herein otherwise expressly provided, cause to be filed, by mail or otherwise, in the office of the commissioner, an application for registration on a blank to be furnished by the commissioner for that purpose, containing: (1) a brief description of the motor vehicle to be registered, including the name of the manufacturer, the motor number and character, and amount of motive power, stated in figures of horsepower; (2) the name, residence and business address of the owner of such motor vehicle; (3) if said motor vehicle be a commercial vehicle the weight of the vehicle and its rated capacity of live load, in pounds or seating capacity; (4) if such motor vehicle be a specially constructed or reconstructed motor vehicle, the application shall so state and the owner shall furnish the commissioner such additional information as he shall require.

"(b) Upon the filing of such application, exhibition of certificate of ownership and the payment of the fees hereinafter provided, the commissioner shall assign a number to such motor vehicle, and without other expense to the applicant shall issue and deliver to the owner a certificate of registration in such form as the commissioner shall prescribe, and a plate, or set of plates, bearing such number."

There is no question but that the operator referred to in your request has fully complied with the Public Service Commission laws. We checked with the Public Service Commission to determine what authority said operator had for operating upon the highways. We found that he is operating under a certificate of convenience and necessity, and also a special travel order issued by the Public Service Commission under authority of Section 5728, page 45, Laws of Missouri, 1944, Extra Session. However, that provision provides that in

addition to the regular registration license fee imposed on all motor vehicles shall at all times, except as provided in Section 5721, pay an annual license fee for the maintenance and repair of public highways and roads in part:

"(a) In addition to the regular registration license fee imposed on all motor vehicles in this state, and its personal property tax, every motor carrier, except as provided in section 5721 shall, at the time of the issuance of a certificate of convenience and necessity and/or an interstate permit, and annually thereafter, on or between January 1, and January 15 of each calendar year, pay to the state treasurer of the State of Missouri the annual license fee, as set out in this article, for the maintenance and repair of the public highways; all such fees levied upon the issuance of a license to any motor carrier for any motor vehicle hereunder shall be reckoned from the beginning of the quarter in which such license was issued: "

In view of the foregoing, it is difficult to argue that a nonresident operating a motor vehicle in this state does not have to register said motor vehicle with the Commissioner of Motor Vehicles and pay the required fee.

Owners of motor vehicles in another state may operate in this state without the necessity of registering with the Commissioner of Motor Vehicles and paying the required fee, provided similar exemptions are afforded owners of motor vehicles in this state operating same in the other state. This exemption is contained in Section 8375, R. S. Mo. 1939, which is known as the reciprocal provision in the Motor Vehicle Act, and reads:

"A nonresident owner, except as otherwise herein provided, owning any motor vehicle which has been duly registered for the current year in the state, country or other place of which the owner is a resident and which at all times when operated in the state has displayed upon it the number plate or plates issued for such vehicle in the place of residence of such owner may operate

or permit the operation of such vehicle within this state without registering such vehicle or paying any fee to this state, provided that the provisions of this section shall be operative as to a vehicle owned by a nonresident of this state only to the extent that under the laws of the state, country or other place of residence of such nonresident owner like exemptions are granted to vehicles registered under the laws of and owned by residents of this state."

Upon an examination of the statutes of the State of Iowa, we find the following in the Code of Iowa, Vol. I, 1946, which we assume are still in effect and read:

"Sec. 321.55. A nonresident owner, except as otherwise provided in sections 321.54 and 321.55, owning any foreign vehicle of a type otherwise subject to registration may operate or permit the operation of such vehicle within this state without registering such vehicle in, or paying any fees to, this state subject to the condition that such vehicle at all times when operated in this state is duly registered in, and displays upon it a valid registration card and registration plate or plates issued for such vehicle in the place of residence of such owner.

"Sec. 321.54. Nonresident owners of foreign vehicles operated within this state for the intrastate transportation of persons or property for compensation or for the intrastate transportation of merchandise, shall register each such vehicle and pay the same fees therefor as is required with reference to like vehicles owned by residents of this state.

"Sec. 321.56. The provisions of section 321.53 shall be operative as to a vehicle owned by a nonresident of this state to the extent that under the laws of the foreign country, state, territory, or federal district of his residence like exemptions and privileges are granted to vehicles duly registered under the laws,

and owned by the residents of this state.

"Nonresident cars shall be listed within ten days after entering the state, with the county treasurer or department, on forms provided by the department. The department will issue a permit for the period of exemption."

Section 321.53, supra, provides an exemption for non-resident owners of motor vehicles operating in the State of Iowa except those mentioned in Sections 321.54 and 321.55, supra. Section 321.54, supra, specifically requires the non-resident owner of a motor vehicle operating same in intrastate transportation of persons for compensation in the State of Iowa to register same and pay a fee in that state. Section 321.56 is in the nature of a reciprocal provision; however, it provides that Section 321.53 shall be operative to the extent that under the laws of the state of a nonresident, like exemptions and privileges are granted Iowa owners of motor vehicles operating in a nonresident state. Therefore, since nonresident owners of motor vehicles under Section 321.54 are specifically excluded from Section 321.53, we must conclude that Section 321.56 is not applicable to owners of motor vehicles that come within the provisions of Section 321.54, and therefore, such owners of motor vehicles operating same in the State of Iowa must register and pay the required fee in that state for operating said motor vehicles therein.

#### CONCLUSION

Therefore, it is the opinion of this department that the owner of this particular coach, carrying an Iowa license and operating same in this state under a certificate of convenience and necessity and special travel order of the Public Service Commission of Missouri, has violated the provisions of Section 8369, R. S. Mo. 1939, in failing to register said coach with the Commissioner of Motor Vehicles in Missouri and paying the required fee for operating said motor vehicle in this state, in the transportation of passengers intrastate and for compensation.

Respectfully submitted,

APPROVED:

AUBREY R. HAMMETT, Jr.  
Assistant Attorney General

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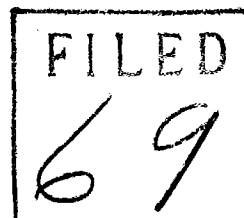
J. E. TAYLOR  
Attorney General

ARH:VLM



TAXATION: The only procedure to increase tax levy for county purposes, when the maximum tax has been assessed and levied, is by a COUNTY: vote of 2/3 qualified electors voting thereon and for said increased tax.

December 11, 1947



Honorable James L. Paul  
Prosecuting Attorney  
McDonald County  
Pineville, Missouri

Dear Sir:

This will acknowledge receipt of your request for an opinion which reads:

"The finances of this county indicate that for the year 1946 the county will have a deficit of a little more than \$6000.00 and for the year 1947 a deficit of approximately \$8000.00.

"This county is already levying the 50% maximum levy for county revenue. Is it possible that under Section 11041 of the revised statutes of the State of Missouri, that an additional fifteen-cent levy making a total of sixty-five cent levy be assessed for the year 1948, by order of the Circuit Judge in order to partly eliminate a portion of this deficit, or will this additional fifteen-cent levy have to be submitted to a vote of the people as provided for under section 11046?"

Section 11 (b) of Article X, Constitution of Missouri, 1945, provides that any tax on property shall not exceed thirty-five cents on the hundred dollars assessed valuation in counties having three hundred million dollars or more assessed valuation and fifty cents on the hundred dollars assessed valuation in all other counties. Section 11 (b) reads:

"Any tax imposed upon such property by municipalities, counties or school districts, for their respective purposes, shall not exceed the following annual rates:

"For municipalities--one dollar on the hundred dollars assessed valuation;

"For counties--thirty-five cents on the hundred dollars assessed valuation in

counties having three hundred million dollars, or more, assessed valuation, and fifty cents on the hundred dollars assessed valuation in all other counties;

"For school districts formed of cities and towns--one dollar on the hundred dollars assessed valuation, except that in the City of St. Louis the annual rate shall not exceed eighty-nine cents on the hundred dollars assessed valuation;

"For all other school districts--sixty-five cents on the hundred dollars assessed valuation."

The 63rd General Assembly enacted legislation to conform to the foregoing constitutional provision, Section 11046, page 1781, Laws of Missouri, 1945. However, the 64th General Assembly repealed that section and enacted in lieu thereof Section 11046 in House Bill No. 77. The only difference in the two laws is that the latter does not include the restriction contained in the former, that no county court shall order a rate of tax levy that will produce mathematically more than ten per cent in excess of taxes levied for the previous year. House Bill No. 77, passed by the 64th General Assembly, also contained an emergency clause. Therefore, Section 11046 of said bill became effective upon approval by the Governor on May 19, 1947, and reads:

"For county purposes the annual tax on property, not including taxes for the payment of valid bonded indebtedness or renewal bonds issued in lieu thereof, shall not exceed the rates herein specified: In counties having three hundred million dollars or more assessed valuation the rates shall not exceed thirty-five cents on the hundred dollars assessed valuation; and in counties having less than three hundred million dollars assessed valuation the rate shall not exceed fifty cents. Provided, that in any county the maximum rates of taxation as herein limited may be increased for not to exceed four years, when the rate and purpose of the increase are submitted to a vote and two-thirds of the qualified electors of the county voting thereon shall vote therefor."

Section 11 (c) of Article X, Constitution of Missouri, 1945, further provides that in all counties the rate of taxation herein limited may be increased for their respective purposes for not to exceed four years, when the rate and purpose of increase is submitted to a vote of two-thirds of the qualified electors voting thereon shall vote therefor. Furthermore, said provision does include an exception for the county court in raising the maximum tax levy herein limited which may be done when authorized by law for libraries, hospitals, public health, recreational grounds and museum purposes. Said provision reads:

"In all municipalities, counties and school districts the rates of taxation as herein limited may be increased for their respective purposes for not to exceed four years, when the rate and purpose of the increase are submitted to a vote and two-thirds of the qualified electors voting thereon shall vote therefor; provided that the rates herein fixed, and the amounts by which they may be increased, may be further limited by law; and provided further, that any county or other political subdivision, when authorized by law and within the limits fixed by law, may levy a rate of taxation on all property subject to its taxing powers in excess of the rates herein limited, for library, hospital, public health, recreation grounds and museum purposes."

Section 11 (b) of Article X, Constitution of Missouri, 1945, further authorizes the Legislature to enact legislation permitting a county to levy taxes other than ad valorem taxes for its essential purposes. Also, under Section 12 (a) of Article X, Constitution of Missouri, 1945, additional taxes are authorized for road and bridge purposes.

You state in your request that your county has already levied the maximum allowed for county purposes which is fifty cents upon the hundred dollars assessed valuation of property. The county now desires to make an additional levy of fifteen cents, making the total assessed levy sixty-five cents on the hundred dollars assessed valuation of property. You state that the additional levy is to take care of a deficit amounting to \$6,000.00 for 1946, and \$8,000.00 for 1947. You inquire if this additional levy may be made by order of the circuit court or by a vote of the people. Section 11041, passed by

the 63rd General Assembly, page 1779, Laws of Missouri, 1945, provides that no other tax for any purpose may be assessed except under certain conditions which are, that upon request of the county court, the prosecuting attorney shall present a petition to the circuit court setting forth facts and specific reasons for assessing other taxes. If the circuit court is satisfied of the necessity of additional taxes, and that to do so will not violate the Constitution, he shall order the county court to assess, levy and collect such additional tax. Said provision reads:

"No other tax for any purpose shall be assessed, levied or collected, except under the following limitations and conditions, viz: The prosecuting attorney or county counselor of any county, upon the request of the county court of such county--which request shall be of record with the proceedings of said court, and such court being first satisfied that there exists a necessity for the assessment, levy and collection of other taxes than those enumerated and specified in the preceding section--shall present a petition to the circuit court of his county, or to the judge thereof in vacation, setting forth the facts and specifying the reasons why such other tax or taxes should be assessed, levied and collected; and such circuit court or judge thereof, upon being satisfied of the necessity for such other tax or taxes, and that the assessment, levy and collection thereof will not be in conflict with the Constitution and laws of this state, shall make an order directed to the county court of such county, commanding such court to have assessed, levied and collected such other tax or taxes, and shall enforce such order by mandamus or otherwise. Such order, when so granted, shall be a continuous order, and shall authorize the annual assessment, levy and collection of such other tax or taxes for the purposes in the order mentioned and specified, and until such order be modified, set aside and annulled by the circuit court or judge thereof granting the same: Provided, that no such order shall be modified, set aside or annulled, unless it shall appear to the satisfaction of such circuit court, or judge thereof, that the taxes so ordered to be assessed, levied and collected are not authorized by the Constitution and

laws of this state, or unless it shall appear to said circuit court, or judge thereof, that the necessity for such other tax or taxes, or any part thereof, no longer exists."

In view of the foregoing constitution inhibitions against increasing taxes over that allowed as a maximum, in this case fifty cents on the hundred dollars assessed valuation of property, and since your county has already assessed and levied the maximum, the provisions of Section 11041, supra, are not applicable in this instance. Had the maximum tax not been previously assessed and levied, then such procedure would apply. (See: State ex rel. Wabash Ry. Co. 169 Mo. 563, l.c. 577.)

Under Section 11046, supra, the matter of increasing taxes in your county fifteen cents per hundred dollars assessed valuation of property may be submitted to a vote of the people, and if two-thirds of the qualified electors of said county voting thereon shall vote for said additional tax, then it shall be assessed, levied and collected, provided the expenditure represented by this deficit for 1946 and 1947 was properly budgeted and came within the anticipated revenue for the year. The General Assembly could have limited the amount of additional tax allowed over and above the fifty cents levy under Section 11 (c) of Article X, Constitution of Missouri, 1945, but at the present time there is no statutory limitation upon such taxes. Under Section 11046, page 1781, Laws of Missouri, 1945, there was a limitation of a levy not to exceed ten per cent of taxes levied for the previous year. However, as hereinabove shown, when the 64th General Assembly repealed that section and enacted a new one known as Section 11046 in House Bill No. 77, that part was deleted therefrom; so there is now no statutory or constitutional limitation upon the amount of additional taxes that may be levied when two-thirds of the qualified electors of the county voting thereon vote for same.

In passing, we would like to make a few remarks about voting this additional tax to pay off these deficits for 1946 and 1947. You are no doubt aware of the fact that under the County Budget Act and Constitution of this state, the financial statutes of counties is presumed to be upon a cash basis and said counties should not incur additional obligations over and above the anticipated revenue for any one year. (See Sections 10910 to 10917, inclusive, R.S. Mo. 1939, and amendments thereto; also Section 26 (a) of Article VI, Constitution of 1945.) Since the foregoing laws and constitutional provisions hereinabove referred to were in effect during 1946 and 1947, the question may be raised as to whether the additional tax referred to in your request could be voted for the specific purpose of satisfying the indebtedness for 1946 and 1947. In Missouri Toncan Culvert Co. vs. Butler

County, 181 S.W. (2d) 506, 1.c. 507, 352 Mo. 1184, the court held that the constitutional provision that no county may become indebted to an amount exceeding in any year revenue provided therefor without consent of two-thirds of the voters can not be circumvented by postponement of payment of the debt until the following year. In so holding, the court said:

"The evidence established that the anticipated revenue of Butler county for road and bridge purposes for 1940 was less than \$31,000; and that warrants were issued against said fund during said year in excess of \$70,000; the total amount issued as of November 1, 1940, being in excess of twice the aggregate anticipated revenue for said purpose for 1940. The testimony discloses that County Judges Githens and Smith were aware of the fact the county was out of funds, did not have the money to pay, and conceived the idea of putting off payment until thirty days after shipment. Constitutional safeguards for the protection of the people's money are not to be circumvented in such manner. They were enacted for a wholesome purpose and should be strictly enforced. All are bound to take notice of such safeguards. While this constitutional provision impliedly authorizes the fiscal agents to anticipate the revenue of the current year in the administration of the county's affairs, it explicitly forbids the anticipation of revenues for any future year, a forbidden act which the named fiscal agents admittedly sought to override. *Trask v. Livingston County*, 210 Mo. 582, 594, 600, 109 S.W. 656, 659, 660, 37 L.R.A. 1045; *Ebert v. Jackson County*, Mo.Sup., 70 S.W. 2d 918, 919 (2); *Hawkins v. Cox*, 334 Mo. 640, 648 (3), 66 S.W.2d 539, 543 (3-5). These and other cases recognize and enforce the constitutional intent to abolish the credit system and to put counties and other political subdivisions on a cash basis by limiting the legal expenditures of any given year to the income and revenue of that year in the absence of some special authorization."

In *Missouri-Kansas Chemical Co. vs. Christian County*, 180 S.W. (2d) 735, 1.c. 736, the plaintiff sued the county to

recover for soap and disinfectant sold the county, and recovered judgment amounting only to part of that sought to recover. Apparently what was recovered was the amount available in the budget for such purchases. The court, in holding that any payment ordered by the county when there was no balance budgeted with which to make the payment is void, said:

"The chemical company contends it is entitled to judgment for the full amount because the county budget law does not affect its transactions with Christian County. That county is one of less than 50,000 inhabitants. Only Sections 10910 to 10917, inclusive, R.S. 1939, Mo. R.S.A., of the budget law apply to such counties. It claims that Section 10932 which invalidates contracts made in violation of the county budget law does not apply to counties of this class.

"The same contention was raised in Missouri-Kansas Chemical Corporation v. New Madrid County, 345 Mo. 1167, 139 S.W. 2d 457. There we held that any payment ordered by the county court of a county of less than 50,000 inhabitants, when there was no balance budgeted with which to make payment, would be void under the provisions of Section 10917 applicable to such county. Therefore, it was of no consequence whether Section 10932 was applicable or not."

Also in Missouri-Kansas Chemical Company vs. New Madrid County, 139 S.W. (2d) 457, 1.c. 458, the court held that absent exceptional circumstances, a sheriff's authority to obligate his county is restricted to his budget allowances and that a company furnishing supplies could not recover for items purchased in excess of budget allowances. (See also State vs. Palmer, 194 S.W. 10, 1.c. 11.)

If said deficits for 1946 and 1947 represent expenditures that were lawful and properly budgeted and were within the anticipated revenue for that year, then we are inclined to believe that the additional tax levy of fifteen cents could be assessed and levied for the purpose of paying said deficits if two-thirds of the qualified electors voting thereon vote for said additional tax.

CONCLUSION

It is the opinion of this department that since your county has assessed and levied the maximum allowed under the law for county purposes, the only procedure for increasing the tax rate for such purposes is to submit the matter to the qualified electors of said county. Such tax may be increased for a period not to exceed four years, if two-thirds of the qualified electors voting thereon shall vote for increased tax, provided that such expenditures resulting in said deficits for 1946 and 1947 were properly budgeted and came within the anticipated revenue for that year.

Respectfully submitted,

AUBREY R. HAMMETT, Jr.  
Assistant Attorney General

APPROVED:

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J. E. TAYLOR  
Attorney General

ARR:VLM



MAGISTRATE COURTS: Board of Aldermen of St. Louis has the power to provide for additional employees for the Magistrate Court of the City of St. Louis.

January 8, 1947

FILED

70

1/9

Honorable Alroy S. Phillips  
Attorney at Law  
418 Olive Street  
St. Louis, Missouri

Dear Sir:

We hereby acknowledge receipt of your request for an opinion of this department relative to the question of whether or not the Board of Aldermen of the City of St. Louis has the power to pass an ordinance providing for employees for the Magistrate Court of the City of St. Louis in addition to clerks and deputy clerks provided for by Senate Bill 239 of the 63rd General Assembly.

Senate Bill 239 provides for the appointment by the court, in banc, of a chief clerk and not more than two deputy clerks and allows each magistrate to appoint one deputy clerk. There is no provision for the appointment of additional employees but Section 2 of this bill provides in part as follows:

"\* \* \* and all the provisions of general law applicable to magistrates, their courts and officers, shall be applicable to the courts, magistrates and officers provided in this act except so far as inconsistent therewith."

Senate Bill 207 of the 63rd General Assembly applies to magistrate courts generally. Therefore, all the provisions of this bill that are not inconsistent with Senate Bill 239 will apply to the Magistrate Court of the City of St. Louis. Senate Bill 239 is silent on whether or not the Board of Aldermen may hire additional employees, while Senate Bill 207 provides that additional employees may be hired if they find the need exists. In the case of *St. Louis v. Klausmeier*, 213 Mo.

119, the Court stated at l. c. 127:

"\* \* \* In order to be a conflict of any kind, two things must of necessity exist, and when it is contended that there is a conflict between two laws both must contain either express or implied provisions which are inconsistent and irreconcilable with each other. If either is silent where the other speaks, there can be no conflict between them."

Applying the above reasoning, Senate Bill 207 and Senate Bill 239 are not inconsistent in relation to our problem, so, therefore, we must look to Senate Bill 207 to determine if the Board of Alderman may provide for the hiring of additional employees. Section 21 of Senate Bill 207 provides in part as follows:

"\* \* The total salaries of clerk, deputies and other employees paid by the state shall in no event exceed the annual amount fixed in this act for clerk and deputy clerk hire of such courts, provided, that in any county where need exists, the county court is hereby authorized, at the cost of the county, to provide such additional clerks, deputy clerks or other employees as may be required. \* \* \*"

It will be noted that the second phrase in the above sentence is preceded by the words "provided, that." At first blush it would seem that the second phrase is a proviso and hence a limitation or exception to the preceding phrase. However, the courts have held that the word "provided" is sometimes used in the conjunctive sense and that this word alone will not make a phrase a proviso. We quote from Mitchell Castilo v. State Highway Commission of Missouri, 312 Mo. 244, l. c. 269:

"However, use of the word 'provided' does not in and of itself convert the words following into a 'proviso' in the strict legal sense. The word may be

used in the conjunctive sense and precede an independent out-and-out grant of power. In Georgia Banking Co. v. Smith, 128 U. S. 174, at page 181, it is said: 'The general purpose of a proviso, as is well known, is to except the clause covered by it from the general provisions of a statute, or from some provisions of it, or to qualify the operation of the statute in some particular. But it is often used in other senses. It is a common practice in legislative proceedings, on the consideration of bills, for parties desirous of securing amendments to them to precede their proposed amendments with the term "provided," so as to declare that, notwithstanding existing provisions, the one thus expressed is to prevail, thus having no greater signification than would be attached to the conjunction "but" or "and" in the same place, and simply serving to separate or distinguish the different paragraphs or sentences.'

It seems clear to us that the second phrase does not limit the first phrase but merely is an additional discretionary power given to the county courts, or, as in our case, the Board of Aldermen of the City of St. Louis.

It has been suggested that Section 22 of Senate Bill 207 prohibits the Board of Aldermen from hiring additional employees, except in the case where an additional magistrate has been authorized by the circuit court. Section 22 reads in part as follows:

"Salaries of clerks, deputy clerks and employees provided for in the last preceding section shall be paid by the state within the limits herein provided upon requisition filed by the judge of the magistrate court; except that the salaries of clerks, deputy clerks and employees of additional magistrates whose offices are created by order of the circuit court as provided in Section 1 of this act shall

be paid by the county as the salaries of such magistrates are required to be paid."

It is our opinion that the General Assembly merely intended by the above exception that the money paid by the state would be used exclusively for paying clerks and employees of magistrates paid by the state and not to prohibit the Board of Aldermen from providing for the hiring of additional employees as the need exists.

Conclusion

Therefore, it is the opinion of this department that the Board of Aldermen of the City of St. Louis has the power to pass an ordinance providing for clerks, deputy clerks and employees for the Magistrate Court of the City of St. Louis in addition to the clerks and deputy clerks provided for by Senate Bill 239 of the 63rd General Assembly.

Respectfully submitted,

PERSHING WILSON  
Assistant Attorney General

APPROVED:

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J. E. TAYLOR  
Attorney General

PW:EG

**TAXATION:**

**MERCHANTS TAX:**

Merchants' Tax provided for in H.C.S.H.B. 471, H.C.S.H.B. 536 and House Bill 995, passed by the 63rd General Assembly, comply with the provisions of Section 4 (a) of Article X of the Constitution of 1945.

January 16, 1947

FILED

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Honorable Hugh Phillips  
Prosecuting Attorney  
Camden County  
Camdenton, Missouri

Dear Sir:

This is in reply to your letter of recent date wherein you submit the question of the validity of an assessment of a Merchants' Tax, assessed under the following set of facts:

"A resident of Pulaski County purchased furs and wool and placed and stored them in a building in Camden County until they were sold and shipped to Eastern markets. In 1946, this person was placed on the Merchants' Tax Book for Camden County, Missouri. He appeared before the Camden County Board of Equalization objecting to such assessment as a Merchants' Tax and Merchants' License on the basis that such was personal property and should be assessed in the county of his residence, which is Pulaski County."

In your letter you also set out the taxpayer's reasons for contesting the tax, which are as follows:

" \* \* \* The assessed tax-payer alleges that there is no valid law or statute in effect in the State of Missouri that authorizes the assessment and collection of a merchants' tax. It is based on the following grounds:

"That there is no valid law or statute in effect in the state of Missouri that authorized the assessment and collection of a Merchants Tax. That committee substitute for House Bill 536 as amended by House Bill 995 and House Bill 998, all enacted by the 63rd General Assembly of Missouri is void and unconstitutional in that it contravenes and violates the provisions of Section 4a of Article 10 of the Constitution of Missouri for 1945 in

that said Acts constitute a legislative intent to create a fourth class of property for tax purposes in Missouri. That the provisions of Section 6 of House Committee Substitute for House Bill 471 is contrary to the provisions of Article 10, 4a of the Constitution of Missouri for 1945 in that said section provides that merchandise held by merchants shall constitute a class separate and distinct by itself for the purpose of state, county and municipal taxes. That by said section the legislature attempted to place merchandise in a class separate and distinct from the three classes of property enumerated in Section 4a of Article 10 of the Constitution. And that the legislature was not authorized nor empowered by the Constitution so to create a separate class of property for tax purposes. That the legislature was only authorized to further classify tangible personal property into sub-classes and to further classify intangible personal property into sub-classes, and that by said section 6 and by the Merchants Tax Law aforesaid the legislature does not attempt to make sub-classifications of tangible personal property or of intangible personal property but instead the legislature exceeds its constitutional power and authority and attempts to place merchandise in a class not enumerated or permitted by the constitution."

The term "merchant" is defined in Section 11303 of H.C.S.H.B. 536 as follows:

"Every person, corporation, copartnership or association of persons, who shall deal in the selling of goods, wares and merchandise at any store, stand or place occupied for that purpose, is declared to be a merchant. Every person, corporation, copartnership or association of persons doing business in this state who shall, as a practice in the conduct of such business, make or cause to be made any wholesale or retail sales of goods, wares and merchandise to any person, corporation, copartnership or association of persons, shall

be deemed to be a merchant whether said sales be accommodation sales, whether they be made from a stock of goods on hand or by ordering goods from another source, and whether the subject of said sales be similar or different types of goods than the type, if any, regularly manufactured, processed or sold by said seller."

This definition of the term "merchant" is quite broad, and, under the authority of an opinion of this department, dated December 6, 1946, written to the Honorable Elmer Peal, this person would be termed a merchant. We are enclosing a copy of this opinion for your information.

On the question of the constitutionality of the laws relative to taxation of merchants, we find the following provisions of the Constitution of 1945 applicable here. Section 3 of Article X of the Constitution of 1945 provides as follows:

"Taxes may be levied and collected for public purposes only, and shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax. All taxes shall be levied and collected by general laws and shall be payable during the fiscal or calendar year in which the property is assessed. Except as otherwise provided in this Constitution, the methods of determining the value of property for taxation shall be fixed by law."

Section 4 (a) of Article X of the Constitution of 1945 provides in part as follows:

"All taxable property shall be classified for tax purposes as follows: Class 1, real property; Class 2, tangible personal property; Class 3, intangible personal property. The general assembly, by general law, may provide for further classification within Classes 2 and 3, based solely on the nature and characteristics of the property, and not on the nature, residence or business of the owner, or the amount owned.\* \* \*"

The lawmakers, by enacting said H.C.S.H.B. 536 and H.C.S.H.B. 471, have attempted to classify stocks of merchandise for ad valorem taxes in a different manner to that in which other tangible personal property, such as livestock, machinery, etc., are classified for taxing purposes. H.C.S.H.B. 471, passed by the 63rd General Assembly, was enacted by virtue of the constitutional authority conferred by said Section 4 (a) of Article X, supra. Section 2 of said H.C.S.H.B. provides as follows:

"All property in Missouri shall be classified for tax purposes as follows:

Class 1--real property

Class 2--tangible personal property

Class 3--intangible personal property."

It will be noted under the provisions of Section 4 (a) of Article X of the Constitution of 1945 that tangible personal property, under Class 2 of said section, may be further classified for tax purposes if the classification is based "solely on the nature and characteristics of the property, and not on the nature, residence or business of the owner, or the amount owned."

The General Assembly, by Section 6 of said H.C.S.H.B. 471, under the authority of the foregoing provisions of said Section 4 (a) of Article X, has placed merchandise in a different class, under Class 2 of said Section 4 (a), to that of livestock, machinery, household goods, etc. Said Section 6 of H.C.S.H.B. 471 reads as follows:

"For the purpose of state, county and municipal taxes merchandise held by merchants and the raw material, merchandise, finished products, tools, machinery and appliances used or kept on hand by manufacturers shall constitute a class separate and distinct by itself."

By Section 11305 of said H.C.S.H.B. 536, provision is made for levying ad valorem taxes on stocks of merchandise. It reads as follows:

"Merchants shall pay an ad valorem tax equal to that which is levied upon real estate, on the highest amount of all goods, wares and merchandise which they may have in their possession or under their control, whether owned by them or consigned to them



for sale, at any time between the first Monday in January and the first Monday in April in each year; provided, that no commission merchant shall be required to pay any tax on any unmanufactured article, the growth or produce of this or any other state, which may have been consigned for sale, and in which he has no ownership or interest other than his commission."

This section is taken from the 1939 Laws with the exception that the dates when the merchandise is held for tax purposes are different.

In speaking of the nature of the Merchants' Tax, the Missouri Supreme Court, in the case of State ex rel. v. Alt, 224 Mo. 493, 1.c. 506, said:

"The taxation of merchants and manufacturers in this state, though nominally and in form a license tax, is, in fact, as often held by this court, a property tax, and not merely an occupation or license tax, and the merchants' statements furnish a basis alike for state, school and municipal taxation.\* \* \*

This opinion definitely holds that the Merchants' Tax is a property tax.

Sub-section (c) of Section 3 of said M.C.S.H.B. 471 defines tangible personal property as follows:

"Tangible personal property includes every tangible thing being the subject of ownership or part ownership whether animate or inanimate, other than money, and not forming part of a parcel of real property as herein before defined."

There can be no question that a stock of merchandise comes within the definition of the term "tangible personal property" which is in Class 2 of property taxed under said Section 4 (a) of Article X of the Constitution. From the attack made on these bills by the taxpayer, he has taken the position that the General Assembly has placed merchandise in a different class than that authorized by the Constitution, and for that reason the Acts are unconstitutional.

As provided by Section 3 of Article X of the Constitution, except as otherwise provided in this Constitution, "the methods of determining the value of property for taxation shall be fixed by law." Pursuant to this provision, the General Assembly

provided the method for determining the valuation of merchants' stocks of goods by said Section 11305 of H.C.S.H.B. 536, supra. By authority of the provisions of Section 4 (a) of Article X of the Constitution, which provides that: "The general assembly, by general law, may provide for further classification within Classes 2 and 3, based solely on the nature and characteristics of the property," the lawmakers, by said Section 6 of H.C.S.H.B. 471, supra, divided Class 2 of tangible personal property and placed merchandise in a class separate from other tangible personal property in Class 2, such as livestock, machinery, household goods, etc.

In the construction of statutes, the constitutionality of a statute is presumed.

The Missouri Constitution of 1875 did not contain any provisions similar to that found in said Section 4 (a) of Article X with respect to classification of property for taxing purposes. However, the Constitution of 1945, as well as the Constitution of 1875, authorizes the General Assembly to impose taxes on all property, real and personal, both tangible and intangible. Both Constitutions also required that the taxes should be uniform on the same class of subjects. The method pursued by the General Assembly, in arriving at the value of property in different classes, is not controlled or provided for by the Constitution of 1945, and the only limitation therein is that the tax be uniform and that the property be in one of the three classes or a subdivision thereof. In the case of *State ex rel. Brown v. The Missouri Pacific Railway Company*, 92 Mo. 157, the Missouri Supreme Court had before it a case in which the validity of the assessment of taxes for school purposes on the rolling stock of railroads was questioned. In holding the statutory method of fixing the value on this stock valid, the court said at l.c. 145:

" \* \* \* It is not required that the same methods shall be pursued in the taxation of the various classes of property; that would be impossible. If the same rate of tax is imposed upon all taxable property, according to its value, the end is accomplished, and although as many different methods be applied as there are different classes of property, yet it is all by 'due process of law.' \* \* \* "

Said Section 4 (a) of Article X of the Constitution of 1945 indicates an intention on the part of the framers of that Article that the Legislature would have authority to further classify property for taxation under Classes 2 and 3. The

rule, as to the authority of the Legislature in such cases, is stated in 51 Am. Jur., page 253, Section 174, in the following language:

"The power to make classifications with respect to taxation is with the legislature in the first instance, and its discretion in the matter is very broad and covers a wide range. In this connection it has been variously said that in taxation there is a broader power of classification than in some other exercises of legislation; that it is not necessary that the basis of a classification of property for tax purposes be deducible from the nature of things classified, and that the legislature, in classifying subjects for taxation, cannot be required to state the grounds of the classification."

We also find the following in the footnotes to the foregoing rule:

"So far as concerns the classes into which articles may be arranged for purposes of taxation, the matter is one for the legislature and not for the courts; the latter not only have no duty to classify, but they are and should be forbidden to interfere with the legislative classification, unless they can say with certainty that it is purely illusory--clearly intended as an evasion of the Constitution. *Heisler v. Thomas Colliery Co.* 274 Pa 440, 113 A 594, 24 ALR 1215, affirmed in 260 US 245, 67 L ed 237, 43 S Ct 83."

In the case of *Missouri, K. & T. Ry. Co. of Texas v. Shannon et al.*, 100 S.W. 138, we find that the Supreme Court, in applying the foregoing principle, made this statement at l.c. 142:

"Taxation shall be equal and uniform. All property in this state whether owned by natural persons or corporations other than municipal shall be taxed in proportion to its value, which shall be ascertained as provided by law." Now, if it be conceded that it was the intention of the makers of the Constitution to confer upon

the county assessors the exclusive power to list and set down the value of all property in their respective counties subject to an ad valorem tax, it cannot be denied that the Legislature is empowered to provide the mode of ascertaining their value."

At l.c. 145, we find the following statement, which was quoted from State v. Jones, 51 Ohio St. 492, 37 N.E. 945:

" \* \* \* The true value in money is adopted as a standard for taxation--as the basis upon which a uniform rate of taxation is to be fixed. But taxation by a uniform rule does not necessarily demand that there should be the same mode of assessment for every species of property, without regard to any classification. An assessment, in the sense of a valuation of the property of the taxpayer for the purpose of determining the proportion of tax to be paid, should, it is true, be uniform in its mode, to the extent that the property is assessed according to its true value in money. But it would not follow that different classes of property may not be valued for taxation by different officers and boards, and by different modes and agencies. The same rigid and inflexible method of assessment for all classes of property might result in a marked inequality in the burden of taxation." \* \* \*

Also in the case of Charleston Federal Savings & Loan Association et al. v. Alderson, State Tax Commissioner, 324 U.S. 182, 65 S. Ct. 624, the United States Supreme Court made the following statement with reference to a law-making body classifying property for taxation in view of the provisions of the Fourteenth Amendment at l.c. 630:

"It is plain that the Fourteenth Amendment does not preclude a state from placing notes and receivables in a different class from personal property used in agriculture and the products of agriculture, including livestock, and taxing the two classes differently, even though the state places them in a single class for other purposes of taxation. \* \* \*

The foregoing principle and authorities clearly demonstrate that as long as the Legislature imposes taxes uniformly on the same class of subjects, it is within the constitutional provisions even though it may provide different modes for ascertaining the value of such property. The Missouri Legislature, in devising a means to assess tangible personal property under Class 2 of Section 4 (a) of Article X of the Constitution of 1945 was acting within the powers granted to it by the Constitution when it provided by H.C.S.H.B. 536 that the value of stocks of merchandise for taxing purposes may be determined as of a different date than for ascertaining the value of other intangible personal property referred to in Section D of Section 3 of said H.C.S.H.B. 471. It is not necessary for the General Assembly to state its reasons for making different classifications of property for tax purposes; however, it is not difficult to see why the General Assembly would find reason to provide a different manner for ascertaining the value of stocks of merchandise than for values of livestock, machinery, household goods, etc. Stocks of merchandise generally consist of numerous articles, and it would be almost impossible for a merchant to furnish the value of a stock of goods on the first day of January as is provided by Section 4 of H.C.S.H.B. 471 in cases in which an individual makes a return of tangible personal property under Class 2. It would seem that it was for this reason that the General Assembly provided in Section 11309 of House Bill 995 that the merchant should make a return on the first Monday in May of each year of the value of goods, wares and merchandise which he has on hand at any one time between the first Monday in January and the first Monday in April.

The House Bills referred to in this opinion were enacted by the 63rd General Assembly.

#### CONCLUSION

From the foregoing, it is the opinion of this department that the Missouri General Assembly, in enacting H.C.S.H.B. 471, H.C.S.H.B. 536, and House Bills 995 and 998, providing for taxation of merchants, was acting within the powers granted to that body under Section 4 (a) of Article X of the Constitution of Missouri for 1945, and that these laws are constitutional.

Respectfully submitted,

APPROVED:

TYRON E. BURTON  
Assistant Attorney General

J. E. TAYLOR  
Attorney General  
T.E:VLM

TAXATION:  
MANUFACTURER:  
MERCHANT:

Companies selling wood for fuel are cooperage companies; cooperage companies manufacturing completed staves and headings are manufacturers; companies making rough staves and headings under contract for other companies which complete manufacturing are manufacturers; companies offering for sale, generally, rough staves and headings are merchants.

July 29, 1947

FILED

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Honorable John P. Peters  
Prosecuting Attorney  
Osage County  
Linn, Missouri

Dear Sir:

This is in reply to your letter of recent date requesting an official opinion from this department, and reading as follows:

"Our Board of Equalization is in session, and is considering tax problems in general and here is one on which I would very much appreciate the advice of your honorable department, in trying to advise and assist the Board in the varied things that come up for its consideration.

"We have in this county, and there are many in other counties, in the timbered sections of the state, what are commonly called 'Stave Mills.' These are operated by corporations, foreign and domestic. One just west of Linn is now operated by 'St. Louis Cooperage Co., Division of Five Counties Lumber Corporation.' This was formerly operated by St. Louis Cooperage Co. (A Missouri Corporation, I believe), but last December there was a merger of some sort winding up with the new and lengthy designation. The Five Counties concern, being a Delaware corporation.

"These companies buy of men owning tracts of timber, on the stump, and pay attractive prices, specifying the type of trees and

dimensions of same, and sometime thereafter their employees cut these trees and saw them in the wood that is called 'stave bolts,' and others haul them to the 'Mill' or Yard. There they are processed by sawing into the rough barrel or keg staves which are stacked up to dry. They also make out of some of this timber what they term 'headings.' This is really the tops and bottoms of the material for the kegs and staves. In the yard in question there is now thousands upon thousands of these staves stacked up and drying, great piles of the 'bolts' yet unprocessed, and the parts cast off in these processes are sold locally for fuel.

"These staves, I am reliably informed, are yet unfinished and must be further processed, at some other place, whether by the same interests or not I am not informed, but rather think they are finished by the same interests or affiliated ones. This further processing gives them the bulge and cuts grooves at both ends so as to fit in the tops and bottoms, for all of which the local equipment and machinery is not suited.

"They pay thousands of dollars for the timber on the stump. One deal southeast of here, with rather restricted limitations on size and type of trees to be cut, was \$6,500.00, and this is only one, there have been many.

"My opinion is that these interests are 'Manufacturers' and come within the purview of the law of 1945, at page 1954, and which repeals a previous law in the same volume (Laws 1945) found at page 1855, which is in six sections, one of which was a definition of 'Manufacturer,' but left out of the later act repealing the said six sections.

"I am surely impressed that these interests are 'manufacturers' and in the 'manufacturing' business, and if I am right their first duty was to apply for and take out a license, as

such, and from then on be governed by the tax law affecting merchants. The one question with our Board is, 'Are they not manufacturers, simply because they do not completely finish the output?' They carve it out of the raw material, improve its form and value, etc., and the process begins when their woodsmen begin to saw down the trees off the stump.

"I would be glad to hear from your honorable department as to their liability to being assessed and taxed. They have been operating in this county for years and have never applied for a license, either as a merchant or a manufacturer, nor have they been taxed under a straight personal property tax."

At the outset, we wish to point out that House Bill No. 975, found at page 1954 of Laws of Missouri 1945, repeals and reenacts only Section 1 of House Bill No. 539, Laws of Missouri 1945, page 1855, and that Sections 2 to 6, inclusive, of House Bill No. 539 are still in effect and have never been repealed. Secondly, we have been informed by the Corporation Department of this State that the St. Louis Cooperage Company is still in existence and has never been dissolved.

First, the question arises as to the status of the St. Louis Cooperage Company with regard to its selling that part of the wood cast off in the process you have described, which is sold locally for fuel. With regard to such sales, the St. Louis Cooperage Company comes under the provisions of the statute with regard to taxation of merchants. Section 11303, Laws of Missouri 1945, page 1839, provides as follows:

"Every person, corporation, copartnership or association of persons, who shall deal in the selling of goods, wares and merchandise at any store, stand or place occupied for that purpose, is declared to be a merchant. Every person, corporation, copartnership or association of persons doing business in this state who shall, as a practice in the conduct of such business, make or cause to be made any wholesale or retail sales of goods, wares and merchandise to any person, corporation, copartnership or association of persons, shall be



deemed to be a merchant whether said sales be accommodation sales, whether they be made from a stock of goods on hand or by ordering goods from another source, and whether the subject of said sales be similar or different types of goods than the type, if any, regularly manufactured, processed or sold by said seller."

Since the St. Louis Cooperage Company is selling these parts cast off during the processing of the staves and headings as fuel, the cooperage company comes within the definition of merchant, as contained in Section 11303, above quoted, and does not come within the exception, since the company is not a commission merchant selling unmanufactured articles. The company is selling its own articles, and, as such, is taxable as merchant.

Section 4, Laws of Missouri 1945, page 1858, provides as follows:

"Every person, company or corporation who shall hold or purchase personal property for the purpose of adding to the value thereof by any process of manufacturing, refining, or by the combination of different materials, shall be held to be a manufacturer for the purposes of the foregoing section."

The word "manufacture" is defined by Webster's New International Dictionary, Second Edition, as follows:

"To make (wares or other products) by hand, by machinery, or by other agency;  
\* \* \* \*"

The general rule with regard to the question of whether or not lumber is manufactured is found in 38 C. J., page 985, as follows:

"Lumber has given rise to some doubt as to whether its production, in early stages, is manufacture or not. The weight of authority seems to be that such production is in general manufacture. A sawmill is usually considered

as a manufacturing establishment, manufactory, or factory."

The cases cited under the quoted portion of Corpus Juris, supra, refer generally to the production of lumber which is a completed product suitable for use as for building, even though such lumber may be further processed to make other articles.

If, as a matter of fact, the St. Louis Cooperage Company completes the manufacture of barrel staves at another place than Osage County, the cooperage company is a manufacturing corporation and is taxable as a manufacturer in Osage County, under the provisions of Section 9, Laws of Missouri 1945, page 1801, which provides as follows:

"All tangible personal property of business and manufacturing corporations shall be taxable in the county in which such property may be situated on the first day of January of the year for which such taxes may be assessed, and every business or manufacturing corporation having or owning tangible personal property on the first day of January in each year, which shall, on said date, be situated in any other county than the one in which said corporation is located, shall make return thereof to the assessor of such county or township where situated, in the same manner as other tangible personal property is required by law to be returned."

Since the production of a completed barrel stave is undoubtedly manufacturing, under the provisions of Section 9, supra, the property of such a corporation is taxable in the county or township where situated.

If, as a matter of fact, the St. Louis Cooperage Company is making rough staves and headings which are to be delivered to another company or companies which complete the manufacture of the staves or headings, and which companies contract for the rough staves and headings with the St. Louis Cooperage Company, the St. Louis Cooperage Company is a manufacturer. In such cases it is immaterial whether or not the rough staves and headings are completely manufactured products immediately ready for use when delivered by the St. Louis Cooperage Company.

In the case of Worth Bros. Co. v. Lederer, 256 Fed. 116, District Court, Eastern District of Pennsylvania, affirmed in 258 Fed. 533, Third Circuit Court of Appeals, affirmed in 251 U.S. 507, United States Supreme Court, the District Court held that where the Worth Bros. Company, under contract with the Midvale Steel Company, delivered to and were paid by the Midvale Steel Company for delivery to the Midvale Steel Company of shell forgings which were completed by such Midvale Steel Company, that the Worth Bros. Company was liable for a tax imposed on:

"every person manufacturing \* \* \* (c) \* \* \* shells \* \* \* of any kind, \* \* \* loaded or unloaded, \* \* \* or (f) any part of the articles mentioned in \* \* \* (c) \* \* \* shall pay for each taxable year \* \* \*"

The District Court said, l.c. 118:

"The product of manufacture by the plaintiff was a rough steel forging, cylindrical in shape, hollow, having one closed end. In order to fit it for delivery to the French government, it was necessary for it to go through a large number of heating, forging, and machining processes before it became a finished, completed, shell body. These processes were carried on after delivery to the Midvale Steel Company at its plant, and were 29 in number. \* \* \*"

At l.c. 121 it was further said:

"In view of the physical changes through the application of labor, skill, and science in manufacturing necessary to develop the shell forging into the finished shell body, it cannot be contended that the shell forging delivered to the Midvale Steel Company was a 'part' of a shell, in the sense of being adapted and ready for assembling with other parts to make a complete shell. It could not be used as a shell body until it underwent at least a large part of the steps of manufacture which the Midvale Steel Company put upon it. If 'manufacturing' is used in the sense of

completing manufacture, the plaintiff was not manufacturing shell bodies, which were at the completion of its work parts of shells.

"It should be borne in mind, however, that the tax is laid, not as a tax upon the shell, or any part of the shell, but is laid as an excise tax upon the business or occupation of manufacturing shells, or any parts of shells, the amount of the tax to be measured by the entire net profits received from the sale of such articles manufactured in the conduct of that business or occupation. That was the construction put upon section 27 of the War Revenue Act of 1898 (Act June 13, 1898, c. 448, 30 Stat. 464), imposing a tax upon persons carrying on the business of refining sugar equivalent to one-fourth of 1 per cent. on the gross amount of their receipts in excess of \$250,000, in the case of Spreckle Sugar Refining Co. v. McClain, 192 U.S. 397, at page 411, 24 Sup. Ct. 376, 48 L. Ed. 496. As the tax is laid upon the business or occupation of manufacturing, the inquiry therefore is whether 'any person manufacturing' includes only such persons manufacturing as bring the article manufactured to the finished condition, where it is adapted for use as part of a shell, or whether the term includes any person manufacturing the article in any one or more of the successive steps substantially necessary to bring it to that condition.

"If the former construction is to prevail, at which of the steps does the manufacture begin? If it is held that it does not begin until the manufacturer who brings it to its finished state commences his work, it would follow that, if the process of manufacture were distributed among a number of manufacturers, each doing a part of the manufacturing, the payment of the tax would be confined to that manufacturer who contributed such final steps as would bring the article

to its completed state of adaptability to the purpose intended. I do not think the language of the section justifies an interpretation which would lead to nullifying its purpose, or would lead to a different measure of liability for the tax assessed against different manufacturers, or against the same manufacturer of different lots of shells, dependent upon what part of the prior stages of manufacture might be done under contract or otherwise by others."

At l.c. 122 and 123 it was further said:

"It is true that, under the Midvale Steel Company's contract, the specifications of which were to be adhered to by the plaintiff, the chemical composition of the steel was prescribed, and it was subject to the inspection of the representatives of the French government. There is nothing in the case, however, to show that the ingots, the blooms or rounds, or the billets were not of such composition as to be used generally in the trade for other purposes. When, however, in the next step the heated billet was forged by the piercing process, it became a hollow forging, closed at its base and open at its top, and destined to become a shell body. There was further progress towards that destination in the next stop of manufacture, when the pierced forging was drawn into a shell forging. The article then manufactured was peculiarly adapted and exclusively intended by further manufacture to become a shell body, and had no other use to which it was peculiarly adapted.

\* \* \* \* \*

"That rule has been settled beyond dispute by the multitude of decisions cited on behalf of the plaintiff, where the courts have ruled that a manufactured article does not become such until its manufacture is complete; that is, it must be so changed from

the material of which it is composed by the application of labor skill, and science as to be put into a form that is suitable for use and adapted with a design to be used as such article. The rule has been applied in the classification of articles of merchandise imported and subject to customs duties, or upon which drawback is allowed. There are decisions as to what constitutes a manufactured article, what constitutes a part of a manufactured article, what constitutes a partially manufactured article, what constitutes a manufacture of certain material, and what constitutes a wholly manufactured article, dependent upon the terms of the law under which a tax is laid upon the article itself, or under which a drawback or other privilege is allowed.

"I cannot perceive that these cases have any bearing upon the question arising in this case, unless the terms of the act imply that the tax is to be imposed only upon the business of manufacturing to completion shells, or parts of shells, and there is no such limitation in its terms. The clear purpose of the act is, through taxation of the business or occupation of manufacturing munitions of war, to reach the profits of all those engaged in such manufacture, whether engaged in manufacturing to completion, or engaged in any part of such manufacturing."

The Circuit Court of Appeals said, l.c. 539 (258 Fed.):

" \* \* \* By the sixth step this hollow cylindrical forging was drawn to a length, and to an inside and outside diameter, which enabled the Midvale Steel Company to thereafter carry forward its twenty-nine progressive steps, which, with the six of the Worth Bros. Company, were required by the contract to complete the manufactured shell of the contract. From this it will be seen the Worth Bros. Company selected the material required in the shell; it made the steel which constituted the shell; by work done upon

said steel, it segregated it from the general field of commercial use and limited it to use for shell-making. That some of that material, when imperfect, was scrapped and used for other mechanical purposes only tends the more strongly to show that the work done by the Worth Bros. Company, in accordance with the contract, was shell work distinctively; for, even where it failed by not being up to contract requirements, it was so far removed from the general field of commerce that it was sold, not as an ordinary commercial product, but as scrap, and its subsequent use was only such restricted use for minor objects as scrap heaps permit. It would therefore seem clear that the volume of work done by the Worth Bros. Company -- 40 per cent. of the cost -- and the character of that work -- segregating the steel from the general field of commercial use and narrowing it to shell use -- made its work such as was aptly described by the act, as being 'manufacturing \* \* \* shells \* \* \* of any kind, loaded or unloaded, \* \* \* or any part' of a shell. Indeed, to say that when Worth Bros. Company made the steel which constituted the shell, and when by pressing a cavity in the steel they made an outer rim or shell which gave it such shape as committed and restricted it to shell use, to say that Worth Bros. Company, when they were doing this abnormal work and earning abnormal profits thereby, were making those profits neither from manufacturing shells nor manufacturing any part of shells is to lose sight of substance and of the purpose of Congress in using the plain, broad, inclusive words of this statute.  
\* \* \* \*

The United States Supreme Court said, l.c. 510 (251 U.S.):

"The progressive processes need not be enumerated. The lower courts have enumerated them, and the Court of Appeals describing them said that the 'steps' six in all, were 'progressive advances

toward the chemical constituents, the shape, and the dimension required by, and essential to, the manufacture of shells in compliance with the contract.' And the court distinguished the effect of the steps. With the fourth, it was said, the inspection by the French Government began; the fifth took the fluid metal (the result of the second step) from the possibility of use for general commercial purposes and by a forging process restricted the steel to the field of use for shells. By the sixth step this forging 'was drawn to a length, and to an inside and outside diameter, which enabled the Midvale Steel Company to thereafter carry forward its twenty-nine progressive steps, which, with the six' of petitioner 'were required . . . to complete the manufactured shell of the contract.'

"Manifestly' as counsel for the Collector says, 'the shell body was not completely manufactured by either of the companies which were engaged in its production' but 'by the two acting together.' And each therefore is liable for the profit it made, and judgment is Affirmed."

If, therefore, the St. Louis Cooperage Company is sawing timber into rough staves and headings, which staves and headings need more work done upon them before becoming completely manufactured staves and headings, and such rough staves and headings are delivered under contract to another company or companies which furnish the work of making completed staves or headings, the St. Louis Cooperage Company is a manufacturer and taxable as such.

If, as a matter of fact, the St. Louis Cooperage Company is not manufacturing rough staves and headings under contract with other companies, but saws the rough staves and headings for sale generally to any one who wishes to buy, the company is a merchant and is taxable as such under the provisions of Section 11303, supra.

#### Conclusion.

It is the opinion of this department that the St. Louis Cooperage Company comes within the definition of "merchant,"



Honorable John P. Peters

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as contained in Section 11303, Laws of Missouri 1945, page 1839, with regard to the sale of wood for fuel; that the St. Louis Cooperage Company is a manufacturer if, as a matter of fact, such company at another place other than Osage County completes the manufacture of rough staves and headings into completely manufactured staves and headings ready for use; that the cooperage company is a manufacturer if such company saws timber into rough staves and headings and delivers such rough staves and headings to other companies for further processing into completely manufactured staves and headings under a contract with such other companies; and that the St. Louis Cooperage Company is a merchant if such company holds out for sale generally rough staves and headings.

Respectfully submitted,

C. B. BURNS, JR.  
Assistant Attorney General

APPROVED:

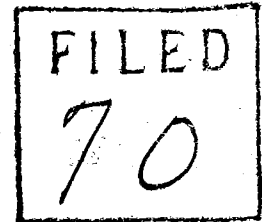
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J. E. TAYLOR  
Attorney General

CEB:ml

EDUCATION: Interpretation of Senate Bill No. 4 of the 64th General Assembly. Military schools with college status not required to teach the courses enumerated in said bill in the college years.

August 7, 1947



Mr. C. A. Phillips, Chairman  
Committee on Accredited Schools and Colleges  
University of Missouri  
Columbia, Missouri

Dear Sir:

This is in reply to your letter of recent date, wherein you requested an opinion of this department relative to the interpretation of Senate Bill No. 4 of the 64th General Assembly. Said letter reads as follows:

"Certain questions have arisen about the provisions of Senate Bill No. Four of the Sixty-fourth Assembly to non-public schools. As you know, the University Committee on Accredited Schools and Colleges visits and inspects all of the private or denominational secondary schools in the state on request of the institutions. The results of these visitations and inspections are reported directly to the Committee on Accredited Schools and Colleges for approval.

"Already I have requests for the interpretation of this law from a military school which has a large number of out of state students. This institution has both high school and college status and a school for women, which is normally under church control. It happens that large numbers who come to this school are from other states. Now, my question is this: 'Do these schools have to comply exactly with the provisions of this bill?' Section 10,373 would seem to indicate that all institutions in the state would have to meet the requirements. However, Section 10,374 seems to confine the instruction to state institutions.

"I would appreciate a formal opinion of this matter for the guidance of the committee."

A well recognized principle of statutory construction, still applied by the courts in this state, was expressed by the Supreme Court of Missouri in the early case of *Spitler v. Young*, 63 Mo. 42, where the court said at l.c. 44:

\*\* \* \* Statutes must be construed in reference to the subject matter, the objects which prompted and induced their enactment, and the mischief they were intended to remedy. \* \* \*

We think it cannot be denied that a very important factor which largely prompted the enactment of Senate Bill No. 4 of the 64th General Assembly was the then, and to a large extent continuing, hostility to certain forms of government which are basically opposed and repugnant to the democratic form of government which we have in this country. There was, at the time of this legislation, the general feeling that those other forms of government were becoming more aggressive even in our own country. To possibly counteract this threat, it was no doubt felt desirable to provide in our schools a course of study to better acquaint the youth of this state with the American and state governments and some of their history. In order to carry through the program of education, Senate Bill No. 4 provided what courses should be included in the course of instruction, and said it shall be "in all public and private schools located within the State of Missouri, except privately operated trade schools \* \* \*."

Other applicable rules of statutory construction are set out in the case of *Hannibal Trust Company v. Elzea*, 286 S. W. 371, where the court said at l.c. 377:

"While the fundamental rule in construing statutes is to ascertain and give effect to the intention of the Legislature, such intention, however, must be the intention as expressed in the statute, and where the meaning of the language used is plain, it must be given effect by the courts, otherwise they would be assuming legislative authority. 36 Cyc. 1106. As said by this court, in *Banc*, in *Grier v. Railway Co.*, 286 Mo. loc. cit. 534, 228 S. W. 457:

"The primary rule for the interpretation of statutes is that the legislative intention is to be ascertained by means of the words it has used. All other rules are incidental and mere aids to be invoked when the meaning is clouded. When the language is not only plain, but admits of but one meaning, these auxiliary rules have no office to fill. In such case there is no room for construction."

And the court continued at l.c. 377:

"Again, in the interpretation of statutes, words in common use are to be construed in their natural, plain, and ordinary signification. \* \* \*"

In an attempt, then, to determine the legislative intent, and bearing in mind the above quoted principles of statutory construction, by the natural and plain interpretation and ordinary signification of the words used in Senate Bill No. 4, what did the Legislature actually say? Section 10373 of said bill reads as follows:

"In all public and private schools located within the State of Missouri, except privately operated trade schools, commencing with the school year next ensuing after the passage of this Act, there shall be given regular courses of instruction in the Constitution of the United States and of the State of Missouri, and in American history, including the study of American institutions."

In an attempt to ascertain the meaning of the word "schools" as used in said section, we find in Webster's Dictionary, Second Edition, that "school" is defined as: "The process of being instructed or educated in institutions for teaching the young, usually not including colleges." Black's Law Dictionary, Second Edition, says that a school is "an institution of learning of a lower grade, below a college or a university. A place of primary instruction." In 47 Am. Jur., we find they say at page 297:

"\* \* \* Thus, the word 'school,' as used in Constitutions and statutory enactments, has

been frequently defined by the courts as referring only to the public, common schools generally established throughout the United States, and usually known as the 'common schools' of the country. It has been held that when used in a statute or contract it will not include universities, business colleges, or other institutions of higher education, unless there is something clearly to indicate the intent that such institutions should be included.\* \* \*

In State v. Erickson , 75 Mont. 429, the Supreme Court of Montana said at l.c. 441:

"\* \* \* The terms 'school,' 'college,' and 'university' convey the same idea, differing only in grade.\* \* \*

In Roach v. Board of Trustees of St. Louis Public Schools, 77 Mo. 484, the court said at l.c. 487:

"The term 'school,' ex vi termini, does not imply a restriction to the rudiments of an education. When contrasted with the term 'college' or 'university,' it may and ordinarily does imply a lower grade, but just where the one ends and the other begins, may not be easy to define.\* \* \*

Applying the wording of the Missouri Supreme Court, we believe the term "school" was meant to be contrasted with, and distinguished from, the words "colleges" and "universities" in the present act. Section 10374 of said Senate Bill No. 4 says:

"Such instruction in the Constitution of the United States and of the State of Missouri, and in American history, including the study of American institutions, shall begin not later than the opening of the Seventh Grade, and shall continue in the high school courses and in the courses in state colleges and universities and, to an extent to be determined by the State Commissioner of Education."

From this section, we find that the enumerated course of instruction is to begin not later than the opening of the seventh grade and is to continue in the high school courses. And then it is stated that the instruction is to be "in the courses in state colleges and universities and, to an extent to be determined by the State Commissioner of Education." In Senate Bill No. 7, passed by the 63rd General Assembly, to be found in Missouri Laws of 1945, page 1622, we find the authority given to the board of regents of each state teachers college to change the name of its college to merely read, "state college." A rule of construction too well recognized to allow any doubt is that the Legislature is presumed to know the law. It is our belief that the Legislature had this in mind when, in Section 10374, they referred to "state colleges and universities," thereby meaning the colleges and universities endowed by state funds. Otherwise the Legislature need only have said colleges and universities, thus omitting the word "state," which would have included all colleges and universities within the State of Missouri.

We do not feel it is the province of this department, in construing statutes, to thus drop words and change the construction of phrases that obviously the Legislature intended to imply a particular meaning. By specifically adding the phrase "state colleges and universities" in Section 10374, we think the Legislature was adding to the schools included in Section 10373, and that all other colleges and universities were meant to be excluded. It is a well-known canon of statutory construction, as expressed in *State ex inf. Conkling ex rel. Hendricks v. Sweaney*, 270 Mo. 685, that the expression of one thing is the exclusion of another.

Section 10374a of Senate Bill No. 4 reads:

"No pupil shall receive a certificate of graduation from any school described in Section 10373, unless he has satisfactorily passed an examination on the provisions and principles of the Constitution of the United States and of the State of Missouri, and in American history, including the study of American institutions."

In *Commonwealth v. Connecticut Valley Street Railway Company*, 82 N.E. 19, the Supreme Judicial Court of Massachusetts said at l.c. 21:

"The statute which we are now to interpret provides only for 'pupils.' The word 'pupils,'

by derivation and the definition of lexicographers, is properly applicable to children and youth. Students in colleges and professional schools are not called pupils."

We think this distinction in the terms "pupil" and "students" was intended in the present act, especially in view of the fact that the term "student" is used in the second paragraph of Section 10374a when referring to college and university, and which reads as follows:

"A student of a college or university, who, after having completed a course of instruction prescribed in this article and successfully passed an examination on the provisions and principles of the United States Constitution, and in American history, including the study of American institutions, transfers to another college or university, shall not be required to complete another such course or pass another such examination as a condition precedent to his graduation from such a college or university."

We interpret this above quoted paragraph to refer to the student of a college or university whose instruction is prescribed in this article, the same being a student of a state college or university.

A further indication of the intention of the Legislature in distinguishing between schools and colleges is to be found in Section 10374c of said bill, which reads as follows:

"The State Commissioner of Education shall make arrangements for carrying out the provisions of this article and prescribe a list of suitable texts adapted to the needs of the school and college grades. (Underscoring ours.)

Applying, then, the rules of construction above indicated, and in an attempt to ascertain the intention of the Legislature in said Senate Bill No. 4, we feel that the word "schools" as used in Section 10373, means grade and high school, or the equivalent thereof; that the "state colleges and universities"

referred to in Section 10374 means those colleges and universities in the state that are endowed by state funds; and that the word "pupil," as used in Section 10374a, refers to those attending a grade or high school, and "student" refers to those attending a college or a university.

One further point we should like to point out as indicating the general plan and intention of the Legislature on this subject is the fact that Section 1 of said Senate Bill No. 4 provides:

"That Article 2 of Chapter 72, Revised Statutes of Missouri, 1939, relating to schools be and the same is hereby amended by repealing Section 10373 providing for the giving of regular courses of instruction in the Constitution of the United States and the State of Missouri; and by repealing Section 10374 providing that instruction shall begin in certain grades, and adding in lieu thereof six new sections relating to the same subject matter; and providing in addition, that no pupil shall receive a certificate of graduation from any school unless he or she has passed an examination on the provisions and principles of the Constitution of the United States and of the State of Missouri, and in American history, including the study of American institutions; with power in the State Commissioner of Education to carry out and enforce the provisions of this act, \* \* \*"

It is to be noted that said Sections 10373 and 10374 of the 1939 Revised Statutes were quite similar in their provisions for the courses of instruction in the public and private schools as is now provided for in Senate Bill No. 4. Said sections were in Article 2 of Chapter 72 of the 1939 Revised Statutes, which contains laws applicable to all classes of schools, and on a review of those sections, we find that, in dealing with schools, it does not refer to colleges and universities. We do not feel that said sections have been previously interpreted to mean such instruction should exist in private colleges. These two sections have been on the statute books for several years and through several revisions, with no indication that said sections should be interpreted otherwise. We think this is a further indication of the legislative intent as to the application of Senate Bill No. 4. As was stated by the court in *State v. Brown*, 105 S.W. (2d) 909, 1.c. 911:



"In construing statutes in pari materia, endeavor should be made, by tracing history of legislation on the subject, to ascertain the uniform and consistent purpose of the Legislature or to discover how the policy of the Legislature with reference to the subject matter has been changed or modified from time to time.

\* \* \*"

### CONCLUSION

In view of the above, it is the opinion of this department that the courses in the Constitution of the United States and of Missouri and in American history, including the study of American institutions, in accordance with Senate Bill No. 4 of the 64th General Assembly, must be included in all grade schools, commencing with the seventh grade and continuing through high school, and in courses in state endowed colleges and universities, to an extent to be determined by the State Commissioner of Education. It is further the opinion of this department that any military school in the state would be required under said bill to teach the courses as included therein, commencing with the seventh grade and continuing through the high school grades. Such military school with a college status, if not endowed by state funds, would not be required to teach the courses in the college years.

Respectfully submitted,

Wm. C. COCKRILL  
Assistant Attorney General

APPROVED:

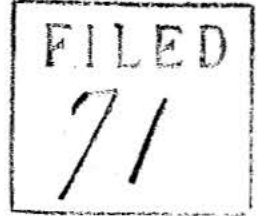
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J. E. TAYLOR  
Attorney General

WCC:LR

EXTRADITION: Only messenger appointed by Governor under Sec. 3976, R.S. Mo. 1939, has authority to return fugitives from justice to this state, and expense must be paid from State Treasury in accordance with Sec. 3977, R.S. Mo. 1939, except in cases where defendant is returned for wife or child abandonment the expense of extradition must be paid by County Court.

March 21, 1947



3/27

Board of Police Commissioners  
Kansas City, Missouri

Gentlemen:

This office is in receipt of your request for our official opinion as to whether the Board of Police Commissioners should advance money to pay traveling expenses to return to Missouri persons charged with a crime who have fled to other states to avoid prosecution, and whether it is the duty of the County concerned or the Prosecuting Attorney to provide those funds.

Extradition, or exchange of fugitives from justice between states, is governed by the Federal Constitution, Federal statutes and Federal decisions. Direct authority is found in Chapter 18, U.S.C.A., Section 662, which is as follows:

"Whenever the executive authority of any state or territory demands any person as a fugitive from justice, of the executive authority of any state or territory to which such person has fled, and produces a copy of an indictment found or an affidavit made before a magistrate of any state or territory, charging the person demanded with having committed treason, felony or other crime, certified as authentic by the governor or chief magistrate of the state or territory from whence the person so charged has fled, it shall be the duty of the executive authority of the state or territory to which such person has fled to cause him to be arrested and secured, and to cause notice of the arrest to be given to the executive authority making such demand, or to the agent of such authority appointed to receive the fugitive, and to cause the fugitive to be delivered to such agent when he shall appear. If no such agent appears within six months

from the time of the arrest, the prisoner may be discharged. All costs or expenses incurred in the apprehending, securing and transmitting such fugitive to the state or territory making such demand, shall be paid by such state or territory."

This has been supplemented by Article 9, Chapter 30, R. S. Mo. 1939, which provides for the appointment of a messenger by our Governor to return the fugitive. Section 3976, of that Article, provides:

"Whenever the governor of this state shall demand a fugitive from justice from the executive of another state or territory, and shall have received notice that such fugitive will be surrendered, he shall issue his warrant, under the seal of the state, to some messenger, commanding him to receive such fugitive and convey him to the sheriff of the county in which the offense was committed, or is by law cognizable."

The following Section, 3977, sets out the manner of payment of the individual appointed by the Governor as messenger, and provides:

"The expenses which may accrue under the last section, being first ascertained to the satisfaction of the governor, shall, on his certificate, be allowed and paid out of the state treasury, as other demands against the state."

The Federal statute above cited contemplates only extradition for violation of state criminal laws, and it is assumed that you also refer to such violations, since the possibility of payment by the County is contemplated as well.

A search of the statutes fails to reveal any authority for the payment of extradition expenses other than Section 3977, supra, except that Section 2250, R. S. Mo. 1939, applicable only to the City of St. Louis, provides for the establishment of a fund for expense in extraditing persons charged with contributing to the delinquency of minors, and Section 4422, R. S. Mo. 1939, provides for the payment, by the various county courts, of the expense of extradition of those fugitives charged with child abandonment. Since the latter section applies to Jackson County, it is set out herein:

"It shall, in any case in which application is properly made by the officer or officers responsible for the execution of the law, be the duty of the county court in any county and of the treasurer of the city of St. Louis, to provide the funds necessary for the extradition of any person charged with violating the provisions of section 4420. All applications for fund under this section shall state the name of the accused and the time, place and pertinent facts of the alleged offense, and shall include an itemized statement of the necessary and actual expenses incurred in the extradition of such person, and shall be signed and sworn to by the officer making such application."

Section 4420, above referred to, defines the crime of wife or child abandonment.

We believe the general rule to be that payment of the expense of the messenger appointed by the Governor must be made in accordance with Section 3977, with the exceptions just noted.

In State ex rel. See v. Allen, Auditor, 79 S. W. 164, 180 Mo. 27, a decision by the Missouri Supreme Court, the marshal of that court had brought back from Idaho a defendant who had fled from Missouri while an appeal was pending in the Supreme Court from a conviction of bigamy. The marshal had been appointed messenger by the Governor, but was attempting to collect his expense by virtue of his execution of a capias (order to take the defendant into custody) issued by the Supreme Court. We consider the following language in that case decisive of the question under discussion, 1. c. 30, 31, 32 (180 Mo.):

" \* \* \* It is axiomatic under our complex system of government that the laws and judgments and powers conferred by a state have, proprio vigore, no extra-territorial force.

\* \* \* \* \*

" \* \* \* The relator acted as a messenger appointed by the Governor, and the only remaining question is whether this court can, by mandamus, compel the Auditor to issue a warrant for the fees and expenses of the relator, before the Governor has ascertained the amount that shall be allowed, and before he has issued his certificate therefor.

"Under the statute quoted (sec. 2744, R. S. 1899) the duty of determining the question of the compensation and expenses of such messenger, is vested solely in the Governor, and he is the head of a co-ordinate branch of the government, \* \* \* and hence he can not be interfered with in the discharge of his duties by the courts. \* \* \*

"\* \* \* The Governor alone has the power to determine how much shall be paid, and to order it paid. Until he does so the Auditor cannot lawfully issue a warrant therefor.  
\* \* \*

Section 2744, R. S. 1899, referred to in the above extract, is very similar to Section 3977, R. S. Mo. 1939, supra.

#### CONCLUSION

It is the conclusion of this office that only the messenger appointed by the Governor of Missouri in accordance with Section 3976, R. S. Mo. 1939, has authority to return fugitives from justice to this State, and that such messengers must be paid from the State Treasury in accordance with Section 3977, R. S. Mo. 1939, except that in cases in which the defendant is being returned on charges of wife or child abandonment the expense of extradition must be paid by the County Court of the County concerned in pursuance to Sections 4421 and 4422, R. S. Mo. 1939. We find no authority for the advancement of expense for extradition by the Board of Police Commissioners of Kansas City, or by Jackson County, except that found in the two sections last cited.

Respectfully submitted,

ROBERT L. HYDER  
Assistant Attorney General

APPROVED:

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J. E. TAYLOR  
Attorney General

RLH:HR

CONSTITUTIONAL LAW:  
TAXATION & REVENUE:

Constitution doesn't require tax moneys from  
intangibles to be deposited in State Treasury.

April 4, 1947

FILED

71

Honorable Edde B. Pope, Chairman  
Committee on Taxation & Revenue  
House of Representatives  
Jefferson City, Missouri

Dear Mr. Pope:

Receipt is acknowledged of your request for an official  
opinion, which reads:

"As Chairman of the Committee on Taxation  
and Revenue of the House of Representatives,  
I respectfully request an official opinion  
on the following question:

"Does the Constitution require  
that tax moneys collected under  
the provisions of House Committee  
Substitute for House Bill 868,  
House Bills 869, 888, and 948 be  
deposited in the State Treasury?

"It appears that Article IV, Section 15 and  
Article X, Section 4 are pertinent to the  
question."

The bills referred to in your letter of inquiry were enacted  
by the 63rd General Assembly and are now in effect. H. C. S. H. B.  
No. 868 provides for the levying and collecting of a property tax  
on intangible personal property based upon the yield thereof.  
House Bill No. 869 imposes a property tax on the accounts of  
savings and loan and building and loan associations, the basis of  
such tax being the taxable portion of the dividends declared  
and credited to said accounts. The act specifically classifies  
the accounts of the above named associations as intangible prop-  
erty. House Bill No. 888 imposes a tax in the nature of a  
franchise tax on banks and trust companies in Missouri according  
to and measured by their net incomes, and House Bill No. 948  
imposes a tax in the nature of a franchise tax on credit institu-  
tions according to and measured by their net incomes.

Section 4(a), Article X of the 1945 Constitution, in part,  
provides:

"All taxable property shall be classified for tax purposes as follows: Class 1, real property; Class 2, tangible personal property; Class 3, intangible personal property.\* \* \* Nothing in this section shall prevent the taxing of franchises, privileges or incomes, or the levying of excise or motor vehicle license taxes, or any other taxes of the same or different types."

The property subjected to taxation as provided in the aforementioned bills fall within the taxable classification of Class 3 in the above quoted constitutional provision. So it has been held in an official opinion submitted by this department on December 10, 1946, to Honorable M. E. Morris, Director of Revenue. In the second paragraph of page 1 of that opinion the following appears:

"Under Section 4(a) of Article X of the Constitution of 1945, property for the purpose of taxes is classified into three classes, namely Class 1, real property; Class 2, tangible personal property; Class 3, intangible personal property. The taxes derived under House Bills Nos. 868, 869, 888 and 948 are in Class 3, namely taxes on intangible personal property."

In answering your question we must now consider the other pertinent constitutional provision.

Section 4(c), Article X of the 1945 Constitution provides:

"All taxes on property in Class 3 and its subclasses, and the tax under any other form of taxation substituted by the general assembly for the tax on bank shares, shall be assessed, levied and collected by the state and returned as provided by law, less two per cent for collection, to the counties and other political subdivisions of their origin, in proportion to the respective local rates of levy." (Underscoring ours)

In reading the above section and giving to the language its plain and ordinary meaning, we believe it requires the taxes on Class 3 property (intangible property) to be assessed, levied and collected by the State, and that all of the taxes collected on intangibles, less 2% shall be returned to the counties and other political subdivisions of their origin. The taxes collected on intangible property cannot be considered as current income of the state which is subject to appropriation for public uses for section

4(c), supra, makes it mandatory that such tax moneys shall be returned to the counties and political subdivisions from whence the tax is paid. Consequently the taxes on intangible property collected by the state do not belong to the state but belong to the counties and political subdivisions of their origin and we believe that the state, in collecting such tax moneys, merely acts as trustee of the moneys for the counties and political subdivision to which such moneys belong.

A somewhat analogous situation would be when fees earned by a particular department of government are paid into the state, and that the cost of operation of such department is to be defrayed wholly from the fees earned. Under these circumstances the Supreme Court of Missouri has indicated that the state is merely a trustee of the moneys paid in equal to the cost of upkeep of the department. So the following appears in State ex rel. Gass v. Gordon, 266 Mo. 394, 181 S. W. 1016, 1.c. 1023:

"\* \* \* \* \*Whenever a statute creating a department of government of this state provides (or whenever an appropriation for the support of a department of government contains such a proviso) that the cost of operation shall be defrayed wholly from fees earned by such department and not otherwise, then clearly the state is, as to an amount equal to the cost of upkeep, a trustee merely of the moneys paid in, and the state's general revenue fund is entitled only to the surplus paid in to the state treasury after deducting expenses of the operation of such department. \* \* \* \* \*" (Emphasis ours)

It is true that when the state collects the taxes on intangibles it necessarily receives them before they are returned to the counties or political subdivisions of their origin, therefore, the question arises whether or not such tax moneys can be returned to the counties and political subdivisions without first passing through



the State Treasury.

In this regard our attention is directed to Section 15, Article IV of the 1945 Constitution, which provides:

"The state treasurer shall be custodian of all state funds. All revenue collected and moneys received by the state from any source whatsoever shall go promptly into the state treasury, and all interest, income and returns therefrom shall belong to the state. Immediately on receipt thereof the state treasurer shall deposit all moneys in the state treasury to the credit of the state in banking institutions selected by him and approved by the governor and state auditor, and he shall hold them for the benefit of the respective funds to which they belong and disburse them as provided by law. Such institutions shall give security satisfactory to the governor, state auditor and state treasurer for the safekeeping and payment of the deposits on demand of the state treasurer authorized by warrants of the state auditor. No duty shall be imposed on the state treasurer by law which is not related to the receipt, custody and disbursement of state funds."  
(Emphasis ours)

The above quoted section has its origin in Section 43, Article IV, and Section 15, Article X of the Consitution of 1875. Portions of each have been combined to form the section now appearing in our present Constitution with other minor changes.

Section 15, Article X of the 1875 Constitution in part provides:

"All moneys now, or at any time hereafter, in the State treasury, belonging to the State, shall, immediately on receipt thereof, be deposited by the Treasurer to the credit of the State for the benefit of the funds to which they respectively belong, in such bank or banks as he may, from time to time, with the approval of the Governor and Attorney General, select, \* \* \*such bank to pay a bonus for the use of such deposits not less than the bonus paid by other banks for similar deposits; and the same, together with such interest and profits as may accrue thereon, shall be disbursed by said Treasurer for

for the purposes of the state, according to law, upon warrants drawn by the State Auditor and not otherwise."

Section 43, Article IV of the 1875 Constitution in part provides:

"All revenue collected and moneys received by the State from any source whatsoever shall go into the treasury, and the General Assembly shall have no power to divert the same, or to permit money to be drawn from the treasury, except in pursuance of regular appropriations made by law. \* \* \*"(Emphasis ours)

It will be observed that the underscored portion of the above quoted section and the first part of the second sentence in Section 15, Article IV of the 1945 Constitution are almost identical. In substance they both say that all revenue collected and moneys received by the state from any source whatsoever shall go into the State Treasury. Does it therefore mean that the tax moneys received by the State derived from taxing intangible property, which we believe the State holds as trustee for the counties and other political subdivisions, must be deposited in the State Treasury?

In construing a constitutional provision the construction given a similar provision in a former constitution or the federal constitution is strongly persuasive. *Star Square Auto Supply Co. v. Gerk*, 30 S. W.(2d) 447, 325 Mo. 968. Further, in the case of *Ludlow Saylor Wire Co. v. Wollbrinck*, 205 S. W. 196, 275 Mo. 339, the Supreme Court of Missouri said at Mo. l.c. 355:

"\* \* \*The rule is firmly settled that the adoption in a later constitution of the words and context of another, which had been construed by a court of last resort, is presumed (in the absence of a contrary intention) to have been done to give the adopted words their adjudicated meaning.  
\* \* \*"

Consequently, in construing the provision in Section 15, Article IV of our present Constitution requiring all revenue collected and moneys received by the State to be deposited in the State treasury, we may look to the construction that the courts have given the similar provision appearing in Section 43, Article IV of the 1875 Constitution.

In the case of State ex rel. Thompson v. Board of Regents for Northeast Missouri State Teachers College, 264 S. W. 698, 305 Mo. 57, the State Treasurer brought a mandamus proceeding to compel the Board of Regents to pay moneys received from insurance companies, as a result of fire losses, into the State Treasury. It was contended that under Section 43, Article IV of the 1875 Constitution requiring that moneys received by the State from any source whatsoever shall go into the Treasury the insurance moneys should be paid into the Treasury. The Supreme Court in defining the term revenue said at S. W. l.c. 700:

"\* \* \*By revenue, whether its meaning be measured by the general or the legal lexicographer, is meant the current income of the state from whatsoever source derived which is subject to appropriation for public uses. This current income may be derived from various sources, as our numerous statutes attest, but, no matter from what source derived, if required to be paid into the treasury, it becomes revenue or state money; its classification as such being dependent upon specific legislative enactment, or, as aptly put by the respondent, state money means money the state, in its sovereign capacity, is authorized to receive, the source of its authority being the Legislature. \* \* \* \* \*

Unless, therefore, it can be successfully contended, in harmony with well-recognized rules of interpretation, that the board of Regents of the college is the state, and that moneys received by it other than from appropriations is state money, the constitutional provision will afford no support to the relator's contention." (Emphasis ours)

In reading Section 15, Article IV of the 1945 Constitution we observe that there are three terms, which we believe are used interchangeably and for the same purposes. They are "revenue", "moneys" and "state funds", and therefore we believe that the definition of "revenue" in the above quotation is applicable and definitive of all three.

Consequently, under the Thompson case, supra, for revenue,

state funds or moneys received by the state to be deposited in the State Treasury they must be subject to appropriation for public uses and must be required to be paid into the State Treasury as intended by the Legislature. If these conditions are not present Section 15, Article IV of the Constitution has no application.

Turning again to the tax moneys received by the State from intangibles, let us ascertain whether or not the necessary conditions attach to bring such moneys within the purview of Section 15, Article IV, supra.

As aforestated, we believe that it is clearly indicated that such tax moneys are not subject to appropriation for public uses for Section 4(c) of Article X makes it mandatory that such moneys shall be returned to the counties and political subdivisions of their origin. The failure to meet this condition alone would exempt intangible tax moneys from going into the State Treasury. Also a study of the bills in question fails to show a legislative intent that such moneys are state moneys and that they should be deposited in the treasury. Obviously the legislature hasn't considered them state moneys for the reason that they do not belong to the state.

Your attention is directed to the last sentence of Section 15, Article IV of the 1945 Constitution, which appears as new matter and which reads:

"\* \* \* No duty shall be imposed on the state treasurer by law which is not related to the receipt, custody and disbursement of state funds."

Under the above provision the State Treasurer shall only receive and be custodian of state funds or state moneys which the State receives in its sovereign capacity and may appropriate for public uses. To impose the duty on the State Treasurer to receive and be custodian of moneys belonging to the counties and political subdivisions would be in violation of the Constitution.

#### CONCLUSION

Therefore, it is the opinion of this department that the Constitution of 1945 does not require tax moneys collected under the provisions of House Committee Substitute House Bill No. 868, House Bill No. 869, House Bill No. 888 and House Bill No. 948 to be

Hon. Edde B. Pope

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deposited in the State Treasury because such moneys are not State moneys.

Respectfully submitted,

RICHARD F. THOMPSON  
Assistant Attorney General

APPROVED:

J. E. TAYLOR  
Attorney General

RFT:mw

SCHOOL FUNDS:

Type of securities in which county and township school funds may be invested.

COUNTY AND TOWNSHIP:

January 23, 1947

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*Copy to Mr. O. F. Preusse*  
Mr. O. F. Preusse  
County Treasurer  
Perry County  
Perryville, Missouri

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Dear Sir:

This is in reply to your letter of recent date wherein you request an opinion from this department relative to the investment of county and township school funds. The questions read as follows:

"1. Perry County has authorized a bond issue for the erection of a county hospital under the provisions of Sections 15192 to 15206 of the RS Missouri 1939. Can the school funds be invested legally in such county hospital bonds?

"2. What is to be included within the term 'approved bonds of any city or school district thereof'?"

The county court derived its authority for investing county and township school funds from the Constitution and statutes. In the case of Molt County v. Harmon, et al., 59 Mo. 165, the Supreme Court, in discussing the powers and duties of county courts in the management of school funds, said at l.c. 171:

"\* \* \* In the care and management of the fund, the County Court acts purely in an administrative capacity, not as the agent of the county, but in the performance of a duty specifically devolved upon it by the laws of the State. There is nothing judicial in the exercise of its functions in this respect. The County Court does not derive its authority from the county, and it can exercise only such powers as the legislature may choose to invest it with."

Therefore, we will refer to the statutes and the Constitution to ascertain what powers the county courts have with respect to investing county and township funds.

I note in your inquiry that you refer to Sections 15192 to 15208, R. S. Mo. 1939. From an examination of the laws passed by the 63rd General Assembly, I find that the Legislature, by House Bill 756, repealed Sections 15192 to 15197, inclusive, and enacted four new sections in lieu thereof. Section 15192 of said bill provides as follows:

"The county courts of the several counties of this state are hereby authorized, as provided in this Article, to establish, construct, equip, improve, extend, repair and maintain public hospitals, and may issue bonds therefor as authorized by the general law governing the incurring of indebtedness by counties. Provided that in all cases where proceedings for the issuance of county bonds have been initiated to the extent that petitions required by existing law have been circulated and filed with the county court containing the signatures of the requisite number of qualified petitioners and an order by the county court has been made pursuant thereto calling an election and fixing the date thereof under any statute repealed hereby, such election shall be held and the results thereof canvassed and certified pursuant to the statutes under which such proceedings were initiated, and if two-thirds of the qualified voters of the county voting thereon at such election shall vote in favor of incurring such indebtedness and of issuing bonds therefor, such bonds may be issued, sold and delivered under the provisions of the statute pursuant to which such proceedings were initiated, and such proceedings and such bonds, so issued, shall be valid; or where the issuance of such bonds has been authorized at an election held prior to the effective date of this act, such bonds may be issued, sold and delivered under the provisions of the statute pursuant to which such proceedings were initiated."

Both the old act and the new act, in substance, authorize county courts to establish and maintain public hospitals and to issue bonds therefor when authority has been conferred upon them by a vote of the people. On the question of whether county and township school funds may be invested in county hospital bonds, we find that Section 7 of Article IX of the Constitution of 1945 sets out the type of securities in which such funds may be invested. It reads in part as follows:

"All real estate, loans and investments now belonging to the various county and township school funds, except those invested as hereinafter provided, shall be liquidated without extension of time, and the proceeds thereof and the money on hand now belonging to said school funds of the several counties and the city of St. Louis, shall be reinvested in registered bonds of the United States, or in bonds of the state or in approved bonds of any city or school district thereof, or in bonds or other securities the payment of which are fully guaranteed by the United States, and sacredly preserved as a county school fund.\* \* \*"

The 63rd General Assembly by Senate Bill 162 enacted enabling legislation for the provisions of said Section 7. Section 10376 of said Senate Bill reads in part as follows:

"It is hereby made the duty of the several county courts of this state to collect diligently and, when authorized by law, to invest securely the proceeds of all moneys, stocks, bonds and other property belonging to or accruing to the county school fund. On and after the effective date of this act, all real estate loans and investments now belonging to the county school funds, except those invested as hereinafter provided, shall be liquidated without extension of time upon the maturity thereof, and the proceeds thereof and the money then on hand belonging to said school fund of the county shall be reinvested in registered bonds of the United States, or in bonds of the state, or in approved bonds of any city or school district thereof, or in bonds or other securities the payment



of which is fully guaranteed by the United States Government, and shall be preserved as a county school fund; \* \* \*

Section 10383 of the same bill contains the same provisions as to the type of securities in which the county and township funds may be invested. From an examination of said Section 7 of Article IX of the Constitution of 1945, and of Sections 10376 and 10383 of Senate Bill 162, passed by the 63rd General Assembly, it will be found that securities such as county hospital bonds are not included within the class of bonds in which the school funds may be invested. Since the county courts are only authorized to invest these funds in securities provided for in the Constitution and in the law, then the county court would not be authorized to invest county and township school funds in county hospital bonds.

On the question of "what is to be included within the term 'approved bonds of any city or school district thereof'", we are assuming that you are inquiring about what is meant by the term "approved bonds" and whether city or school district bonds are securities in which such funds may be invested. The framers of the Constitution and the lawmakers, in providing that the bonds of cities or school districts must be approved bonds before the funds may be invested in them as securities, must have had in mind the provisions of Section 3306, R. S. Mo. 1939. This section reads in part as follows:

"Before any bond, hereafter issued by any county, township, city, town, village or school district or special road district or by virtue of the provisions of articles 1, 3, 6, 7 and 8, Chap. 79, R. S. 1939, for any purpose whatever, shall obtain validity or be negotiated, such bonds shall first be presented to the state auditor, who shall register the same in a book or books, provided for that purpose, in the same manner as state bonds are now registered, and who shall certify by endorsement of such bond that all conditions of the laws have been complied with in its issue, if that be the case, and also that the conditions of the contract, under which they were ordered to be issued, have also been complied with and the evidence of that fact shall be filed and preserved by the auditor.\* \* \*

Section 3307, R. S. No. 1939, makes the following provision relating to the investment of funds held by trustees in securities which have been approved or registered by the State Auditor. This section reads as follows:

"Any and all bonds registered by the state auditor under the provisions of the laws of this state, and any and all bonds that have been or may be duly issued by any county or city having a population of over 300,000 inhabitants, whereon there is no default in payment of principal or interest, may be accepted as good and lawful security for the investment of the capital stock, surplus and reserve funds of any insurance or fraternal benefit society incorporated in or authorized to transact business in this state, or trust company authorized to transact business in this state. The state superintendent of insurance is hereby authorized to accept such bonds as security or pledge in all cases where such pledge or security is required by the laws of this state. Such bonds may be accepted by the state treasurer as security for the deposit of any and all state funds, and by county and city treasurers as security for the deposit of any and all county and city funds. They shall also be eligible for the investment of any funds in the possession of any administrator, executor, guardian, curator, trustee and all other persons sustaining fiduciary relations. Such investments may be made without an order of court first had and obtained, and without incurring liability for loss, except in case of inexcusable negligence."

On account of the limitations prescribed in said Section 7 of Article IX of the Constitution of 1945, and in said Senate Bill 162, we do not think that county and township school funds could be invested in every type of bond which is registered by the State Auditor.

The authority for issuing bonds by a city or school district is found in Sections 26 (b), 26 (c), 26 (d) and 26 (e) of Article VI of the Constitution of 1945. These sections read as follows:

"Sec. 26 (b) Any county, city, incorporated town or village, school district or other political corporation or subdivision

of the state, by vote of two-thirds of the qualified electors thereof voting thereon, may become indebted in an amount not to exceed five per centum of the value of taxable tangible property therein as shown by the last completed assessment for state and county purposes.

"Sec. 26 (c) Any county or city, by vote of two-thirds of the qualified electors thereof voting thereon, may incur an additional indebtedness for county or city purposes not to exceed five per centum of the taxable tangible property shown as provided in section 26 (b).

"Sec. 26 (d) Any city, by vote of two-thirds of the qualified electors thereof voting thereon, may become indebted not exceeding in the aggregate an additional ten per centum of the value of the taxable tangible property shown as provided in section 26 (b), for the purpose of acquiring rights of way, constructing, extending and improving the streets and avenues and acquiring rights of way, constructing, extending and improving sanitary or storm sewer systems. The governing body of the city may provide that any portion or all of the cost of any such improvement be levied and assessed by the governing body on property benefited by such improvement, and the city shall collect any special assessments so levied and shall use the same to reimburse the city for the amount paid or to be paid by it on the bonds of the city issued for such improvement.

"Sec. 26 (e) Any city, by vote of two-thirds of the qualified electors thereof voting thereon, may incur an indebtedness in an amount not to exceed an additional ten per centum of the value of the taxable tangible property shown as provided in section 26 (b), for the purpose of paying all or any part of the cost of purchasing or constructing waterworks, electric or other light plants to be owned exclusively by the city, provided

the total general obligation indebtedness of the city shall not exceed twenty per centum of the assessed valuation."

Bonds issued under authority of these sections are registered and approved by the State Auditor as is provided for in said Section 3306, supra.

The question might arise as to the authority to invest school funds in the revenue bonds provided for by Section 27 of Article VI of the Constitution of 1945 which reads as follows:

"Any city or incorporated town or village in this state, by vote of four-sevenths of the qualified electors thereof voting thereon, may issue and sell its negotiable interest bearing revenue bonds for the purpose of paying all or part of the cost of purchasing, constructing, extending or improving any revenue producing water, gas or electric light works, heating or power plants, or airports, to be owned exclusively by the municipality, the cost of operation and maintenance and the principal and interest of the bonds to be payable solely from the revenues derived by the municipality from the operation of such utility."

The Missouri Supreme Court, in the case of State ex rel. City of Fulton v. Smith, 194 S.W. (2d) 302, had before it for consideration the question of the registration of revenue bonds issued by authority of said Section 27. At l.c. 306, the court, in passing on this particular question, said:

"It is perfectly clear that Sections 3303, 3304 can have no reference to revenue bonds. They relate solely to bonds payable through the collection of taxes. It is, therefore, impossible to harmonize them with Section 3306, if the latter be applied to revenue bonds.\* \* \*"

Speaking further on the question of the reason that revenue bonds were not required to be registered by the State Auditor under said Section 3306, the court made this further statement:

"\* \* \* The preferred position thus accorded to bonds validated through registration by the state auditor, payable in the exercise of the taxing power, the holders thereof being possessed of well understood and long defined remedies, is not to be extended, in the absence of a manifest legislative intent so to do, to another and different type of security not constituting a debt or liability within the ordinary meaning of those terms, and to the payment of which the taxing power may not be pledged, and the issuing body does not agree to pay except out of revenues, and thus made wholly dependent upon the successful operation of the utility improved with the proceeds."

From this opinion, we think there is no question but that county and township school funds may not be invested in the revenue bonds authorized by said Section 27 of Article VI because such bonds are not registered and approved by the State Auditor.

CONCLUSION

From the foregoing, it is the opinion of this department that: (1) county and township school funds may not be invested in county hospital bonds, and (2) that the county and township school funds may be invested in city or school district bonds of such county, provided such bonds have been approved and registered by the State Auditor as is required by Section 3306, R. S. No. 1939.

Respectfully submitted,

FRANK E. DUNNICK  
Assistant Attorney General

APPROVED:

J. E. TAYLOR  
Attorney General

TWB:VLM

PAROLE: Authorities of State of Florida may retake  
CRIMINAL LAW: parolee in this state under interstate compact  
INTERSTATE COMPACT: for violations committed subsequent to this  
state becoming a signatory to said compact.

August 2, 1947

Board of Probation and Parole  
State of Missouri  
Jefferson City, Missouri

Attention: Mr. Donald W. Bunker  
Executive Secretary

Gentlemen:

This will acknowledge receipt of your request for an official opinion which for sake of brevity we are restating.

As we understand the facts in your request, Rose Lair was convicted of robbery with a dangerous and deadly weapon in the State of Florida, and on March 10, 1941, was sentenced to serve 10 years in the state penitentiary at Raiford, Florida. Thereafter, on May 13, 1942, she was released on parole by the Florida authorities and the Missouri Board of Probation and Parole accepted supervision of said parolee. She was to remain on parole until March 10, 1951. Thereafter, on several occasions, she violated the terms of her parole and the Board of Probation and Parole reported such violations to the Florida authorities and recommended revocation of said parole and her return to Florida. Thereupon, she filed a petition for writ of habeas corpus in the Court of Criminal Corrections, Division No. 2, City of St. Louis, Missouri, and that court sustained said writ in December, 1946, whereupon she was advised by her counsel that she should continue to report to your St. Louis office in accordance with the parole regulations; but she has repeatedly refused and has not, as of the date of your request, reported to said office although she is in St. Louis, Missouri.

You now inquire if under the compact, for such violations of the parole and regulations of your board, subsequent to Missouri becoming a signatory state and upon your notifying the proper authorities in the State of Florida, which likewise is a signatory to said compact, may the proper accredited officers of the State of Florida enter Missouri and re-take said parolee without any formalities other than establishing their authority and the identity of the parolee.

The 73rd Congress, Second Session, on June 6, 1934, enacted Public Law No. 293, 48 Stats. 909, 18 U.S.C.A. 7,

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Section 420, wherein Congress gave its consent to two or more states to enter into agreements or compacts for cooperative effort and mutual assistance in the prevention of crime, which act, the basis for this state entering into a compact, is authorized under Section 46, page 737, Laws of Missouri 1945. Said Section 420 reads:

"The consent of Congress is hereby given to any two or more States to enter into agreements or compacts for cooperative effort and mutual assistance in the prevention of crime and in the enforcement of their respective criminal laws and policies, and to establish such agencies, joint or otherwise, as they may deem desirable for making effective such agreements and compacts."

Under Section 46, page 737, Laws of Missouri 1945, the 63rd General Assembly authorized the Governor of this state to enter into a compact with other states pursuant to the foregoing act of Congress consenting to such compacts, which reads:

"The governor is hereby authorized and directed to enter into a compact on behalf of the state of Missouri with any and all other states of the United States legally joining therein and pursuant to the provisions of an act of the congress of the United States of America granting the consent of congress to any two or more states to enter into agreements or compacts for cooperative effort and mutual assistance in the prevention of crime and for other purposes, which compact shall have as its objective the permitting of persons placed on probation or released on parole to reside in any other state signatory to the compact assuming the duties of visitation and supervision over such probationers and parolees; permitting the extradition and transportation without interference of prisoners, being re-taken, through any and all states signatory to said compact under such terms, conditions, rules and regulations, and for such duration as in



the opinion of the governor of this state shall be necessary and proper."

Thereafter, on April 3, 1947, in conformity with Section 46, supra, the Governor of this state entered into a compact with all other signatories of said compact. The compact executed by Governor Phil M. Donnelly is the uniform type executed by all other states a party thereto. It specifically provides under Section 6 thereof that said compact shall become operative immediately upon its execution by any state as between it and any other state or states so executing; that when executed, it shall have the full force and effect of laws within such states.

Section 3 of said compact further authorizes any accredited officers of a sending state at any time to enter and re-take any person on probation or parole without the necessity of extradition proceedings. Furthermore, the decision of the sending state that to re-take a parolee is conclusive. Section 3 reads:

"That duly accredited officers of a sending state may at all times enter a receiving state and there apprehend and retake any person on probation or parole. For that purpose no formalities will be required other than establishing the authority of the officer and the identity of the person to be retaken. All legal requirements to obtain extradition of fugitives from justice are hereby expressly waived on the part of the states party hereto, as to such persons. The decision of the sending state to retake a person on probation or parole shall be conclusive upon and not reviewable within the receiving state: Provided, however, That if at the time when a state seeks to retake a probationer or parolee there should be pending against him within the receiving state any criminal charge, or he should be suspected of having committed within such a state a criminal offense, he shall not be retaken without the consent of the receiving state until discharged from prosecution or from imprisonment for such offense."

Such compacts as executed by the Governor of this state have been held constitutional on most all grounds imaginable.



See Ex Parte Tenner, 128 P. (2d) 338, 1.c. 341, 342, 343, wherein the court said:

"The administration of parole is an integral part of criminal justice, having as its object the rehabilitation of those convicted of crime and the protection of the community. Unquestionably such rehabilitation of a parolee may often be facilitated by transferring him to another state, with new surroundings and better opportunities for employment. It is apparent, however, that the success of such out-of-state transfers requires adequate control and intelligent supervision of parolees during the period of their readjustment to civil life. And from the standpoint of the protection of society, there is sound reason for an agreement between states that the authority over parolees should follow them across state lines. The knowledge on the part of the out-of-state parolee that he may summarily be returned to prison for any violation of the rules which he has agreed to obey undoubtedly is an effective check upon any inclination to violate parole.

"The compact represents the social policy of both California and Washington in this regard. It is an agreement for cooperative effort and mutual assistance in the prevention of crime and in the enforcement of the criminal laws of each state within the contemplation of the federal legislation and therefore does not violate the prohibition of the Constitution concerning compacts between states.

"Nor does the act of the respondent deprive the petitioner of his liberty without due process of law in violation of the Fourteenth Amendment to the United States Constitution. He had his day in court when he was tried and convicted of a felony and sentenced to a maximum term of five years in the Washington State Penitentiary. The parole which he accepted was granted upon the express condition that the Board of Prison

Terms and Paroles may at any time within its discretion and without notice cause the parolee to be returned to the said institution to serve the full maximum sentence or any part thereof.' One convicted of crime has the right to reject an offer of parole, but once having elected to accept parole, the parolee is bound by the express terms of his conditional release. In re Peterson, 14 Cal. 2d 82, 92 P. 2d 890.

"The most serious question presented by the petitioner is his contention that article IV, section 2, clause 2, of the United States Constitution providing for the extradition of criminals and the act of Congress carrying that constitutional provision into effect constitute the sole method by which a parolee whose parole has been revoked may be returned to the state in which he was convicted. The Constitution provides:"

\*\*\*\*\*

"Except for section 2 of article IV of the Constitution, there would be no question concerning the right of states to provide, by their joint agreement, for the return of a certain class of fugitives, subject, of course, to the constitutional provision regarding interstate compacts. \*\*\*"

\*\*\*\*\*

"The existence of an independent method of securing the return of out-of-state parolees does not conflict with nor render ineffectual the federal laws with relation to extradition. The federal method of extradition is always present and may be invoked when necessary to secure the right to return of the fugitive to the demanding state. Also states not party to the interstate compact are free to invoke that procedure to secure the return of fugitive parolees. And if a state has elected to

follow the federal procedure and claim the constitutional guarantee, the fugitive of course has the right to insist, on habeas corpus, that the procedure conform to the federal law. Similarly the parolee detained under the interstate compact has the right to complain, by means of habeas corpus, if that law is not complied with by the authorities. But no right exists on the part of the parolee, whose parole has been revoked, to claim that he may only be removed by the method of his choosing. And since the statute applies uniformly to all parolees from states party to the compact, the petitioner may not complain that the statute deprives him of the equal protection of the laws. (See cases cited.) \* \* \* "

Therefore, it appears that the only question now to be determined, since you specifically state the parolee has positively violated the conditions of her parole subsequent to this state executing the foregoing compact and the State of Florida revoking said parole and re-taking said parolee, does the taking of said Rose Lair by virtue of said compact executed under and by virtue of Section 46, page 737, Laws of Missouri 1945, and the act of Congress consenting to such action by the Legislature as heretofore referred to, amount to said compact and law operating retrospectively. And if such be the case, can said parolee be re-taken by the proper officials of the State of Florida without extradition proceedings.

Under Article I, Section 13 of the Constitution of Missouri 1945, the General Assembly is prohibited from enacting ex post facto laws and said amendments prohibit the passage of any law impairing obligations of contracts, or retrospective in operation, or making any irrevocable grant of special privileges or immunities. Said amendment reads:

"That no ex post facto law, nor law impairing the obligation of contracts, or retrospective in its operation, or making any irrevocable grant of special privileges or immunities, can be enacted."

Retroactive and retrospective have been regarded as synonymous. In *Graham Paper Company vs. Gehner*, 59 S.W. (2d) 49, l.c. 50, the Supreme Court of Missouri, en banc, defined

said words in the following manner:

"The plaintiff bases its contention on the literal reading of the amended statute which provides that there shall be levied and collected 'for the calendar year 1927'--all of it--an income tax of 1 per cent. on only the proportional amount of the total income derived from business done within this state, and so the statute reads. To this the defendants reply that such amended statute did not go into effect till July 3, 1927, and therefore could not work any change in the income tax law as to the basis or mode of computing the tax till after that date, and that to hold otherwise and in accordance with plaintiff's contention, the amendment is 'retrospective in its operation' and in contravention of section 15, article 2, of our Constitution.

"Defendants are clearly correct. A new or an amendment of an existing statute which reaches back and creates a new or different obligation, duty, or burden which did not exist before the new law itself became effective, or which makes the obligation or burden begin at a date earlier than the date of going into effect of the law itself, is retroactive in its operation and unconstitutional. A law is retroactive in its operation when it looks or acts backward from its effective date, and if it has the same effect as to past transactions or considerations as to future ones, then it is retrospective. *Leete v. State Bank*, 115 Mo. 184, 198, 21 S.W. 788.

"In *Bartlett v. Ball*, 142 Mo. 28, 36, 43 S.W. 783, 785, this court said: 'Nor is it to be forgotten that retrospective laws are forbidden, eo nomine, by our state constitution; and when this is the case it is immaterial whether or not the act interferes with vested rights. *Cooley, Const. Lim. (6th Ed.) pp. 454, 455; Black, Const. Law, par. 197, p. 543.* There is nothing,

however, in the section which gives indication of other than prospective operation. If it did, it would contravene the constitution. \* \* \* But it is not thought that the section under consideration was intended to affect, obstruct or defeat the inchoate dower right of a wife, or such right when it becomes absolute in a widow by reason of her husband's death.' This statement of the law is approved in *Bartlett v. Tinsley*, 175 Mo. 319, 332, 75 S.W. 143.

"Much this same question came before this court in *Smith v. Dirckx*, 283 Mo. 188, 198, 223 S.W. 104, 106, 11 A.L.R. 510. In that case the Legislature of 1919, Laws 1919, p. 718, amended the then existing income tax law so as to increase the rate from one-half of 1 per cent. to  $1\frac{1}{2}$  per cent, and made the same applicable to the entire year of 1919, beginning January 1st, though the amended law did not go into effect till August 7, 1919, being ninety days after the adjournment of that Legislature. This court there held that this legislative act attempting to increase the rate of taxation so as to cover a period prior to the date the law itself went into effect was plainly retroactive in its operation and the increased rate could not apply to that portion of the year 1919 prior to its effective date, though the act plainly specified that it should be applied to the entire year 1919. This court, after quoting with approval the definition of 'retrospective laws' given in *Reed v. Swan*, 133 Mo. 100, 108, 34 S.W. 483, said: 'Applying the above definition to so much of the amendment of 1919 as undertook to assess an additional 1 per cent. upon that portion of the net income for the calendar year of 1919, which was received by appellant prior to the going into effect of said amendment, we are clearly of the opinion that it "did create a new obligation or impose a new duty" in regard thereto, and that the amendment does to that extent operate retrospectively, and is in violation

of the above-mentioned constitutional inhibition against retrospective laws.' It was, therefore, held that the income tax for 1919 then in controversy should be computed under the old law for the portion of the year 1919 prior to the date the amendment of 1919 went into effect and under the amended law for the remainder of that year."

Also in *Wilson vs. New Mexico Lumber & Timber Company*, 81 P. (2d) 61, 1.c. 62, the court said:

"In order for claimant to come under the amended act, said act would have to receive a retroactive construction.

"As applied to statutes the words "retroactive" and "retrospective" may be regarded as synonymous and may broadly be defined as having reference to a state of things existing before the act in question. A retrospective law may be defined more specifically as one "which is made to affect acts or transactions occurring before it came into effect, or rights already accrued, and which imparts to them characteristics, or ascribes to them effects, which were not inherent in their nature in the contemplation of the law as it stood at the time of their occurrence." *Black on Interpretation of Laws*, 247. *Ashley v. Brown*, 198 N.C. 369, 151 S.E. 725, 727."

By the very terms of the compact executed by the Governor of this state providing that said compact shall become operative immediately upon its execution and furthermore, Section 46, supra, nowhere indicating said act or compact shall act retroactively, unquestionably it must have been the intention of the Legislature and the Governor for said compact to act prospectively. In all probability, had the authorities in Florida attempted to re-take said parolee for violations committed prior to this state becoming a party to said compact, it would have been considered acting retrospectively; however, since both states, Florida and Missouri, are now signatories of said compact and said parolee has violated the conditions

of her parole subsequent thereto, certainly the authorities of the State of Florida by reason of such subsequent violations may re-take said parolee.

#### CONCLUSION

Therefore, it is the opinion of this department that the compact executed by the Governor of this state on April 3, 1947, is valid and constitutional and for violations committed by Rose Lair, a parolee from the State of Florida, subsequent to Missouri becoming a signatory to said compact, the authorities of the State of Florida, upon revocation of said parole, may enter this state and re-take parolee by merely showing authority of the officer and identifying said parolee to be taken as provided in the compact to which both states are parties thereto.

Respectfully submitted,

AUBREY R. HAMMETT, Jr.  
Assistant Attorney General

APPROVED:

---

J. E. TAYLOR  
Attorney General

ARH:VLM

COUNTY TREASURER: In counties of third class, except counties under township organization, treasurer not entitled to one-half of one percent for disbursing school money in addition to his regular salary.

March 5, 1947

FILED

73

Copy to  
J. Smith

Mr. B. E. Ragland  
Chief Clerk  
State Auditor's Office  
Jefferson City, Missouri

Dear Mr. Ragland:

Your letter of recent date asking for an opinion of this office reads as follows:

"House Bill No. 780, enacted by the 63rd General Assembly, provides for the compensation of county treasurers in counties of the 3rd class, except counties under township organization.

"Section 10400 of House Bill No. 494, enacted by the 63rd General Assembly, provides in part 'and the county treasurer shall be allowed such compensation for his services as the county court may deem advisable, not to exceed one-half of one per cent of all school moneys disbursed by him, and to be paid out of the county treasury.'

"We request your official opinion advising us whether or not the county treasurers can receive any compensation under provisions of House Bill No. 494, in addition to compensation provided for in House Bill No. 780."

The question in your letter is, can the County Treasurer receive, in addition to his compensation provided for in House Bill No. 780, Section 13800.3, additional fees as provided for in House Bill No. 494, Section 10400.



Mr. B. E. Ragland

Section 13800.3 of House Bill No. 780, passed by the 63rd General Assembly and approved March 7, 1946, reads as follows:

"The county treasurers in counties of the third class of this State, except counties under township organization, shall receive for their services annually, to be paid out of the county treasury in equal monthly installments at the end of each month by a warrant drawn by the county court upon the county treasury, the following sums: In counties having less than 7,500 inhabitants, the sum of \$1,300; in counties having more than 7,500 inhabitants and less than 10,000 the sum of \$1,400; in counties having more than 10,000 inhabitants and not more than 12,500, the sum of \$1,500; in counties having more than 12,500 inhabitants and not more than 15,000 the sum of \$1,800; in counties having more than 15,000 inhabitants and not more than 20,000, the sum of \$2,200; in counties having more than 20,000 inhabitants and not more than 25,000 the sum of \$2,400; in counties having more than 25,000 inhabitants and not more than 30,000, the sum of \$2,400; in counties having more than 30,000 inhabitants but not more than 35,000, the sum of \$2,750, in counties having more than 35,000 inhabitants but not more than 40,000, the sum of \$3,200; and in counties having more than 40,000 inhabitants, the sum of \$3,500; provided, salaries set out and prescribed in this section shall be in lieu of any other or additional salaries, fees, commissions or emoluments of whatsoever kind for county treasurers in all counties of this state to which this section, by its terms, applies, the provisions of any other statute of this state to the contrary notwithstanding: Provided however that this increase in compensation shall not apply during their present terms of office."

Section 10400 of House Bill No. 494, passed by the same General Assembly and approved March 25, 1946, reads as follows:

"The county treasurer in each county shall be the custodian of all moneys for school purposes belonging to the different districts,

until paid out on warrants duly issued by order of the board of directors or to the treasurer of some town, city or consolidated school district, as authorized by this chapter, except in counties having adopted the township organization law, in which counties the township trustee shall be the custodian of all school moneys belonging to the township, and be subject to corresponding duties as the county treasurer; and said treasurer shall pay all orders heretofore legally drawn on township clerks, and not paid by such township clerks, out of the proper funds belonging to the various districts; and on his election, before entering upon the duties of his office, he shall give a surety company bond, with sufficient security, in the probable amount of school moneys that shall come into his hands, payable to the State of Missouri, to be approved by the county court, and paid by the county court out of the county common school funds, conditioned for the faithful disbursement, according to law, of all such moneys as shall from time to time come into his hands; and on the forfeiture of such bond it shall be the duty of the county clerk to collect the same for the use of the schools in the various districts. If such county clerk shall neglect or refuse to prosecute, then any freeholder may cause prosecution to be instituted. It shall be the duty of the county court in no case to permit the county treasurer to have in his possession, at any one time, an amount of school moneys over the amount of the security available in the bond; and the county treasurer shall be allowed such compensation for his services as the county court may deem advisable, not to exceed one-half of one percent of all school moneys disbursed by him, and to be paid out of the county treasury: Provided that the county treasurer in any county of the third class or fourth class may furnish either a personal or surety bond and in case a surety bond is required by the county court in said county, said surety bond shall be paid for by said county."

In order to reach a proper understanding of your question and solve the problem, it is necessary that we go back to the

Mr. B.E. Ragland

origin of what was Section 13800, R. S. Missouri, as amended in 1941, and the clause in Section 10400, R. S. Missouri, 1939, which permits the county court to allow to the treasurer for disbursing school moneys not to exceed one-half of one per cent of the amount disbursed, to be paid out of the county treasury.

The statute providing for the pay for the county treasurers was first enacted in 1855 (Laws of Missouri 1855, page 523). This law provided that:

"He shall be allowed for his services under this act, such compensation as may be deemed just and reasonable."

This statute with slight amendment remained the law of the state until 1941, when it was repealed by the 61st General Assembly, Laws of Missouri 1941, page 534. The section as it was before it was repealed read as follows:

"Unless otherwise provided by law, the County Court shall allow the treasurer for his services under this article such compensation as may be deemed just and reasonable, and cause warrants to be drawn therefor."

In 1941 the General Assembly for the first time specifically fixed the amount to be paid county treasurers, and for all intents and purposes the 1941 law is identical with House Bill 780, because it fixed the amounts and provided that such amounts would be in lieu of all other additional salaries, fees, commissions or emoluments of whatsoever kind, the provisions of any other statute to the contrary notwithstanding. From a reading of the above history it will be seen that the pay of the county treasurers as it now is fixed came into existence in 1941.

The section of the law in House Bill 494 giving to the county treasurer compensation for the disbursement of school moneys first appeared in the law of this state in 1865, Laws of Missouri 1865, page 170. This statute has been carried down through the years intact except that the percent that may be allowed has been changed from time to time.

The question is therefore presented whether a later law which is intended to cover the entire field repeals by implication an earlier law relating to the same subject matter when there is no conflict or inconsistency between the two laws.

We believe the rule is aptly stated in *Manker v. Faulhaber*, 94 Mo. 430, 6 S. W. 372, l.c. 439 and 440 as follows:

Mr. B. E. Ragland

"\* \* \* \* The two statutes should be so construed as that both may stand if possible. Repeals by implication are not favored by the courts for cogent and sufficient reasons not necessary to repeat, and the prior law is to be upheld if the two acts may well subsist together. \* \* \* \* \*

\* \* \* \* \*

In order that the latter shall operate a repeal of the former, the two acts must be irreconcilably inconsistent, or it must clearly appear that the legislature intended by the latter act to prescribe the only rule that should govern in the case provided for.

\* \* \* \* " (Underscoring ours)

What was said in Meriwether v. Love, 167 Mo. 514, 67 S.W. 250, we believe is especially apropos to the question in the instant case when Judge Marshall said, l.c. 520:

"The intention to repeal the old law and to substitute a new and sufficient system in place of the old law is therefore perfectly plain. It is argued, however, that there is no necessary repugnancy between the old and the new systems, that both can stand together, and therefore there is no repeal by implication; or, otherwise stated, that the courts can not imply an intention of the lawmakers to repeal the old and leave only the new system. The answer to this is afforded by the Act of 1897 itself, for the lawmakers have left nothing to implication or to be inferred, as to their intention--they distinctly declare that the Act of 1897 was enacted for the purpose of 'taking the place of statutes which failed in their object.' \* \* \* \* \*

(Underscoring ours)

The statute under discussion in the case above, stated that its purpose was to take the place of statutes which failed in their object. House Bill #780 provides that the statute is to take the place of all laws which relate to the compensation or fees of county treasurers. Therefore, we believe it is apparent that House Bill #780 repealed all other laws relating to compensation of county treasurers and it is the sole statute to which county treasurers look in order to determine their pay.

Mr. B. E. Ragland

A question might arise as to the effect of the repeal and re-enactment by the 63rd General Assembly in 1945 of the two statutes under discussion. The title to House Bill No. 780 provides as follows:

"AN ACT to provide for the compensation of county treasurers in counties of the third class, except counties under township organization, and to repeal an act of the Sixty-first General Assembly, approved August 7, 1941, and found at pages 534 and 535 of the Laws of Missouri, 1941."

The title to House Bill 494 reads as follows:

"AN ACT to repeal Section 10400, Article 2, Chapter 72, relating to schools and the county treasurers and their duties and bond required as custodian of school moneys and compensation for such services, and to enact a new section in lieu thereof relating to the same subject, to be known as Section 10400."

From a reading of the above two titles it will be seen that House Bills Nos. 780 and 494 merely repeal and re-enact existing laws.

A reading of the two bills discloses that the purpose of the Legislature in repealing and re-enacting the acts was to amend those acts. It will be noted that the provisions now under consideration were left substantially as they were before 1945. As to the effect of the action of the 63rd General Assembly of 1945, we believe the rule is aptly stated in the syllabus in the case of *Collins v. Twellman*, 126 S. W. 2d 231 wherein it is said:

"Where two conflicting statutes had been repealed and re-enacted without substantial change, fact that the earlier statute, as re-enacted, became effective subsequent to effective date of act re-enacting the later of the two statutes was without effect, as respects which of the statutes was controlling. Mo. St. Ann. Secs. 13097, 13757, pp. 4155, 6978."

Therefore, the only effect that the repeal and re-enactment had as to the provisions now under discussion was to continue the provisions as they were before such repeal and re-enactment.

Mr. B. E. Ragland

CONCLUSION

It, therefore, is the opinion of this department that the County Treasurer, in counties of the third class not under township organization, is only entitled to his salary as provided for in Section 13800.3 of House Bill No. 780 of the Laws of 1945, and is not entitled to any compensation for disbursing the school moneys as provided in Section 10400 of House Bill No. 494, Laws of 1945.

Respectfully submitted

ARTHUR M. O'KEEFE  
Assistant Attorney General

APPROVED

J. E. TAYLOR  
Attorney General

AMO'K:MA

SCHOOLS:  
COUNTY SCHOOL FUND:  
COUNTY COURT:

County court is not authorized to pay an agent for procuring insurance or collecting on delinquent school fund loans.

Copy to  
Mr. John

May 13, 1947

6/11



Honorable Charles H. Rehm  
Prosecuting Attorney  
Ste. Genevieve County  
Ste. Genevieve, Missouri

Dear Sir:

This is in reply to your letter of recent date regarding an official opinion rendered by Mr. S. V. Medling, Assistant Attorney General, in November, 1937, which held that the county court could employ an agent to procure insurance and collect on delinquent school fund loans. Your letter reads as follows:

"In November, 1937, Mr. S. V. Medling, Assistant Attorney General, rendered an opinion in answer to a question raised by Mr. W. P. Wilkerson, then Prosecuting Attorney of Scott County, Missouri. It was to the effect that the County Court had a right to hire and to pay out of the School Fund Money, a salary to someone they appointed to procure insurance and collect on delinquent school fund loans. As you know, this whole set up has been greatly changed. However, our County Clerk has for about ten years, been receiving the sum of \$40.00 per month for this purpose. The County Court is willing to continue to pay this amount; however they would like to have an opinion from your office as to the legality of such payments.

"In view of the above, I would rather have your office give the opinion, without any expression from me."

Section 10376 of Senate Bill No. 162 of the 63rd General Assembly provides as follows:

"It is hereby made the duty of the several county courts of this state to collect diligently and, when authorized by law, to invest securely the proceeds of all moneys, stocks, bonds and other property belonging to or accruing to the county school fund.

On and after the effective date of this act, all real estate loans and investments now belonging to the county school funds, except those invested as hereinafter provided, shall be liquidated without extension of time upon the maturity thereof, and the proceeds thereof and the money then on hand belonging to said school fund of the county shall be reinvested in registered bonds of the United States, or in bonds of the state, or in approved bonds of any city or school district thereof, or in bonds or other securities the payment of which is fully guaranteed by the United States Government, and shall be preserved as a county school fund; PROVIDED, that all interest accruing from such reinvestment of the county school fund, the clear proceeds of all penalties, forfeitures and fines collected for any breach of the penal laws of the state, the net proceeds from the sale of estrays, and all other money lawfully coming into said fund, shall hereafter be collected and distributed annually to the schools of the county as hereinafter provided in this article.

Section 10383 of Senate Bill No. 162 of the 63rd General Assembly provides as follows:

"On and after the effective date of this act, all real estate loans and investments now belonging to the capital of the school fund of any township, except those invested as hereinafter provided, shall be liquidated without extension of time upon the maturity thereof, and the proceeds thereof and the money then on hand belonging to said capital of township funds, shall be reinvested in registered bonds of the United States, or in bonds of the State, or in approved bonds of any city or school district thereof, or in bonds or other securities the payment of which is fully guaranteed by the United States government; Provided, that all interest accruing from such reinvestment of the capital of township school funds and all other moneys lawfully coming into said funds, shall hereafter be collected and distributed annually for the use of schools in any townships or parts of townships in the county as hereinafter provided in this article."



Both Section 10376 and Section 10383, quoted above, became effective November 26, 1945. Under the provisions of these sections it is clearly the duty of the county court to invest all moneys received from real estate loans in the securities specified in such sections, and the county court obviously has no power to pay the county clerk or any other agent for anything such agent may do in regard to the investment of such moneys in the securities listed.

Section 10384B, Laws of Missouri, 1943, page 880, provided that when a school fund loan on real property was made after the effective date of such section, which was November 22, 1943, the borrower should, before such loan was made and at all times during the term of the loan (which loan could not exceed five years under the provisions of Section 10384, Laws of Missouri, 1943, page 880), insure the buildings on the real estate on which the loan was made, and Section 10384B further provided that the county court should require that such insurance be maintained by the borrower. This is a duty placed directly on the county court.

Since the county court has the duty of seeing that the insurance is maintained, the county court is not authorized to procure insurance on such buildings, and since this is true, the county court cannot pay an agent for procuring insurance on such buildings.

The duty of the county court in seeing that the borrower maintains insurance on such buildings applies also to loans made before November 22, 1943, which loans matured between November 22, 1943, and November 26, 1945, since Section 10384B applies to such loans if they have been renewed, a renewal, in effect, being a new loan.

Loans made before November 22, 1943, which have not yet matured, were made under the provisions of Section 10384, R. S. Mo. 1939, which section was repealed by Senate Bill No. 162, effective November 26, 1945, which provided that when money from the county school fund was loaned, such loan had to be secured by a mortgage on real estate in the county of a value double the amount of the loan, with a bond, and, if deemed necessary, the county court could require personal security on such bond, and provided further that a person accepted as security should own property in an amount equal to that loaned, in addition to all his debts, and that such property must be free from execution, and provided further that the bond should be to the county, and that upon failure of the principal of the bond to give additional security when lawfully required, as provided in Section 10386, R. S. Mo. 1939, which was repealed in 1943, the principal and interest should become due forthwith. This duty was placed on the county court to provide ample security for the repayment of the loan.

The provision that additional security could be required, and if not furnished, that the principal and interest would be forth-

with due and payable, gives the county court the right to require ample security for the loan.

Although the county court was not required to see that the borrower procure and maintain insurance on buildings on real estate on which county school funds were loaned, the county court could have required such a provision be written in the mortgage on the property given by the borrower.

Since the statutes placed on the county court the duty of seeing that ample security was provided for the loan, and since the county court may require additional security if deemed necessary, no authority exists for the county court to procure insurance on buildings on real property on which school funds were loaned prior to November 22, 1943, which loans have not yet matured, and, therefore, no authority exists for the county court to pay an agent for procuring insurance.

Section 10385, Laws of Missouri, 1943, page 880, which section applies to loans on real property made from county school funds after November 22, 1943, provides as follows:

"Every mortgage taken under the provisions of this chapter shall be in the ordinary form of a conveyance in fee, shall recite the bond, and shall contain a condition that if default shall be made in payment of principal or interest or any part thereof, at the time when they shall severally become due and payable, according to the tenor and effect of the bond recited, and shall contain the further condition that if the borrower fail at any time during the existence of the loan to keep the buildings, if any, on the real estate insured against loss by fire and windstorm, with loss payable or mortgage clause attached to policy in favor of the county, that the sheriff of the county may, upon giving twenty days' notice of the time, place and property to be sold, by publication in some newspaper published in the county, if there be one published, and if not, by at least six written or printed handbills, put up in different public places in the county, without suit on the mortgage, proceed to sell the mortgaged premises or any part thereof, to satisfy the principal and interest, and make an absolute conveyance thereof, in fee, to the purchaser, which shall be as effectual to all intents and purposes as if such sale and conveyance were made by virtue of a judgment of a court of

competent jurisdiction foreclosing the mortgage. In all cases of loan of school funds in the various counties, the expense of drawing and preparing securities therefor, and of acknowledging and recording mortgages, including the fees of all officers for the filing, certifying or recording such mortgages, and other securities, shall be paid by the borrower respectively."

Section 10385, R. S. Mo. 1939, which section applied to loans on real property made from county school funds prior to November 22, 1943, provides as follows:

"Every mortgage taken under the provisions of this chapter shall be in the ordinary form of a conveyance in fee, shall recite the bond, and shall contain a condition that if default shall be made in payment of principal or interest, or any part thereof, at the time when they shall severally become due and payable, according to the tenor and effect of the bond recited, the sheriff of the county may, upon giving twenty days' notice of the time and place of sale, by publication in some newspaper published in the county, if there be one published, and if not, by at least six written or printed handbills, put up in different public places in the county, without suit on the mortgage, proceed and sell the mortgaged premises, or any part thereof, to satisfy the principal and interest, and make an absolute conveyance thereof, in fee, to the purchaser, which shall be as effectual to all intents and purposes as if such sale and conveyance were made by virtue of a judgment of a court of competent jurisdiction foreclosing the mortgage. In all cases of loan of school funds in the various counties, the expense of drawing and preparing securities therefor, and of acknowledging and recording mortgages, including the fees of all officers for the filing, certifying or recording such mortgages and other securities, shall be paid by the borrowers respectively."

From the provisions of these two sections, it is clear that upon default in the payment of principal or interest on loans

made on real estate from county school funds, the mortgage can be foreclosed. Since the mortgage can be foreclosed upon non-payment of the principal or interest, a method of enforcing payment has been provided by law, and the county court has no power to pay an agent to collect such loans.

CONCLUSION

It is the opinion of this department that a county court is not authorized to pay the county clerk or any other agent for procuring insurance on buildings on real property on which loans from county school funds are to be made, nor to pay the county clerk or any other agent to collect county school fund loans.

Respectfully submitted,

C. B. BURNS, Jr.  
Assistant Attorney General

APPROVED:

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J. E. TAYLOR  
Attorney General

CBB:HR

*Mr. [unclear]*  
*Mr. [unclear]*

SCHOOLS:  
BOARD OF DIRECTORS:  
VACANCIES:

Determination of whether or not a vacancy exists in a school board in a consolidated district due to a member's refusal to serve or neglect of duty is to be made by school board. Before such determination is made member should be notified and given a chance to defend himself.

December 8, 1947

FILED

74

12/16

Mrs. Ada Reynolds  
County Superintendent of Schools  
Randolph County  
Huntsville, Missouri

Dear Mrs. Reynolds:

This is in reply to your letter of recent date, requesting an official opinion of this department and reading as follows:

"I would also appreciate a ruling on the following:

"I have a six director school board in a Consolidated district. One director, elected this last April, has not attended the meetings and has refused to do so on notice. The school board have notified him by either telephone or personal visit of each meeting. He made the statement that he wouldn't have anything to do with it and they need not expect him to come. After repeated notices the board met and declared his office vacant due to negligence of duty and appointed another board member to take his place. Did the board act within their legal rights and, if not, what should have been the legal procedure in this case?"

Section 10468, R. S. Mo. 1939, provides as follows:

"The government and control of such town or city school district shall be vested in a board of education of six members, who shall hold their office for three years and until their successors are duly elected and qualified, and any vacancy occurring in said board shall be filled in the same man-

ner and with like effect as vacancies occurring in boards of other school districts are required to be filled, and the person appointed shall hold office till the next annual meeting, when a director shall be elected for the unexpired term."

Section 10423, R. S. Mo. 1939, provides as follows:

"If a vacancy occur in the office of director, by death, resignation, refusal to serve, repeated neglect of duty or removal from the district, the remaining directors shall, before transacting any official business, appoint some suitable person to fill such vacancy; but should they be unable to agree, or should there be more than one vacancy at any one time, the county superintendent of public schools shall, upon notice of such vacancy or vacancies being filed with him in writing, immediately fill the same by appointment, and notify said person or persons in writing of such appointment; and the person or persons appointed under the provisions of this section shall comply with the requirements of section 10421, and shall serve until the next annual school meeting."

While Section 10468 does not specifically state the facts necessary to create a vacancy in the board of directors of a consolidated school district, this department has held in a long line of opinions that the provisions of Section 10423, with regard to the facts necessary to constitute a vacancy in the board of directors of a common school district, apply also to consolidated school districts.

The question to be decided, then, is whether the determination that the person elected as director has refused to serve or has repeatedly neglected his duties, or both, and that a vacancy exists, is to be made by the remaining members of the school board or by a court of law.

In the case of State ex rel. v. Harper, 80 S. W. (2d) 849, the Supreme Court of Missouri, in ruling on the validity of the appointment of a school board member which had been made by three alleged members of the school board, held that the purported appointment was invalid because of the fact that the ap-

pointment was not made at a meeting at which a quorum of the legal members of the school board was present. While the court in that case did not directly rule that the school board was the proper body to determine the fact that a vacancy existed or did not exist because of "abandonment or refusal to act" by a member of the board, we believe that by its holding in that case the Supreme Court impliedly recognized that the school board did have this right when a quorum of the legal members of the school board make such a determination.

We also believe that it was the intent of the Legislature in passing what is now Section 10423, R. S. No. 1939, that the determination of whether or not a vacancy exists is to be made by the school board. This is clearly shown to be correct by that part of Section 10423 providing, "the remaining directors shall, before transacting any official business, appoint some suitable person to fill such vacancy." This quoted provision, placing the duty upon the school board to make the appointment before transacting any official business, obviously means that the existence of the vacancy is to be determined and the appointment made as soon as the vacancy occurs. If the question of whether or not a vacancy exists were to be determined by the courts, the time consumed by such determination would unnecessarily delay the transaction of official business by the board. While it may be true that business transacted by the board when a vacancy existed would be upheld by the courts, it still was the intention of the Legislature, as shown by such quoted language, that the vacancy should be immediately filled. The only body that could make this determination before the board proceeded with official business would be the board itself.

However, we believe that before the determination can be made by the board that a vacancy exists, the board should give reasonable notice to the person who is alleged to be refusing to serve or to be neglecting his duties, and that a hearing must be afforded such person so that he may explain or refute any facts which, if not explained or refuted, would justify the school board's determination that the office is vacant and the appointment of another person to fill the vacancy.

In the case of *Commonwealth v. Gibbons*, 196 Pa. 97, the Supreme Court of Pennsylvania had before it the question of whether or not notice and a hearing should be provided under a law reading as follows:

"If any person having taken upon himself the duties of his office as (school) director, shall neglect to attend any two regular meetings of the board in succession unless de-

tained by sickness or prevented by absence from the district; ... the directors present shall have power to declare his seat on the board vacant, and to appoint another in his stead to serve until the next regular election."

The court said, 1. c. 100-101:

"There is another equally conclusive reason why no ouster can be declared at the second meeting. The act does not make absence from two regular meetings necessarily a cause for ouster, but only 'unless detained by sickness or prevented by absence from the district.' Conceding that the burden of showing such excuse would be upon the absent member, he would nevertheless be entitled to notice and an opportunity to be heard to present it and this could not be afforded without a subsequent meeting. The act is highly penal in that it permits a few individuals, liable to be governed by personal feeling, as is intimated not only by the learned judge in this case but also in *Zulich v. Bowman*, supra, from the same county, to oust by summary proceedings the officer duly chosen by the electors to represent them in their school matters. The act therefore must be strictly construed, and every step in the proceedings must clearly appear to have been regular and within the authority conferred by the statute."

Under the principles laid down in the above quoted decision of the Pennsylvania Supreme Court, we believe it necessary, in order for the board to make a determination of the fact that a vacancy exists, to give notice of the hearing to the person whose office is sought to be vacated, and to hold a hearing at which such person may be permitted to explain or refute facts which, if not explained or refuted, would justify the board in declaring a vacancy.

#### CONCLUSION

It is the opinion of this department that the determination of the fact that a vacancy does or does not exist in the office of director of the school board of a consolidated district, due



Mrs. Ada Reynolds

-5-

to a member's refusal to serve or neglect of duty, is to be made by the school board.

It is further the opinion of this department that before such determination is made, the member whose office is sought to be vacated should be given notice and allowed to present any facts that he may have in his defense at a hearing to be held by the board.

Respectfully submitted,

C. E. BURMS, Jr.  
Assistant Attorney General

APPROVED:

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J. E. TAYLOR  
Attorney General

CBB:HR

COUNTY COURT: County court may allow up to \$500.00 per annum to county clerk for payment of additional compensation to deputies and assistants.

FILED

76

February 19, 1947

Mr. Allen Rolston  
Prosecuting Attorney  
Lancaster, Missouri

Dear Sir:

This department is in receipt of your request for an official opinion which reads as follows:

"The county court of Schuyler county has called on me as prosecuting attorney for information that I am not sure that I can give correctly. My conclusion is not in harmony with an opinion written by an assistant to General McKittrick. The question is this:

"This, Schuyler, county is a county of fourth class. House bill No. 768 (I believe I have the number correctly) is a substitute for Sec. 13433, as amended by Laws of 1943, page 874, making that statute applicable to counties of this class.

"This statute and bill provides that in counties of this class a fixed salary of \$600.00 per year, and then provides a further sum of \$500.00 per year may be paid for necessary additional clerical hire, and further provides that such sum can only be used for clerical hire, and further provides that the county court, before allowing such additional salary, shall determine that the work to be done by such clerk or clerks demands or requires such extra remuneration.

"It will be difficult, if not impossible, for this county to get a competent deputy for the salary of \$600.00 per year, and it is very necessary that this county have a deputy county clerk.

"A somewhat similar question was submitted to your predecessor, General McKittrick, and was answered by Mr. B. Richards Creech on Dec. 27, 1943, and

the opinion referred to says that it is the opinion of the department, briefly stated that the statute (Laws of 1943) requires that this extra salary can only be paid to some one who is not already a deputy clerk. I am informed that our state auditor has in some way notified our county clerk that he, the auditor, will follow the opinion written by Mr. Creech.

"As it is immediately imperative that our county have a full time deputy clerk, and at my suggestion, our county court has made an order finding that such clerical work requires additional compensation, approving the appointment of a deputy, and fixing her salary at \$87.50 per month until and unless there be a contrary adjudication, or unless and until your department rules to the contrary.

"The principal basis for my opinion is derived from the wording of this House Bill 768, where, close to the last paragraph it reads: 'Provided further, that the county court shall determine that the work required to be done by such clerk or clerks demands or requires such extra remuneration'. The basis of the opinion written by Mr. Creech, as I understand him, is that the statute requires extra help, while the law says that the court must find that the work to be done requires such extra remuneration.

"Since our clerk seems to be unable to get a competent deputy for \$600.00 per year, and without extra compensation, it seems clear to me that our court is fully justified in making its finding that such extra remuneration is necessary. The only question in my mind, that is to my own satisfaction, is whether or not some one in addition to the regular clerk must be employed, or whether the regular deputy can draw this pay for such extra service."

House Committee Substitute for House Bill #768 enacted by the 63rd General Assembly and approved by the Governor provides for the compensation for the clerk of the County Court in counties of the fourth class. The act further provides for the employment of deputies and clerks in said office and fixes their compensation, which authority is set forth in Section 5 as follows:

February 19, 1947

"The clerk of the county court in counties of the fourth class shall be entitled to employ deputies and assistants and, for such deputies and assistants, shall receive the following sums: In counties having a population of less than 7,500 the sum of \$600; \* \* \* \* \*  
\* \* \* \* \*  
provided that the county court in all counties of the fourth class may allow the county clerk, in addition to the amount herein specified for deputies or assistants hire, a further sum not to exceed \$500 per annum to be used solely for clerical hire to be determined by the county court of such county; and provided further that the county court shall determine that the work required to be done by such clerk or clerks demands or requires such extra remuneration."  
(Underscoring ours)

Schuyler County according to the last decennial census has a population of 6,627 and therefore falls within the class mentioned in the statute above.

An opinion of this department rendered by a previous Attorney General to Honorable Charles A. Prather, Memphis, Missouri, held under a law enacted by the 1943 General Assembly, which law was for the purpose of this opinion identical with House Bill #768, as follows:

"1) It is the opinion of this department that if a County Court in exercising their discretion allowed a County Clerk an additional sum of money, not to exceed the sum of \$500 per annum, to be used solely for clerical hire as is provided in section 13433 Laws of Missouri 1943, page 874, that such clerical help must be different individuals than his deputies or assistants, and must not have any official power or authority as deputies or assistants to the county clerk for the reason that the compensation of the deputies and assistants is otherwise provided for in said section."

In reconsidering the above opinion we reach the conclusion that it does not correctly state the law relating thereto for reasons hereinafter set forth.

Senate Bill #483 enacted by the 63rd General Assembly sets forth the duties of the clerk of the County Court and Section 10 of said bill provides in part as follows:

February 19, 1947

"Every clerk of a county court shall keep an accurate record of the orders, rules, and proceedings of the county court, and shall make a complete alphabetical index thereto; issue and attest all process, when required by law, and affix the seal of his office thereto; keep an accurate account of all moneys coming into his hands on account of fees, costs or otherwise, and punctually pay over the same to the persons entitled thereto: \* \* \* \* \*

It will be seen that under the above statute that the clerk of the County Court has certain clerical duties to perform.

Under House Bill #768, supra, the county clerk is entitled to employ deputies and assistants and may be allowed an additional amount by the County Court to be used solely for clerical hire, if the County Court determines that the work to be done by such clerk or clerks demands or requires such "extra remuneration."

In Ballentine's Law, page 364, we find the term deputy defined as follows:

"deputy -- A person subordinate to a public officer whose business and object is to perform the duties of the principal.

One who occupies in the right of another, and for whom his superior shall answer."

The word "assistant" on page 117 reads as follows:

"The word is universally defined as one who aids, helps or assists. In the absence of any statutory provision, the assistant never acts officially for the principal. He is not required to be sworn nor to give bond. His capacity is more clerical than otherwise. The word is far from being synonymous with 'deputy' which is the designation of a person who is appointed to act for another, a substitute, a delegate, an agent."

In view of the above two definitions, a deputy and an assistant in the office of the clerk of the County Court aids and assists the clerk in carrying out his duties which includes clerical work.

The word "clerk" has been defined in Appeal of Walker, 294 Pa. 385, 144 A. 288 as "one engaged in a form of

Mr. Allen Rolston

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clerical work like bookkeeping, copy, transcribing, letter writing, tabulating, etc." A like definition is given in 14 C.J.S., page 1205 and Amyot v. Caron, 88 N.H. 394, 190 A. 134.

Therefore, the deputies and assistants provided for in House Bill #768 for whom a definite salary is provided are also clerks and if the County Court determines that the work required of such clerks demands "extra" remuneration then it may grant such extra compensation. The word extra has been defined as expressing "an idea of something beyond, in addition to, or in excess of what is due." Fullerton v. City of Des Moines, 115 N. W. 607.

When the General Assembly provided that "extra" remuneration be paid, it obviously meant compensation that was to be paid in addition to some other pay or salary already provided for, that is the \$600.00 allowed the deputies and assistants.

Therefore, we believe that the \$500.00 extra remuneration allowed in the act may be paid to augment and increase the pay of the deputies or assistants in the office of the clerk of the County Court.

#### CONCLUSION

It is, therefore, the opinion of this department that under the provisions of the H.C.S. for House Bill #768, enacted by the 63rd General Assembly, the clerk of the County Court in Counties having a population less than 7,500 shall receive the sum of \$600.00 for the payment of the salaries of deputies and assistants. Further, if the County Court shall determine that the work required to be done demands extra remuneration, then the County Court may allow a further sum not to exceed \$500.00 per annum to pay extra remuneration to such deputies and assistants.

The opinion of this department rendered to the Honorable Charles A. Prather of Memphis, Missouri, on December 27, 1943, in so far as it holds to the contrary is overruled.

Yours very truly

ARTHUR M. O'KEEFE  
Assistant Attorney General

APPROVED

J. E. TAYLOR  
Attorney General

ROADS AND BRIDGES: County not liable for negligent operation of road and bridge machinery even though used in work optional with county.

April 18, 1947

FILED

76

Honorable Allen Rolston  
Prosecuting Attorney  
Schuyler County  
Lancaster, Missouri

Dear Sir:

This is in reply to your letter of April 12, 1947, requesting an official opinion from this department, which reads as follows:

"Schuyler county owns quite a lot and variety of road machinery, including maintainers, graders and trucks. This machinery is used for general road work in this county. A large part of the work being work and maintenance required of the county by law, but quite often this machinery is used for road or bridge work that is optional with the county, that is work that is not expressly required, but also being work that is not prohibited.

"The question is whether or not the county would be liable for damages arising from the negligent operation of such machinery while it is being used in such optional work or work that is not required to be done by the county.

"I feel rather familiar with the rule that the state cannot be held liable for damages in the absence of a statute or provision of the constitution making it liable, and with the further rule that in most such instances the county, being a political subdivision, is only acting for



and on behalf of the state, and that the county would not be liable for damages incurred while discharging its obligatory duties, but I can not make up my mind as to the liability of the county when it engages in work that it is not required to do, and would very much like to have the benefit of your views on this question.

"The case of Hannon v. The County of St. Louis, and also the case of Zoll v. St. Louis County, 124 S. W. (2d) 1168, touch on this question, but not enough to make it clear to me. The Hannon case is reported in 62 Mo. 313."

The specific question for consideration is whether or not a county is liable for damages arising from the negligent operation of road machinery while it is being used in road or bridge work which is not expressly required to be done by the county.

A public corporation or quasi corporation which performs governmental functions is not liable in a suit for negligence (Todd v. Curators of the University of Missouri, 147 S.W. (2d) 1063). This view is followed in the case of Reardon v. St. Louis County, 36 Mo. 555, 1. c. 561, 562:

"The State Legislature has given to the county court of St. Louis county certain powers and duties in respect to roads and highways in that county, and even if we admit that the acts of the Legislature do fully impose upon the county courts the duty to construct and repair and keep in good order the bridges, and that the same acts confer upon it the means of accomplishing that duty, by the levying of taxes upon the property of the people of the county, does it then follow as a legal sequence that the county is responsible for special damages arising out of neglect in keeping a road or bridge in proper condition? The duty is imposed not upon the county but upon the county court, nor has the county any power over districts and overseers.

\* \* \* \* \*



"The counties, as such, have no control over the repair of roads; they choose the county court, and there their power ceases. The statute gives to the county court, in express terms, the care and superintendence of the highways and bridges of the county, and confers upon it all the powers requisite to the execution of the trust; and it derives all its authority, not through the county, but directly from the statute. The county has no authority to give any direction or instruction to the county court as to the proper performance of its duty.

"Upon a whole view, therefore, of the plain provisions of the statute, we are lead irresistibly to the conclusion that no such broad and onerous obligations rest upon the county."

If such quasi corporations are to be held liable for negligent injury, the right of action must be given expressly by statute. And a statutory provision providing that a public corporation "may sue and be sued" does not authorize a suit against it for negligent injury because the waiver of immunity for liability for torts of officers or agents of the state is quite different from the waiver by the state for itself or its agents of immunity from an action (Todd v. Curators of the University of Missouri, supra). In the present case we find no statutory provision authorizing an action for the negligent operation of road and bridge machinery.

Our attention is directed to the case of Hannon v. County of St. Louis, 62 Mo. 313, where the court said at pages 316, 317 and 319:

"In the view we have taken of this case, it would be foreign, alike to our purpose and the facts admitted by the demurrer, to question the correctness of the proposition so generally concurred in elsewhere, asserted in Reardon vs. St. Louis County (36 Mo. 555) 'that quasi corporations, created by the legislature for the purposes of public policy, are not responsible for the neglect of duties enjoined on them,

unless the action is given by the statute.' But \* \* \* \* \* 'This rule of law, however, is of limited application. \* \*'

\* \* \* \* \*

"\* \* \* the county undertook the contract of its own volition, and not in the observance of a public duty imposed by general law, then there is no refuge from this result; that the county, in regard to the performance of that contract, must occupy the same attitude as if a mere private corporation, and the work thus contracted for should be deemed a private enterprise, undertaken for its own local benefit; and this is more especially the case as the work, at the time of the occurrence which resulted in this action, was being done on its own property. \* \* \*

\* \* \* \* \*

"I am fully aware of the distinction so generally taken by the authorities between the liability of municipal corporations on the one hand, and the non-liability of quasi corporations under like circumstances on the other, though it has been very shrewdly observed in this connection, that 'the court have been much perplexed respecting the principle on which to rest the distinction' (Dill, Munc. Corp., Sec. 764): but I think it may with safety be asserted, that the admitted facts of this case disclose no sound reason why any such distinction should be taken here, nor why the county, in respect to its own property, should not be held answerable to the same rules, as would certainly prevail were a municipal or private corporation, or an individual, a party defendant. \* \* \*

Although the county in that case was held liable for the injury of the plaintiff, we cannot accept it as authority in the present situation as the facts are distinguishable. In the Hannon case the county was in the process of laying a water-

pipe to an insane asylum maintained by the county when the injury occurred. The court there held the county liable to the same extent and under the same conditions as a private corporation because it was exercising a private or proprietary function for the profit, benefit or advantage of the county, rather than the public at large. In the present case the court was not acting in a private or proprietary capacity but in a governmental function. And therefore the exception or limitation on the general rule set out in the Hannon case, is not applicable.

Clark v. Adair County, 79 Mo. 536, involved a situation similar to the one in the present case, as there the plaintiff was injured when a county bridge gave way allegedly because of defective construction and improper maintenance. The court said there, at page 537:

"Under the law of this State, as laid down in the cases of Reardon v. St. Louis County, 36 Mo. 555, and Swineford v. Franklin County, 73 Mo. 279, the judgment in this case will have to be affirmed. Counties are territorial subdivisions of the State, and are only quasi corporations created by the legislature for certain public purposes. As such they are not responsible for neglect of duties enjoined on them or their officers unless the right of action for such neglect is given by statute. Such has always been the law of this State. The plaintiff's case does not fall within the distinction approved in the case of Hannon v. St. Louis County, 62 Mo. 313. In this latter case the county was held liable for injuries suffered by the employe of a contractor, while a trench was being dug through the grounds of the county insane asylum under the superintendence and control of the county. It was held that in respect to county property of which the county was owner and proprietor, it must be held responsible for negligence in improving and managing it like any other proprietor of realty. The correctness of the doctrine settled in Reardon v. St. Louis County, was not questioned, but on the contrary was alluded to in terms of approval."

Also, in Pundman v. St. Charles Co., 110 Mo. 594, another similar case, the court said, l. c. 596, 597:

"\* \* \* It has long been settled law in this state that counties, being merely political subdivisions of the state and only quasi corporations created by the legislature for purposes of public policy, are not responsible for neglect of public duties enjoined upon its officers, unless the action is given by statute; and no statutory action is given in cases such as this. Reardon v. St. Louis Co., 36 Mo. 555; Hannon v. St. Louis Co., 62 Mo. 313; Swineford v. Franklin Co., 73 Mo. 279; Clark v. Adair Co., 79 Mo. 536.  
\* \* \*"

The case of Hill-Behan Lbr. Co. v. State Highway Comm., 347 Mo. 671, 148 S. W. (2d) 499, decided in 1941, restates the rule and approves the cases cited above, saying at pages 679-680 (Mo.):

"The opening, construction and maintenance of public highways is purely a governmental function, whether done by the State directly or by one of its municipalities." (13 R.C.L., p. 79, sec. 70) Under the governmental function rule, not always specifically referred to, and absent an authorizing statute, relief has been denied where damages resulted by falling from an unguarded bridge (Reardon v. St. Louis County, 36 Mo. 555); from filling up a millrace to prevent injury to a public road (Swineford et al. v. Franklin County, 73 Mo. 279); from a defective bridge in a public road (Pundeman v. St. Charles County, 110 Mo. 594, 19 S. W. 733; Clark v. Adair County, 79 Mo. 536); from driving an automobile, in the nighttime, into a creek where a bridge had been removed and the place left unguarded (Moxley v. Pike County, 276 Mo. 449, 208 S. W. 246). Also, and in spite of Sec. 21, Art. 2 of the Constitution, and under the rule of governmental function, relief has been denied, because of the absence of an authorizing statute, where lands,

outside of a drainage district, have been damaged from overflow due to the improvements of the district. (Anderson et al. v. Inter-River Drainage Dist., 309 Mo. 189, 274 S. W. 448; Sigler et al. v. Inter-River Drainage Dist., 311 Mo. 175, 279 S. W. 50; Max v. Barnard-Bolckow Drainage Dist., 326 Mo. 723, 32 S. W. (2d) 583.) See also, Todd v. The Curators of the University of Missouri, 347 Mo. 460, 147 S. W. (2d) 1063, concurrently handed down, and where it is held that the State University is not liable for failure to exercise ordinary care to furnish a reasonably safe place to work."

Even when a function is voluntarily assumed by a quasi corporation, if it is a public or governmental one the corporation is not responsible for the negligence of its officers or agents. The construction and maintenance of roads and bridges by a county is a governmental function, and, in absence of statute expressly granting the right of action for negligent injury, no such action can be maintained even though said construction and maintenance is optional with the county.

#### Conclusion

Therefore, in view of the foregoing authorities, it is the opinion of this department that a county is not liable, in the absence of statute, for damages resulting from the negligent operation of county road and bridge machinery, and further, that a county is not liable for said damages even though such machinery is used in road and bridge work which is optional with the county.

Respectfully submitted,

DAVID DONNELLY  
Assistant Attorney General

APPROVED:

J. E. TAYLOR  
Attorney General

DD:EG

*Copy to  
D. Smith*

CIRCUIT COURT: Circuit judge required to serve as jury commissioner  
*Circuit Judge:* under Section 13394, R.S. Mo. 1939, but not entitled  
SALARY: to \$1300.00 allowed for such services under same  
section.

April 18, 1947

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FILED

*76*

Honorable James S. Rooney  
Circuit Judge  
Seventh Judicial Circuit  
Liberty, Missouri

Dear Sir:

This will acknowledge receipt of your request for an official opinion, which reads:

"I would appreciate your opinion relative to the salary and duties of circuit judges as contained in Section 13394 of the Revised Statutes of 1939. I notice that this section has not been repealed although the sections immediately preceding it and the one just following it, are expressly repealed. It is my position that judges of circuits, such as the Seventh, sit as a Jury Commissioner and not as a Circuit Judge. I understand that by Senate Bill 442, \$6000.00 shall be the total compensation for services rendered as Circuit Judge. The questions which I have in mind and which I would like for you to give me an opinion on, are as follows:

"(1) Is it proper for me to sit with the County Court to prepare jury lists and to draw names for jury service?

"(2) Should I receive the payment of \$1300.00 per annum for performing this duty as a Jury Commissioner?"

This department, under date of August 20, 1946, rendered an opinion to Honorable O. O. Brown, Judge of the 26th Judicial Circuit, holding that under Senate Committee Substitute for Senate Bill No. 442, passed by the 63rd General Assembly, circuit judges are not entitled to the \$10.00 change of venue fee allowed under Section 1074, R.S. Mo. 1939, that under said bill circuit judges in circuits similar to yours shall receive \$6,000.00 annually, and that constitutes the total compensation allowed said judges. Section 6, S.C.S.S.B. No. 442, reads:

"All of said salaries and expenses herein provided shall be paid in monthly installments on the first day of each month and shall constitute the total compensation for all duties performed by, and all expenses of, said judges, and there shall be no further payment made to or accepted by said judges for the performance of any duties required to be performed by them under the law."

One of the cardinal rules of statutory construction is that a public officer performing public services is deemed to be rendering gratuitous services, unless a compensation is provided for same. Furthermore, if the law requires said compensation be paid in a particular manner, then it can be paid no other way, and he is entitled to no further compensation. The court, in announcing the foregoing rule in Nodaway County v. Kidder, 129 S.W. (2d) 857, 1.c. 860, so often referred to, said:

"The general rule is that the rendition of services by a public officer is deemed to be gratuitous, unless a compensation therefor is provided by statute. If the statute provides compensation in a particular mode or manner, then the officer is confined to that manner and is entitled to no other or further compensation or to any different mode of securing same. Such statutes, too must be strictly construed as against the officer. State ex rel. Evans v. Gordon, 245 Mo. 12, 28, 149 S.W. 638; King v. Riverland Levee Dist., 218 Mo. App. 490, 493, 279 S.W. 195, 196; State ex rel. Wedeking v. McCracken, 60 Mo. App. 650, 656."

Section 6, S.C.S.S.B. No. 442, supra, provides an annual salary of \$6,000.00 for judges serving in circuits similar to the Seventh Judicial Circuit, and furthermore, specifically requires said salary to be paid in a particular manner, and that said salary shall constitute the total compensation for all duties performed by, and all expenses of, said judges, and there shall be no further payment made or accepted by said judges for the performance of any duties required to be performed by them under the law, which provision we believe is not ambiguous,

and, therefore, leaves no room for construction. Furthermore, Section 24, Article V of the Constitution of Missouri, 1945, strongly indicates it was the intent to limit judges to the salary as provided by law and to allow no further compensation. Section 24 reads:

"All judges shall receive as salary the total amount of their present compensation until otherwise provided by law, but no judge's salary shall be diminished during his term of office. Until the end of their present terms probate judges shall continue to receive compensation and clerk hire as now provided by law. The salaries of magistrates shall be fixed by law. No judge or magistrate shall receive any other or additional compensation for any public service, or practice law or do law business, except probate judges during their present terms. Judges may receive reasonable traveling and other expenses allowed by law. The fee of all courts, judges and magistrates shall be paid monthly into the state treasury or to the county paying their salaries." (Under-scoring ours.)

You mention the fact that the Legislature, in passing S.C.S.S.B. No. 442, specifically repealed Sections 13393 and 13395, R.S. Mo. 1939, but did not specifically repeal Section 13394, R.S. Mo. 1939. The reason for this can most likely be explained in the following manner, that neither section placed any additional duty upon the circuit judges, but merely allowed additional expenses and compensation. In the former section it allowed circuit judges a monthly allowance of \$100.00 for expenses incidental to holding circuit court, and in the latter section it allowed, in addition to the salary, \$125.00 monthly to be paid by the counties of a certain size to their circuit judge, but neither section placed any additional duty upon the circuit judge. Therefore, S.C.S.S.B. No. 442 was enacted in lieu of such provisions allowing circuit judges expenses and compensation. However, it is different with regard to Section 13394, that particular provision does place additional duties upon the circuit judge to act as a jury commissioner, and further allows said judge a \$1300.00 annual salary for such service. The Legislature apparently did not desire or intend to relieve the said circuit judges of this statutory duty to act as jury commissioner, but did intend to compensate him for such services under S.C.S.S.B. No. 442, supra, instead of under Section 13394,



supra. This is apparent under the foregoing provision, Section 6 of said bill, providing for an annual salary and making that the total compensation for all services rendered and expenses of said circuit judges.

You raise the question as to whether the circuit judge might be entitled to the additional \$1300.00 allowed under Section 13394, supra, for serving as jury commissioner and not as circuit judge. A careful examination of the language used by the Legislature, in passing S.C.S.S.B. No. 442, convinces us that it fully intended that such circuit judges should continue to act as jury commissioner, but that they should not be entitled to receive the \$1300.00 allowed under Section 13394, supra. Section 6 of said bill provides the annual salary for said judges for the performance of any duty required by them under the law. Had it been the legislative intent to allow said circuit judges, in addition to the annual compensation provided under said bill, the \$1300.00 allowed under Section 13394, supra, it would have been an easy matter to have so phrased Section 6 of said bill so as to leave no room for construction. Furthermore, the 63rd General Assembly, under S.C.S.S.B. No. 442, made certain exceptions for additional compensation and expenses to circuit judges over and above the annual salary fixed by the act (see Sections 4 and 5). A similar exception could have been included in said act for the \$1300.00 allowed said judges under Section 13394, R.S. Mo. 1939. However, this was not done.

#### CONCLUSION

Therefore, it is the opinion of this department that circuit judges serving in judicial circuits similar to the Seventh Judicial Circuit are still required to serve as jury commissioner as provided in Section 13394, R.S. Mo. 1939. However, said judges are not entitled to receive for such services the \$1300.00 per annum allowed under Section 13394, R.S. Mo. 1939, but are entitled to only such compensation as provided in S.C.S.S.B. No. 442, passed by the 63rd General Assembly of the State of Missouri.

Respectfully submitted,

AUBREY R. HAMMETT, Jr.  
Assistant Attorney General

APPROVED:

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J. E. TAYLOR  
Attorney General

ARR:LR

ELECTIONS:  
COUNTY COURTS:  
ROADS AND BRIDGES:

County Court of Andrew County may call a special election to increase rate of levy for not to exceed four year term. "Respective purposes" authorize such election to be held for increasing tax levy for bridge purposes. Tax levy, under Sections 8527 and 8529, Laws of Mo. 1945, authorizes increase for only one year. Such election provided for in Sec. 8529, Laws of Mo. 1945, may be held in place or places July 24, 1947 in county designated by county court.

Honorable J. W. Roberts  
Assistant Prosecuting Attorney  
Andrew County  
Savannah, Missouri

8/1  
FILED  
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Dear Sir:

We are in receipt of your letter of recent date requesting an official opinion of this department, and the questions that you have asked in your letter read as follows:

"1st: Is the County Court of Andrew County authorized under Section 11 of Article 10 of the Constitution of Missouri to call a special election to test the sense of the voters on a proposition to increase the annual rate of taxation on all taxable real estate and tangible personal property in the amount of 35 cents on the \$100.00 assessed valuation for a period of three years, 1947, 1948 and 1949, and upon a two-thirds vote of the qualified electors to be empowered to make such increased levee?

"2nd: Does the term 'respective purposes' found in the second and third lines of the last paragraph of said Section 11 on page 54, Laws of Missouri 1945 include the 'Special Road and Bridge Fund' mentioned in Section 8528, Laws of Missouri 1945, page 1480 and in Section 12, Article 10 of the Constitution?

"3rd: Does the second sentence in Section 12 of the Constitution in conjunction with

Section 8527 and 8529, Laws of Missouri 1945, page 1479-1480 authorize an increase of levy for more than one year?

"4th: Does the special election provided for in said Section 8529 have to be held at one place in the County or may the election be held in the usual voting places in the various voting precincts of the County?"

Under the provisions of Section 11(c), Article X of the Constitution of Missouri 1945, and Section 11046 of House Bill No. 77 of the 64th General Assembly, signed May 19, 1947 by the Governor, which bill contained an emergency clause and repealed and reenacted Section 11046, Laws of Missouri 1945, page 1781, but left out that part of Section 11046, Laws of Missouri 1945, which provided "that no county court shall order a rate of tax levy that will produce mathematically more than ten per cent in excess of the taxes levied for the previous year," the County Court of Andrew County is authorized to call a special election for an increase of the annual rate of taxation on all taxable real estate and tangible personal property in an unlimited amount for a period of not to exceed four years, and at such election a two-thirds vote of those voting thereon is required to carry such election.

Your second question inquires as to whether or not the term "respective purposes," found in Section 11(c), Article X of the Constitution, includes the "Special Road and Bridge Fund" mentioned in Section 8528, Laws of Missouri 1945, page 1480, and Section 12 of Article X of the Constitution.

In answer to this question we are enclosing a copy of an official opinion of this department rendered under date of July 16, 1947, to the Honorable Emmett L. Bartram, Prosecuting Attorney of Wodaway County, which opinion was written with reference to a county under township organization. However, the conclusion reached therein is equally applicable to a county not under township organization. It will be noted that Section 8534 (1939), providing for the county court to determine what bridges shall be built and maintained by the county and by the road district and that the road district shall not be compelled to build bridges costing fifty dollars or more, and Section 8536 (1939),

providing that road districts shall not be required to repair bridges built by the county and attached to the road district for repair when such repair shall cost more than fifty dollars, and Section 8540 (1939), providing for payment of part of the cost of bridges in the adjoining county, are statutes placing the duties regarding the construction of bridges on the county, therefore a tax for such purposes is a tax for a county purpose. Section 8527, Laws of Missouri 1945, page 1479, providing for the payment of taxes arising from property not in a special road district and 20% of the taxes arising from property in a special road district to the county and to be spent by the county court, provides for an additional road and bridge tax and does not prohibit the levy of a tax for bridge purposes, as a part of the general levy for county purposes.

You will note that the conclusion reached in the enclosed opinion to Mr. Bartram holds that the term "county purposes," as used in Section 11(c), Article X, of the Constitution, and Section 11046 of House Bill No. 77 of the 64th General Assembly, does not include the "Special Road and Bridge Fund" mentioned in your second question, but that the term "respective purposes" does include the bridge taxes that may be levied by a county court under its power to levy for "county purposes."

In answer to your third question, we are enclosing copies of official opinions rendered by this department to the Honorable Roy C. Miller, Prosecuting Attorney of Webster County, under date of March 21, 1947, and the Honorable Herbert S. Brown, Prosecuting Attorney of Grundy County, under date of March 24, 1947. These two opinions hold that the special road and bridge tax authorized by the second sentence of Section 12 of Article X of the Constitution of Missouri, and Section 8529, Laws of Missouri 1945, page 1480, authorizes an increase of a tax levy for one year only.

In answer to your fourth question, Section 652, R.S. No. 1939, provides as follows:

"When any subject-matter, party or person is described or referred to by words importing the singular number or the masculine gender, several matters and persons, and females as well as males, and bodies

corporate as well as individuals, shall be deemed to be included."

(Underscoring ours.)

Therefore, under the provisions of Section 652, supra, the county court may designate the place or places, which may be the usual voting places in the various voting precincts of the county, when an election is held under the provisions of Section 8529, Laws of Missouri 1945, page 1480.

Conclusion.

It is the opinion of this department that (1) the County Court of Andrew County is authorized, under Section 11, Article X of the Constitution of Missouri, and Section 11046 of House Bill No. 77 of the 64th General Assembly, to call a special election to vote on a proposition to increase the annual rate of taxation in the county for a period of not to exceed four years; that (2) the term "respective purposes," found in Section 11(c), Article X of the Constitution of Missouri, authorizes an election to vote an increase in taxation in Andrew County for road and bridge purposes to an unlimited amount for a period not to exceed four years; that (3) the second sentence of Section 12, Article X of the Constitution of Missouri, and Section 8529, Laws of Missouri 1945, page 1480, authorize a levy of a tax for one year only; and that (4) the special election provided for in Section 8529, Laws of Missouri 1945, page 1480, may be held at a place or places designated by the county court, and the county court may designate the usual voting places in the various voting precincts of the county.

Respectfully submitted,

C. B. BURNS, JR.  
Assistant Attorney General

APPROVED:

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J. E. TAYLOR  
Attorney General

CBB:ml  
Encs (3)

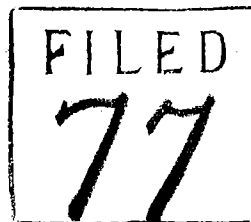
COUNTY COURT:  
MINERAL LEASES:  
COUNTY COLLECTOR:

(1) Member of county court or other county officer cannot buy county warrants at less than par. (2) If member of county court votes for employment of a relative within 4th degree, by consanguinity or affinity, he forfeits his office. (3) Where mineral leases have been made, taxes should be assessed to owner of land. (4) Sec. 11107, R.S. 1939, has no application to Maries County. (5) Without a vote of the people, tax rate cannot be increased in any year so it will produce mathematically more than 10% in excess of taxes levied for previous year.

February 18, 1947

Filed #77

Honorable Hamp Rothwell  
Prosecuting Attorney  
Maries County  
Vienna, Missouri



Dear Sir:

This is in reply to your letter of recent date, requesting an official opinion of this department, and reading as follows:

"Please let me have your opinion on the following questions:

"First: Can a member of the County Court or any other officer of the County buy protested warrants issued by the County Court?

"Second: Can the County Court employ any member of his immediate family to work for the County on the county roads in any capacity whatsoever.

"Third: There are a number of private companies or corporations who have leases on certain real estate in Maries County for the purposes of mining fireclay. These companies have never paid any taxes of any kind for carrying on this work in Maries County. Some of the companies bought the land outright, taking a warranty deed, but most of them merely leased the mineral rights. Where the companies own the land in fee simple of course they pay taxes on the land. What is the method of assessing these mineral leases?

"Fourth: Our County Collector collects county taxes each year to an amount between sixty and

eighty thousand dollars and paragraph seven of section 11106 sets the fees he may collect on any amount between these two figures. Please refer to section 11107 and let me know what per cent he would be entitled to out of which to pay his deputy hire.

"Five: The County Court on August 26th, 1946, reduced the tax levy from 50¢ on the one hundred dollars valuation, to 30¢ on same. The record of their action reads as follows: 'Ordered by the Court that the following levy be set on roads and county revenue and courthouse bonds: county revenue, 30¢; courthouse bonds, 5¢; county roads, 35¢; all special roads, 35¢. Objection made by Frank Laubert opposed of setting 20¢ levy on county revenue, cast his vote in favor of 50¢ levy on county revenue.' This is all of the record. The record does not disclose how many members of the court were present and does not set forth their vote.

"The cutting of this levy was made out of pure spite and by the two members who were not re-elected to office. No one objected to the payment of 50¢, which levy permitted all county bills to be paid. Can the County Court fix the levy back to 50¢ on the hundred or can they only increase it 10% which would make it 33¢ on the hundred? I would like very much to have your opinion as soon as possible."

Section 4486, R. S. Mo. 1939, provides as follows:

"Every clerk of a court of record, sheriff, marshal, constable, collector of public revenue, or deputy of any such officer, or a judge of a county court, prosecuting attorney or county treasurer, who shall traffic for or purchase at less than the par value or speculate in any county warrant issued by order of the county court of his county, or in any claim or demand held against such county, shall be adjudged guilty of a misdemeanor, and shall, upon conviction, be punished by fine not less than twenty nor more than fifty dollars."

From the provisions of this section, it is clear that if a member of the county court, or any county official listed in said Section 4486, purchases county warrants for less than the par value, he is guilty of a misdemeanor.

Section 6 of Article VII of the Constitution of Missouri of 1945 provides as follows:

"Any public officer or employee in this state who by virtue of his office or employment names or appoints to public office or employment any relative within the fourth degree, by consanguinity or affinity, shall thereby forfeit his office or employment."

In the case of State ex rel. v. Becker, 81 S. W. (2d) 948, a cousin of one of the St. Louis Court of Appeals judges was elected by the other two judges as commissioner, the judge to whom the commissioner was related not voting. The Supreme Court said in that case, 1. c. 949-950:

"In the petition it is stated substantially that Judges Becker and McCullen, who constitute the majority of the judges of said court, in so exercising the court's power of appointment in the manner threatened, are entirely free from any connivance, agreement, or conspiracy with Judge Hostetter, or with each other or with any one else, and hold the judicial view that the action which they are about to take in the premises lies within their judicial powers and discretion; that such reappointment is proper and lawful and not within the inhibition of said constitutional provision. But it is alleged in the petition that, nevertheless, such action upon their part will violate said constitutional provision and will, therefore, be in excess of their jurisdiction in the premises. And this is the issue for determination.

"The constitutional provision in question (article 14, section 13) provides: 'Any public officer or employee of this State or any political subdivision thereof who shall, by virtue of said office or employment, have the right to name or appoint any person to render service to the State or to any political subdivision thereof, and who shall name or appoint



to such service any relative within the fourth degree, either by consanguinity or affinity, shall thereby forfeit his or her office or employment.'

\* \* \* \* \*

"The relator takes the position that the true meaning of said provision, as decided in that case, would render the appointment of Commissioner Sutton by the two members of the Court of Appeals not related to him just as obnoxious to the provision as if one of the two were related to him; this, notwithstanding the fact that the third member, who is related to the proposed appointee, declines to participate in any manner in the purpose of his associates or in aid of the result of the combined action of the two."

The court further said, l. c. 951:

"Now, in the instant proceeding, it is freely conceded that in the intended appointment there is not in fact or in semblance any connivance, agreement, confederation, or conspiracy between the majority members of the Court of Appeals as between themselves or as between them, on the one hand, and the non-voting member on the other, or any common design between any two of them, that the two should accomplish in behalf of any or all a prohibited purpose. The sum of the matter is that Judges Becker and McCullen are about, honestly and in good faith, to exercise their official power in securing for the Court of Appeals the continued and uninterrupted services of a commissioner whose record of integrity of character, untiring industry, and distinguished judicial service, has met with the unqualified approval alike of his associates on the Court of Appeals and the bench and bar of the state.

"In view of the foregoing considerations, we are of the opinion that the threatened action

of the respondents is not beyond or in excess of their jurisdiction as members of the St. Louis Court of Appeals and is not in violation of section 13 of article 14 of our State Constitution.

The reasoning in the above quoted case under the nepotism section of the Constitution of 1875 applies equally to the provisions of Section 6 of Article VII of the Constitution of 1945.

Therefore, if a person related to one of the members of the county court within the fourth degree, by consanguinity or affinity, is employed by the other two members of the county court, and the related member does not vote, the employment does not violate the Constitution of Missouri. However, if the related member votes for such employment, Section 6 of Article VII of the Constitution is violated, and such member of the county court thereby forfeits his office.

In regard to the assessment of the leases of the companies in Maries County that are mining fireclay, we are enclosing a copy of an official opinion of this department rendered under date of May 28, 1937, to Honorable J. H. Mosby, Prosecuting Attorney, Linn, Missouri, which we believe answers the question propounded in your opinion request.

Section 11107, R. S. Mo. 1939, provides as follows:

"That the officers referred to in section 11106, in addition to the maximum amount of fees and commissions permitted to be retained by county collectors as provided in section 11106, Revised Statutes of Missouri for 1939, each such officer may retain for the payment of deputy and/or clerical hire a sum not to exceed twenty-five per cent of the maximum amount of fees and commissions which such officer is permitted to retain by said section as so amended, but such deputy and/or clerical hire shall be payable out of fees and commissions earned and collected by such officer only and not from general revenue."

Section 11106, R. S. Mo. 1939, provides that the collector, except in counties where the collector is paid a salary, shall receive as full compensation for his services in collecting the revenue, except back taxes, certain commissions. Maries County falls within subdivision 7 of Section 11106, and we note that the maximum that can be earned by the collector under that sub-

division is twenty-five hundred dollars per year. Subdivision 15 of Section 11106 provides that the maximum that may be retained by a collector of a county which falls in subdivision 7 is twenty-five hundred dollars a year. Therefore, the Collector of Maries County may retain the maximum amount that he can earn under Section 11106 for current taxes.

Section 11106, when reenacted in 1933 as Section 9935, Laws of 1933, page 454, provided "that the limitation on the amount to be retained as herein provided shall apply to fees and commissions on current, back and delinquent taxes." Section 11106 was reenacted as Section 9935 in Laws of 1937, page 547, and provided "that the limitation on the amount to be retained as herein provided shall apply to fees and commissions on current taxes, but shall not apply to commissions on the collection of back and delinquent taxes."

Section 11107 was reenacted as Section 9935a, Laws of 1935, page 406. When Section 11107 was first reenacted in 1933, the twenty-five hundred dollar limitation in Section 11106 applied to fees and collections on both current and back and delinquent taxes. Under Section 11107, it was possible then for the amount from fees and collections from current and back and delinquent taxes to amount to more than twenty-five hundred dollars a year, and the excess over twenty-five hundred dollars a year to the amount of twenty-five per cent, or six hundred twenty-five dollars, could be retained by the collector for clerk hire. When Section 11106 was reenacted in 1937, however, making the limit in Section 11106 apply only to current taxes, Section 11107 became surplus, since not more than twenty-five hundred dollars could be earned by the collector of a county which falls in subdivision 7, and the entire twenty-five hundred dollars could be retained by the collector.

Therefore, Section 11107, at the present time, has no application to Maries County.

Section 11(b) of Article X of the Constitution of 1945 provides as follows:

"Any tax imposed upon such property by municipalities, counties or school districts, for their respective purposes, shall not exceed the following annual rates:

"For municipalities--one dollar on the hundred dollars assessed valuation;

"For counties--thirty-five cents on the hundred

dollars assessed valuation in counties having three hundred million dollars, or more, assessed valuation, and fifty cents on the hundred dollars assessed valuation in all other counties;

"For school districts formed of cities and towns--one dollar on the hundred dollars assessed valuation, except that in the City of St. Louis the annual rate shall not exceed eight-nine cents on the hundred dollars assessed valuation;

"For all other school districts--sixty-five cents on the hundred dollars assessed valuation."

Section 11046 of House Bill No. 468 of the 63rd General Assembly provides as follows:

"For county purposes the annual tax on property, not including taxes for the payment of valid bonded indebtedness or renewal bonds issued in lieu thereof, shall not exceed the rates herein specified: In counties having three hundred million dollars or more assessed valuation the rates shall not exceed thirty-five cents on the hundred dollars assessed valuation; and in counties having less than three hundred million dollars assessed valuation the rate shall not exceed fifty cents. Provided, however, that no county court shall order a rate of tax levy that will produce mathematically more than ten per cent in excess of the taxes levied for the previous year. Provided, further, that in any county the maximum rates of taxation as herein limited may be increased for not to exceed four years, when the rate and purpose of the increase are submitted to a vote and two-thirds of the qualified electors of the county voting thereon shall vote therefor."

Section 11046 of House Bill No. 468 is a further specific limitation of the maximum tax rate expressed by the Legislature. Without a vote of the people, the tax rate in Maries County cannot be set by the county court at a rate which will produce mathematically more than ten per cent in excess of the taxes levied for the previous year.

The record of the levy of the taxes for Maries County, as shown by the record of the County Court on August 26, 1946, does show that the said levy was made by the county court, and all members of the court must have been present and voted on such levy, since one member voted in favor of a fifty cent levy for county purposes, but the order of the court was that the tax rate for county purposes should be thirty cents. The record of the county court is the authorization of the tax levy. The taxes in Maries County for 1946 can be paid on no other basis.

Therefore, the fact that the record of the levy might be considered rather incomplete cannot nullify the fact that the tax rate for Maries County for 1946 was set at thirty cents for county purposes. Certainly, after the action of the county court in levying a tax rate of thirty cents for county purposes has been acquiesced in since August, 1946, and taxes paid by the taxpayers under this levy, no attack could now be made on the validity of the setting of such tax rate.

The provision of Section 11046 of House Bill No. 468 reading:

"\* \* \* Provided, further, that in any county the maximum rates of taxation as herein limited may be increased for not to exceed four years, when the rate and purpose of the increase are submitted to a vote and two-thirds of the qualified electors of the county voting thereon shall vote therefor"

would enable Maries County, by a two-thirds vote, to increase the tax rate as limited by the provision of Section 11046 that "no county court shall order a rate of tax levy that will produce mathematically more than ten per cent in excess of the taxes levied for the previous year," for a period of not to exceed four years. This provision is, in our opinion, as much a maximum tax rate as is the general thirty-five cent or fifty cent limits found in the same section.

#### CONCLUSION

It is the opinion of this department that:

(1) A member of the county court, or any other county officer listed in Section 4486, R. S. Mo. 1939, cannot buy county warrants at less than par value.

(2) If a relative within the fourth degree, by consanguinity

Honorable Hamp Rothwell - 9

or affinity, of a member of the county court is employed by the county, and the related member does not vote for such employment, the Constitution has not been violated. If the member of the county court votes for his relative, he forfeits his office.

(3) The land in Maries County the mineral rights of which have been leased should be taxed to the owner of the property.

(4) Section 11107, R. S. Mo. 1939, has no application to Maries County.

(5) Without a vote of the people of Maries County, the tax rate for county purposes for 1947 cannot be set at a rate that will produce mathematically more than ten per cent in excess of the taxes levied for 1946. If an election is held under the provisions of Section 11046 of House Bill No. 468, and a two-thirds majority is secured at such election, the tax rate may be set at any figure which the people vote for.

Respectfully submitted,

C. B. BURNS, Jr.  
Assistant Attorney General

APPROVED:

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J. E. TAYLOR  
Attorney General

CBB:HR

BONDS:

ROADS AND BRIDGES:

Money derived from bond issue for grading, constructing, paving or maintaining of paved, gravel, macadamized or rock roads, and necessary bridges and culverts, can be expended for the purchase of necessary machinery.

April 29, 1947

FILED

77

4/30

Honorable Hamp Rothwell  
Prosecuting Attorney  
Maries County  
Vienna, Missouri

Dear Sir:

This is in reply to your letter of recent date, requesting an official opinion of this department, and reading as follows:

"I am sending you an order of publication under which Maries County voted a bond issue of \$50,000.00 which is to be used for the purposes stated in the order of publication.

"My question is, can any part of this \$50,000.00 be used for the purpose of buying the necessary road machinery to be used for the grading, construction, paving, or maintaining of paved, gravel, macadamized, or rock roads, and necessary bridges and culverts in said Maries County?

"Maries County has no road machinery fit for use in doing this work, and if they can't use part of the proceeds of the bond issue for the purchase of necessary machinery, then a part of the purpose fails for which this bond issue was voted, as they have no other fund available with which to purchase machinery to build and maintain the roads. Please let me have your opinion as early as possible, as the bonds are ready for sale."

Section 8606 of House Committee Substitute for House Bill No. 752 of the 63rd General Assembly authorizes the county court of the counties of this state to issue bonds for and on behalf of the respective counties for the construction, reconstruction, improvement, maintenance and repair of any and all public roads, highways, bridges and culverts within such county.

Sections 3292 to 3300b of House Committee Substitute for House Bill No. 749 of the 63rd General Assembly provide the method to be followed in voting such bonds.

Section 8595, R. S. No. 1939, provides, in part, as follows:

"Whenever any public money, whether arising from taxation or from bonds heretofore or hereafter issued, is to be expended in the construction, reconstruction or other improvement of any road or bridge or culvert, the county court, township board or road district commissioners, as the case may be, shall have full power and authority to construct, reconstruct or otherwise improve any road, and to construct any bridge or culvert in such county or other political subdivision of the state, and to that end may contract for such work, or may purchase machinery, employ operators and purchase needed materials and employ necessary help and do such work by day labor. \* \* \*"  
(Emphasis ours.)

The quoted provision of Section 8595, R. S. No. 1939, clearly authorizes the purchase of machinery out of the bonds voted by virtue of Section 8606 of House Committee Substitute for House Bill No. 752 and Sections 3292 to 3300b of House Committee Substitute for House Bill No. 749 of the 63rd General Assembly.

#### CONCLUSION

It is the opinion of this department that part of the proceeds of the bond issue of Maries County voted under the provisions of Section 8606 of House Committee Substitute for House Bill No. 752 and Sections 3292 to 3300b of House Committee Sub-



Honorable Hamp Rothwell - 3

stitute for House Bill No. 749 of the 63rd General Assembly  
can be used for the purchase of machinery.

Respectfully submitted,

C. B. BURNS, Jr.  
Assistant Attorney General

APPROVED:

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J. E. TAYLOR  
Attorney General

CBB:HR

ROADS AND BRIDGES:  
SPECIAL ROAD DISTRICTS:  
TOWNSHIPS:

Levy of not to exceed 35¢ on proper in special road districts in counties under township organization is made by township board. Additional levy of not to exceed 35¢ may be voted by special road district. County court in counties under township organization may not assist in building and maintenance of bridges in special road district.

December 30, 1947



Honorable Theo. R. Schneider  
Prosecuting Attorney  
Bates County  
Butler, Missouri

Dear Sir:

This is in reply to your letter of recent date, requesting an official opinion of this department and reading as follows:

"Bates County, Missouri, is a county organized under township organization and we have several special road districts organized and existing under Article 18, Chapter 46, Revised Statutes of Missouri, 1939.

"Section 8841 and 8842 pertaining to said special road districts was repealed by House Bill 799 as set forth in Laws of Missouri, 1945, page 1499, which left no provision for said special road districts to make a levy for maintenance of the roads and bridges within the district.

"Section 8820 pertaining to road districts other than special road districts in counties under township organization was repealed and re-enacted as set forth in Laws of Missouri, 1945, page 1497 and was further amended by House Bill 42 in 1947 by the addition of the following, 'Except that amounts collected within the boundaries of road districts formed in accordance with the provisions of Article 18, Chapter 46, Revised Statutes of Missouri, 1939, shall be paid to the treasurers of such road districts.'

"Section 8840 gives a special road district, '\* \* \*sole, exclusive and entire control and

jurisdiction over all public highways, bridges and culverts, within the district\* \* \*'.

"I would appreciate if you would give me your opinion on the following questions in view of the above changes:

"1. Does the township board set the levy for road and bridge tax including the land of a special road district lying in said township?

"2. While the special road district has exclusive control of the roads and bridges as above set forth can the county court assist in any manner in the building and maintenance of bridges within special road districts?"

Section 8820 of House Bill No. 42 of the 64th General Assembly provides that a levy of not to exceed thirty-five cents on the one hundred dollars assessed valuation may be levied by the township board of directors, and that the amounts collected within the boundaries of road districts formed in accordance with the provisions of Article 18 of Chapter 46, R. S. Mo. 1939, shall be paid to the treasurers of such road districts. From the provisions of this section, it is clear that this levy is set by the township board of directors, and applies to a special road district organized under Article 18 of Chapter 46, R. S. Mo. 1939, as well as to the part of the township not in a special road district.

The only other tax that may be received by a special road district is that authorized by Section 8529, Laws of Missouri, 1945, page 1480, which provides that an additional thirty-five cent tax may be levied on the property within a special road district when such special road district votes such a tax. The election for imposing such tax authorizes the imposition of the tax for one year.

In the case of Lancaster v. County of Atchison, 180 S. W. (2d) 706, the Supreme Court states the general rule with regard to the authority of the county court at 1. c. 708:

"The county courts are not the general agents of the counties or of the state. Their powers are limited and defined by law. These statutes constitute their warrant of attorney. Whenever they step outside of and beyond this statutory authority their acts are void.\* \* \*"

We are unable to find any authority for the county court to expend money to aid the board of commissioners of a special road

district organized under the provisions of Article 18, Chapter 46, R. S. Mo. 1939.

Section 8825, R. S. Mo. 1939, is the authority for the county to build bridges in townships when such bridges cost more than one hundred dollars.

Section 8688, R. S. Mo. 1939, is the authority for the county court to aid a special road district formed under the provisions of Article 10, Chapter 46, R. S. Mo. 1939, in the construction, maintenance or repair of bridges in such special road district.

It is to be noted that Section 8682, R. S. Mo. 1939, provides that the board of commissioners in a special road district organized under the provisions of Article 10, Chapter 46, R. S. Mo. 1939, is given exclusive jurisdiction over "public highways" in its district, and authority for the county court to aid in constructing, maintaining or repairing bridges is found in Section 8688, R. S. Mo. 1939, while Section 8840, R. S. Mo. 1939, provides that the board in special road districts organized under the provisions of Article 18, Chapter 46, R. S. Mo. 1939, shall have exclusive jurisdiction over "public highways, bridges and culverts" in the special road district.

A well recognized rule of statutory construction is that the inclusion of one thing is the exclusion of another. Since the Legislature has provided only that aid may be given townships and special road districts organized under the provisions of Article 10, Chapter 46, it is our opinion that aid may not be given by the county to road districts organized under the provisions of Article 18, Chapter 46, R. S. Mo. 1939.

#### CONCLUSION

It is the opinion of this department that:

1. A special levy for road and bridge purposes of not to exceed thirty-five cents on the one hundred dollars assessed valuation is to be made by the township board of directors, and that such levy applies to special road districts organized under the provisions of Article 18, Chapter 46, R. S. Mo. 1939, as well as to that part of the township not in a special road district, and that an additional road and bridge tax of not to exceed thirty-five cents may be voted by the residents of the special road

Honorable Theo. R. Schneider

-4-

district under the provisions of Section 8529, Laws of Missouri, 1945, page 1480.

2. The county court has no authority to assist in any way in the building and maintaining of bridges within a special road district organized under the provisions of Article 18, Chapter 46, R. S. Mo. 1939.

Respectfully submitted,

C. B. BURNS, Jr.  
Assistant Attorney General

APPROVED:

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J. E. TAYLOR  
Attorney General

SHERIFFS:

Authority as Conservator of the peace is county-wide, and includes violation of city ordinance if it constitutes an offense against the state. Allowed only such mileage as comes within Section 5, H.C.S.H.B. No. 872.

March 11, 1947

FILED

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3/27

Honorable Rufe Scott  
Prosecuting Attorney  
Stone County  
Galena, Missouri

Dear Sir:

This is in reply to your letter dated February 28, 1947. Said letter reads in part as follows:

"Please advise me as to the law governing the following situation as to the duty and legal authority of the Sheriff.

"The Village of Reeds Spring, 10 miles from Galena, incorporated as a village, has an ordinance against drunkenness. On Saturday nights the city officers have a lot of trouble with men getting drunk. The Sheriff of the County is called in to handle the drunks. They have no city jail. The sheriff has been taking the prisoners to the County jail at Galena and locking them up for the night. The only charge being the violation of the village ordinance.

"Please advise me as to whether or not the Sheriff of the County has any legal right to take such action, or whether or not he can legally take the violators out of the town and bring them to the county jail and lock them up. Also whether or not he could collect mileage for such trips."

The problem presented involves the legal right, or duty and authority of the sheriff of a county, and how far that duty and authority extends as regards a city or town within the county and the enforcement of such city's ordinances.

Section 13136, R.S. Mo. 1939, in part reads:

"Every sheriff shall be a conservator of the peace within his county, and shall cause all offenders against law, in his view, to enter into recognizance, with security, to keep the peace and to appear at the next term of the circuit court of the county, and to commit to jail in case of failure to give such recognizance. \* \* \*"

The case of State v. Williams, 144 S.W. (2d) 98, 346 Mo. 1003, was a quo warranto proceeding by the state against the Sheriff of Jackson County to oust him from office for neglect of duty. The sheriff contended that he should not be charged with the failure of law enforcement in Kansas City as charged, because the duty to enforce the law there was upon the metropolitan police department. The court, in speaking of the county sheriff, said at l.c. 104:

"His authority is county wide. He is not restricted by municipal limits. For better protection and for the enforcement of local ordinance the cities and towns have their police departments or their town marshals. Even the state has its highway patrol. Still the authority of the sheriff with his correlative duty remains. It has become the custom for the sheriff to leave local policing to local enforcement officers but this practice cannot alter his responsibility under the law. Usage cannot alter the law. United States v. McDaniel, 7 Fed. 1, 8 L. Ed. 587. It is self evident that a custom or usage repugnant to the express provision of a statute is void. A policeman is an officer whose duties have been, for local convenience, carved out of the old duties of constable, and the constables were always part of the general force at the disposal of the sheriff. There is no division of authority into those of the sheriff and the police. Each is a conservator of the peace possessing such power as the statutes authorize. See Vickers



on Police Officers. In every county there are a number of peace officers of varying authority. They and the sheriff must work in harmony. In the larger communities where dense population has increased the hardship of proper law enforcement police departments have developed scientific methods of crime detection and prevention. Larger means and a greater number of men are available to a local police department than to the county sheriff. Methods of rapid communication and transit are provided. Under these circumstances the sheriff may leave local enforcement in local hands, but only so long as reasonable efforts in good faith are made to enforce the law."

If the act complained of is an offense against the state as well as the city, in view of the above quoted authority, it would appear that the Sheriff of Stone County is responsible as the conservator of peace in the entire county, including the village of Reeds Spring, and this responsibility is not altered by the fact that Reeds Spring may have enacted city ordinances for its local police enforcement. Arrests for drunkenness, if such drunkenness constitutes any offense against the state, would be within the authority and duty of the county sheriff.

If such arrests were made for offenses against the state, and it was the duty of the sheriff as conservator of the peace to make such arrests, he, nevertheless, would not be entitled to collect mileage for the trips unless he could qualify under Section 5 of House Committee Substitute for House Bill No. 872, infra. Said Bill No. 872, passed by the 63rd General Assembly, which became effective July 1, 1946, provides for the salary and compensation of sheriffs in counties of the fourth class, which would be applicable to the Sheriff of Stone County. This County was listed as having in 1940 a population of 11,300. Section 1 of said Bill No. 872 in part provides:

"The sheriff in counties of the fourth class shall receive annually for his official services in connection with the investigation, arrest, prosecution, custody, care, feeding, commitment and transportation of persons accused of or convicted of a criminal offense, the following sums:  
\* \* \* \* in counties having a population of 10,000 and less than 11,500 the sum of \$1300; in counties having a population of 11,500 and less than 13,000 the sum of \$1900; \* \* \* \*"



Section 5 of said Bill No. 372 provides:

"In addition to the salary provided in Section 1 of this act, the county court shall allow the sheriffs and their deputies, payable at the end of each month out of the county treasury, actual and necessary expenses for each mile traveled in serving warrants or any other criminal process not to exceed five cents per mile."

The provisions of the bill as to mileage seem clear of construction. Section 1 provides for the salaries, depending on population of the county, and says the sheriff shall receive such salary for his official services in connection with the investigation, arrest, prosecution, custody, care, feeding, commitment and transportation of persons accused of or convicted of a criminal offense. The only reference to reimbursement for mileage expense incurred in the carrying out of these official duties is Section 5, which provides for payment of actual and necessary expenses for each mile traveled in serving warrants or any other criminal process not to exceed five cents per mile. The case of Maxwell v. Andrew County, 146 S.W. (2d) 621, 347 Mo. 156, involves the question of alleged overpayment of expenses to the Sheriff of Andrew County. The statutes relating to sheriffs at that time provided for certain fees as payment for their services, and a mileage allowance (similar to Section 5 of Bill No. 372), which provided ten cents "for each mile actually traveled in serving any venire summons, writ, subpoena, or other order of court, when served more than five miles from the place where the court is held \* \* \*." The court, in the Maxwell case, supra, said at l.c. 625:

"But our statutes do not provide any compensation for the work which the sheriff may have to do in thus preserving the public peace. Sections 11791, 11792, R.S.No. 1929, Mo. St. Ann. Sections 11791, 11792, pp. 7014, 7017. They do provide that the sheriff in executing a warrant placed in his hands by a court or magistrate shall be allowed certain fees and mileage, but in performing his duty as a conservator of the peace and in detecting and apprehending without warrant, as he may in certain cases, persons guilty of crime, he is not by statute allowed compensation.

"It is well established law that the right of a public officer to be compensated by salary or fees for the performance of duties imposed on him by law does not rest upon any theory of contract, express or implied, but is purely a creature of the statute. \* \* \*

\* \* \* \* \*

"The statutes regulating the compensation of sheriffs expressly provide for the payment of mileage in certain cases. For example, such provision is made when the officer is serving subpoenas or writs or transporting a prisoner to the penitentiary. The specification in the statute of instances when mileage is to be paid and money lawfully be received by the sheriff constitutes an implied prohibition upon its collection in other instances. Particularly is this true when we consider the provisions of Section 11793, specifically limiting the compensation to be received by sheriffs."

It may be that an act which constitutes an offense against a city ordinance is not an offense against the state. As was stated by the Supreme Court of Tennessee in *O'Haver v. Montgomery*, 111 S.W. 449, 1.c. 450:

"The word 'misdemeanor,' as employed in statutes conferring power upon municipal corporations, is not wholly synonymous with the same term as used at common law, or in general statutes defining offenses against the state of a grade less than felony, but has a more restricted meaning, being limited to offenses against the smaller local government. However, it may happen, and often does happen, that an offense against the city may also be an offense against the state, and both jurisdictions may punish (*Greenwood v. State*, 6 Baxt. 567, 573, 574, 32 Am. Rep. 539; *State v. Mason*, 3 Lea, 649; *Ogden v. Madison*, 111 Wis. 413, 87 N.W. 568, 55 L.R.A. 506); but there are many offenses against municipalities which are not offenses against the state, and which the legislative bodies of municipal corporations are

authorized to define and declare by ordinance \* \* \* \* \*

If the act in question falls in such category, it is the duty of the local officials to enforce the ordinance. If such be the case, the enforcement of such ordinance would not be one of the official services which the sheriff is called upon to perform. However, by Section 7360, R.S. No. 1939, it may be the sheriff's duty to accept such offenders in the county jail. Said Section 7360 of Chapter 38, which are miscellaneous provisions applicable to all cities, towns and villages, provides:

"If any city as in this chapter provided for have no suitable and safe place of confinement, the defendant may be committed to the common jail of the county by the mayor or police judge of such city, and it shall be the duty of the sheriff, upon the receipt of a warrant of commitment from the mayor or police judge, if he have room, to receive and safely keep such prisoner until discharged by due process of law. Such city shall pay the board of such prisoner at the same rate as may now or hereafter be allowed by law to such sheriff for the keeping of other prisoners in his custody."

#### CONCLUSION

It is, therefore, the opinion of this department that, if the act complained of is an offense against both the municipal ordinance and the state, it is the duty of the sheriff to act as conservator of the peace within his county, as provided for in Section 13136, R.S. No. 1939. In making arrests as such conservator of the peace, the sheriff is not entitled to mileage unless he comes within the provisions of Section 5 of H.C.S.H.B. No. 872, supra. If the offense is one against the local ordinance only, and not the state, it is not the county sheriff's duty to enforce such ordinance, but the offender may be committed to the county jail under the provisions of Section 7360, R.S. No. 1939, supra.

Respectfully submitted,

Wm. C. COCKRILL  
Assistant Attorney General

APPROVED:

J. E. TAYLOR  
Attorney General

WCC:LR

COURT REPORTERS: In circuits where there are counties with more than forty-five thousand inhabitants the court reporter is not entitled to hotel and traveling expenses.

May 15, 1947

5-17  
FILED

Honorable Louis H. Schult  
Judge, 38th Judicial Circuit  
Caruthersville, Missouri

Dear Sir:

Receipt is acknowledged of your letter requesting an official opinion which reads:

"I would like to have your opinion on the following question:

"Section 13347 provides that every official court reporter of a circuit or a criminal court in counties having forty-five thousand inhabitants and less shall be allowed\* \* \* necessary hotel and traveling expenses while attending \* \* \* court at any place in the circuit in which he is appointed, other than the place of his residence therein, etc.

"The 38th Judicial Circuit is composed of two counties, one having over 45,000 inhabitants (Pemiscot 46,857) and one having less than 45,000 inhabitants (New Madrid 39,787).

"The Supreme Court in Woodside vs County, 308 Mo. 227, 271 SW 766 held that where each county in the circuit had a population of less than 45,000 inhabitants, the court reporter was entitled to his expenses in attending court.

"Would the court reporter of this circuit be entitled to his expenses from New Madrid County?

"And further would he be entitled to such expenses if he lived in New Madrid County. The reporter for this circuit lives in Portageville, New Madrid County, which is some twenty (20) miles from the town of New Madrid wherein circuit court is held, would he therefore be entitled to his expenses (mileage) in going from Portageville to New Madrid and return, since his residence is in that county."

In reading your request we observe two questions to be answered:

I.

May the official court reporter of the 38th Judicial Circuit, composed of Pemiscot County with a population of 46,857 inhabitants and New Madrid County with a population of 39,787 inhabitants, be reimbursed for sums of money actually expended for necessary hotel and traveling expenses while engaged in attending or traveling to and from any regular, special or adjourned term of court at any place in the circuit?

II.

When circuit court is held in New Madrid County, the county in which the court reporter resides, would he be entitled to traveling expenses in going to the town of New Madrid where court is held from his home at Portageville and return?

Section 13347, R. S. Mo. 1939, provides for allowances of hotel and traveling expenses incurred under the aforementioned conditions and reads as follows:

"Every official court reporter of a circuit or a criminal court in counties having forty-five thousand inhabitants and less shall be allowed and paid all sums of money actually expended only in necessary hotel and traveling expenses while engaged in attending any regular, special or adjourned term of court at any place in the circuit in which he is appointed, other than the place of his

residence therein, or while engaged in going to and from any such place for the purpose of attending such terms of court. Such moneys shall be paid out of the county treasuries of the respective counties in said district in proportion to their respective populations."

The leading case construing the above section is Woodside v. Dent County, 271 S. W. 766, 308 Mo. 227. In that case the question involved was whether or not under Section 12674, R. S. Mo. 1919, the court reporter of the 19th Judicial Circuit was entitled to be reimbursed for money actually expended for hotel and traveling expenses while engaged in attending court in the counties of the circuit other than his residence. The 19th Judicial circuit was composed of six counties having a total population of 87,959 but no county had a population in excess of 45,000. In holding that the court reporter was entitled to such reimbursement the Supreme Court en banc said at S. W. 1.c. 767:

"The only question presented is whether court reporters in circuits having a total population of over 60,000, and where each of the counties in the circuit has less than 45,000 inhabitants, are entitled to expenses provided by section 12674, R. S. 1919, in addition to salary. The section reads:

'Section 12674. Allowed actual expenses attending court.-- Every official court reporter of a circuit or a criminal court in counties having forty-five thousand inhabitants and less shall be allowed and paid all sums of money actually expended only in necessary hotel and traveling expenses while engaged in attending any regular, special or adjourned term of court at any place in the circuit in which he is appointed, other than the place of his residence therein, or while engaged in going to and from any such place for the purpose of attending such terms of court. Such moneys shall be paid



out of the county treasuries of the respective counties in said district in proportion to their respective populations. Laws 1919, p. 713.'

"The above section applies only to circuits consisting of two or more counties. The manner of apportionment and payment of this expense by the respective counties prescribed in the last sentence of the law indicates this intent beyond a peradventure. In no such circuit is there now, or was there at the time the law was passed, a county having more than 45,000 inhabitants. Consequently, no hardship arises, and no good reason appears why the plain, unambiguous terms of the statute should not be given a literal construction, and held to apply to every official court reporter of a circuit court in counties having 45,000 inhabitants and less. Appellant was a resident of Dent county within the judicial circuit for which he was the duly appointed, qualified and acting official court reporter. Circuit court was held in every county in this circuit, and every county in the circuit had less than 45,000 inhabitants, though the total population of the circuit was more than 60,000. The facts in appellant's case clearly bring him within the purview of sections 12670 and 12674, R. S. 1919, and he was entitled to recover the full amount sought.\* \* \* \* (Emphasis ours.)

The principal difference in the facts of the Woodside case from the situation presented in your first question is that in the Woodside case there was not a county in the circuit with a population over 45,000, while in the situation presented, one county in the circuit (Pemiscot) does have a population exceeding 45,000. This factual difference, we believe, is, in view of the language appearing in the Woodside case, a very important one to consider in determining the application of Section 13347, supra.

The court in the Woodside case did not directly rule on the question of whether or not Section 12674, R. S. Mo. 1919, which is identical to Section 13347, supra, would have entitled the

court reporter to receive hotel and traveling expenses had one of the counties of the circuit had a population exceeding 45,000 inhabitants. However, in reading the decision of the court it becomes apparent that the court wished to emphasize the fact that no county in the circuit had more than 45,000 inhabitants, and we believe the court even indicated that its decision might have been different had one or more of the counties within the circuit had more than 45,000 inhabitants for it said, "in no such circuit is there now, or was there at the time the law was passed, a county having more than 45,000 inhabitants. Consequently no hardship arises \* \* \*." The converse of this statement would be that there would have been a hardship existing had one or more counties of the circuit had a population exceeding 45,000.

The latter portion of the section being construed in the Woodside case, which is also the same as appears in Section 13347, *supra*, provides that the moneys allowed the court reporter for hotel and traveling expenses "shall be paid out of the county treasuries of the respective counties in said district in proportion to their respective populations." In this provision of the statute we believe that the Legislature has used the word "district" synonymously with the word "circuit", and that it was intended that the moneys for hotel and traveling expenses would be paid by the respective counties of the circuit in proportion to their respective populations. In other words all of the counties of a circuit are bound by the statute to pay their proportionate share of all the hotel and traveling expenses to which the court reporter is duly entitled. The liability of each county for its proportionate share is clear when no county in the circuit has more than 45,000 inhabitants, but such clarity vanishes when confronted with a situation such as the case at hand.

We ascertain in reading the first part of the statute that the Legislature has limited the liability of counties for any hotel and traveling expenses incurred by the court reporter to only those counties having 45,000 inhabitants or less. Therefore, in a circuit such as the 38th Judicial Circuit, Pemiscot County, which has more than 45,000 inhabitants, would not be liable for any portion of the hotel and traveling expenses incurred by the court reporter, at the same time New Madrid county, which at most would only be liable for a proportionate share, could not be assessed for the full amount of such expenses. The statute in question when applicable, certainly contemplates that the court reporter should be paid in full for hotel and traveling expenses to which he is duly entitled, and the last sentence of the statute clearly shows that the Legislature intended that all counties of a circuit would be liable for a proportionate part of such expenses, but it is our notion that such liability depends upon the counties comprising the circuit having no more than 45,000 inhabitants.



Consequently we are persuaded to the view that Section 13347, supra, does apply to a circuit in which one or more counties therein have more than 45,000 inhabitants, and if such is the case, the court reporter would suffer the hardship, which we believe that the court was mindful of in the Woodside case, of not being entitled to hotel and traveling expenses.

Therefore, in answer to your first question we are constrained to hold that the official court reporter of the 38th Judicial Circuit cannot be reimbursed for hotel and traveling expenses incurred while engaged in attending or traveling to and from any regular, special or adjourned term of court at any place in the circuit,

At this time we would like to point out that the only counties other than Pemiscot County which have a population in excess of 45,000 are Jackson, St. Louis, Buchanan, Greene and Jasper, and each of these counties comprise a separate judicial circuit. The 38th Judicial Circuit, which includes Pemiscot County, is composed of only two counties. Undoubtedly one reason for this is that Pemiscot County is not nearly so large as the counties aforementioned so as to constitute it a single judicial circuit. Although we believe that Section 13347, supra, has no application to the 38th Judicial Circuit, it can be readily seen that it would apply to the great majority of the circuits throughout the State, and the court reporters in such circuits would be entitled to reimbursement for hotel and traveling expenses under the conditions set forth in the statute.

The answering of your first question in the negative, we believe, also answers your second question in that we have concluded that the court reporter of the 38th Judicial Circuit would not be entitled to reimbursements for traveling expenses incurred while traveling to or from any term of court. However, we also believe that the words "other than the place of his residence therein", as used in the statute, has reference to the county in which the court reporter may reside and not to his actual place of abode. To pay the court reporter for mileage traveled while going from his home to the courthouse and return, both being within the same county, would in fact be paying him for traveling to and from work. We do not believe that such travel would be necessarily performed in the public service or in an official capacity so as to allow reimbursement for expenses incurred as contemplated by the statute.

What if the court reporter only lived a mile or two beyond the city limits of New Madrid, would he be entitled to mileage for going to and from work when court was being held in New Madrid? We think not.

In the case of United States v. Shields, 153 U. S. 88, 14 Sup. Ct. 735, the question involved was whether or not the United States District Attorney was entitled to mileage while going to and from his home on weekends. The place where court was being held was 58 miles from his home. The court in ruling that he was not entitled to such mileage said the following at S. C. l.c. 736:

"The only question now involved in the case is whether such an officer, whose place of abode is at a distance from the place at which court is held, is entitled to mileage for travel in going to his home every Saturday, and in returning to the place of holding court the following Monday morning, during the continuous session of the court.

"The appellee relies in support of his claim for mileage, and in affirmance of the judgment below, on that part of section 824, Rev. St., which provides: 'For traveling from the place of his abode to the place of holding any court of the United States in his district, or to the place of any examination before a judge or commissioner, of a person charged with crime, ten cents a mile for going and ten cents a mile for returning.'

"This provision of section 824 has been modified by section 7 of the act of February 22, 1875, Supp. Rev. St. 66, which, in respect to mileage for attorneys, marshals, and clerks, enacts that 'from and after the first day of January 1875, no such officer or person shall become entitled to any allowance for mileage or travel not actually and necessarily performed under the provisions of existing law.'

"This being the provision of law in force as to mileage during the period covered by the claim of the appellee, can it be properly said that going to his home on Saturday afternoon and returning the Monday morning following was travel 'actually and necessarily performed?' It certainly cannot be held to be travel necessarily performed in

the public service. Mileage allowed to public officials involves the idea that the travel is performed in the public service, or in an official capacity. The appellee lived at Canton, Ohio, 58 miles from Cleveland, where the court was held; and he made the journey to and from his home once a week, for the purpose of spending Sunday with his family. If he is entitled to mileage for each one of these trips made during the uninterrupted session of the court, it is difficult to see upon what principle he would not be entitled to mileage for a daily trip of that sort, which would enable him to spend each night of the week at home. Suppose that his place of abode had been 10, 15, 20 or 25 miles from Cleveland, and instead of going home Saturday afternoon, and returning Monday morning, he had made the trip to his place of residence each afternoon of the court week, and returned the following morning. Could it be held that it was the true intent and meaning of congress that he should be allowed mileage for these daily trips? We think, clearly, not. Section 824, and the above-quoted act of February 22, 1875, will not admit of a construction which would give the right to mileage under such circumstances. There is, in principle, no essential difference between the claim for mileage on a daily trip to and from the officer's home, and a weekly trip, when performed for his own pleasure and convenience so as to spend Sunday at home. The travel, whether made daily or weekly, cannot be said to have been made in the character of a public official, or in the performance of a public service, but merely in a private and unofficial capacity. (Emphasis ours.)

In view of the foregoing we do not believe that the court reporter would be entitled to reimbursement for traveling expenses incurred while traveling from Portageville to New Madrid

and return during the time that court is being held in New Madrid.

CONCLUSION

It is, therefore, the opinion of this department that in a Judicial Circuit wherein a county or counties have more than 45,000 inhabitants, Section 13347, R. S. Mo. 1939 does not apply and the official court reporter of such circuit would not be entitled to reimbursement for sums of money expended for necessary hotel and travel expenses while engaged in attending or traveling to and from any regular, special or adjourned term of court at any place in the circuit. Nor in any event would the court reporter be entitled to traveling expenses for going from his home to the place where court was being held and return where both are in the same county.

Respectfully submitted,

RICHARD F. THOMPSON  
Assistant Attorney General

APPROVED:

J. E. TAYLOR  
Attorney General

RFT:mw

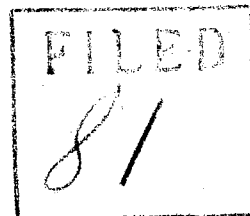
BANKING BUSINESS:

An express company having contracts with railroad companies for the operation of an express service upon the lines of such railroad companies, or a transatlantic steamship company, or a telegraph or telephone company, as exceptions to corporations prohibited from doing any acts of banking under Sec. 7890, R.S. Mo. 1939, possess the power of receiving for transmission or of transmitting the same,

February 20, 1947

by draft, traveler's check, money order, or otherwise, without any authority or supervision of the Department of Finance of this State whatsoever.

Honorable E. G. Shaffner  
Commissioner of Finance  
Jefferson City, Missouri



Dear Commissioner Shaffner:

This will acknowledge your letter of recent date, which is as follows:

"This office is in receipt of the following letter dated September 4th from Cunard White Star, Ltd., St. Louis office:

"Department of Finance  
State of Missouri  
Jefferson City, Missouri

"Dear Sirs:

"We are about to reengage in the business of transmitting moneys to foreign countries and in due course we shall authorize our regularly appointed agencies in the State of Missouri to receive moneys for transmission.

"This business will be conducted by us subject to all the restrictions and limitations set forth by the United States Treasury Office pursuant to the Executive Orders and Regulations relating to Foreign Fund Control, under a license to be granted us by the Secretary of the Treasury through the Federal Reserve Bank, New York.

"We would esteem highly an acknowledgment of this letter with particulars as to the

requirements with which we should comply to operate under the existing regulations of the State of Missouri affecting the business of receiving moneys for transmission abroad.'

"In this connection, it appears Sec. 7890-7891, R.S. Mo. 1939, indicate this Department is in a position to grant such a request. Since there is no evidence in this office that such permission has previously been authorized, there are apparently other banking laws which supersede those sections mentioned.

"May we be favored with your opinion at your convenience?"

Sections 7890 and 7891, Article 1, Chapter 39, R.S. Mo. 1939, respectively, are as follow:

"Sec. 7890. Prohibition of banking business.--No corporation, domestic or foreign, other than a corporation formed under or subject to the banking laws of this state or of the United States, except as permitted by such laws, shall by any implication or construction be deemed to possess the power of carrying on the business of discounting bills, notes or other evidences of debt, or receiving deposits, of buying and selling bills of exchange, or of issuing bills, notes or other evidences of debt for circulation as money, or of engaging in any other form of banking; nor shall any such corporation, except an express company having contracts with railroad companies for the operation of an express service upon the lines of such railroad companies, or a transatlantic steamship company, or a telegraph or telephone company, possess the power of receiving money for transmission or of transmitting the same, by

draft, traveler's check, money order or otherwise."

"Sec. 7891. Licenses to foreign corporations--renewal.--Upon receipt by the commissioner from any foreign corporation of an application in proper form for leave to do business in this state under the provisions of this chapter, he shall, by such investigation as he may deem necessary, satisfy himself whether the applicant may safely be permitted to do business in this state. If from such investigation he shall be satisfied that it is safe and expedient to grant such application and it shall have been shown to his satisfaction that such applicant may be authorized to engage in business in this state pursuant to the provisions of this chapter and has complied with all the requirements of this chapter, he shall issue a license under his hand and official seal authorizing such applicant to carry on such business at the place designated in the license and, if such license is for a limited time, specifying the date upon which it shall expire. Such license shall be executed in triplicate and the commissioner shall transmit one copy to the applicant, file another in his own office and file the third in the office of the recorder of the county or city in which is located the place designated in such license. Whenever any such license is issued for one year or less, the commissioner may, at the expiration thereof, renew such license for one year."

We believe the last part of said Section 7890, beginning with the word "nor" in the fourteenth line of said section, and including the word "otherwise" at the end of said section indicates that your Department has

Honorable H. G. Shaffner -4-

no duties to perform respecting the issuing of licenses or permits to any of the companies named in said Section 7890.

There is no other section of the Banking Code which either supersedes, as you suggest in your letter might be the case, said Sections 7890 and 7891, or refers to them.

Section 7890, R.S. Mo. 1939, is designed as a statute to prohibit all corporations, domestic and foreign, other than corporations formed under or subject to the Banking Laws of this State or the United States from performing any of the acts exclusively belonging to banking business. Said Section 7890 identifies many of the acts which are prohibited from being performed by corporations other than those formed under and subject to the Banking Laws of this State, or the United States, except as permitted by such laws, which are by the terms of Section 7949, R.S. Mo. 1939, exclusively within the power and authority of banks to perform.

However, said Section 7890, in the part thereof hereinabove quoted, identifies certain corporations as exceptions to such corporations, domestic or foreign, other than corporations formed under or subject to the Banking Laws of this State or the United States, as corporations which are privileged to perform some of the acts which are mentioned in said Section 7890, as being so prohibited as aforesaid, and also mentioned in said Section 7949 as being exclusively privileged to banks. Such corporations so constituting such exceptions are: 1) an express company having contracts with railroad companies for the operation of an express service upon the lines of such railroad companies, or, 2) a transatlantic steamship company, or, 3) a telegraph or telephone company. Said Section 7890 proceeds and states that such corporations so excepted from the corporations, domestic or foreign, which are prohibited from performing any of such acts of banking shall "possess the power of receiving money for transmission or of transmitting the same, by draft, traveler's check, money order or otherwise."

Section 7890 is positive, clear and certain in its direction that the said corporations so named as such



exceptions may perform such acts as named in said section, and which are otherwise exclusive acts of banking, without limitation or condition. Said section does not provide for any license, certificate or authority to be procured from any public official in order to do and perform such acts as are privileged to them by said section to perform.

Section 7891 is, as we view it, not sufficiently clear in itself to authorize your Department to grant a written license or permit of any kind thereunder. Certainly, said Section 7891 does not circumscribe or limit the powers of the corporations named as exceptions in said Section 7890 from performing such acts they are permitted to perform without any authority from any public administrative office including your Department.

We believe the corporations named in said Section 7890 as possessing the power of receiving money for transmission or of transmitting the same by draft, traveler's check, money order or otherwise, may proceed to the performance of such acts, even though such acts may be business transactions exclusively assigned to banks, except for such exceptions as are stated in said Section 7890, without interference or supervision from any person or authority in this State.

CONCLUSION.

It is, therefore, the opinion of this Department that your Department has no duty to perform with respect to licensing, granting a certificate of authority or other consent for an express company having contracts with railroad companies for the operation of an express service upon the lines of such railroad companies, or a transatlantic steamship company, or a telegraph or telephone company in order for any such company to possess the power of receiving money for transmission or of transmitting the same by draft, traveler's check, money order, or otherwise. Such companies possess such power independently by reason of Section 7890, and your Department has no duty to perform in such matters.

Respectfully submitted,

APPROVED:

J. E. TAYLOR  
Attorney General

GEORGE W. CROWLEY  
Assistant Attorney General

GWC:lr

TRUST COMPANIES: Corporations may be created under Section 8024, Article 3, Chapter 39, R.S. Mo. 1939, to do a trust company business as provided therein, without being required to do "banking" business.

April 14, 1947

FILED

81

Honorable H. G. Shaffner  
Commissioner of Finance  
Jefferson City, Missouri

Dear Commissioner Shaffner:

This will acknowledge your letter of recent date requesting the opinion of this Department if it is permissible for your Department to issue a charter to a corporation as a trust company, under the terms of Section 8024, R.S. Mo. 1939, without infringing upon the business of banking as defined in Section 7949, R.S. Mo. 1939.

Your letter is as follows:

"Parties within the state are interested in organizing a trust company. A copy of the Articles of Agreement are enclosed.

"You will note that Paragraph Seven sets out the purposes for which the corporation is to be formed. It appears that those parties interested wish to obtain a charter which will exclude rights and powers in connection with banking corporations as defined in Section 7949, Banking Laws, State of Missouri, 1939.

"Can this Department issue a charter to operate in the manner as described in the paragraph referred to in the Articles of Agreement."

Section 8024, R.S. Mo. 1939, is one section of Article 3, Chapter 39, dealing with trust companies, and by the terms of said Article 3 the incorporation and

supervision and control of such trust companies are placed under the administration of the Department of Finance.

The first clause of said Section 8024, is as follows:

"Corporations may be created under this article for any one or more of the following purposes."

Then said Section 8024 declares what business may be transacted by a corporation organized under said section.

It is true that a trust company may, if its Articles of Incorporation so provide, do a banking business under the terms of said Section 8024. But unless the Articles of Incorporation do so provide, a trust company, as such, would have no power to transact any kind of banking business whatever.

In the case being considered, where the incorporators desire to organize a trust company under the corporate name of The Guaranty Trust Company of Missouri, and following the conference with the same persons in your office on April 1, this Department has received from such proposed incorporators a copy of the proposed Articles of Incorporation of the said trust company. These persons not only do not include in their Articles of Incorporation any expressed purpose to carry on any banking business, but they do expressly disclaim any such purpose or intention, or right, if and when incorporated, of doing any banking business whatever.

A trust is defined in 65 C.J., pages 212, 213, under the subject of "Trusts" as follows:

"In its technical legal sense a trust has been defined as the right, enforceable solely in equity, to the beneficial enjoyment of property the legal title to which is vested in another. It has been otherwise defined as an

obligation upon a person arising out of a confidence reposed in him to apply property faithfully and according to such confidence; a holding of property, subject to a duty of employing it or applying its proceeds according to directions given by the person from whom it was derived; a right of property, real or personal, held by one party for the benefit of another. That relation between two persons by virtue of which one of them holds property for the benefit of the other, an equitable right, title, or interest in property, real or personal, distinct from the legal ownership thereof."

The terms of said Section 8024 in prescribing the purposes for which corporations may be organized as trust companies, adhere very closely to the performance of such acts by a trust company as would come strictly within the above text definition of a trust.

A bank is defined in 7 C.J., 473 as: "\* \* \* 'an association or corporation whose business it is to receive money on deposit, cash checks or drafts, discount commercial paper, make loans, and issue promissory notes payable to bearer, \* \* \* ' \* \* \*'".

It will be readily seen, therefore, that the purposes set forth in the Articles of Incorporation of this proposed corporation do not propose to do any of the acts or things set forth in Section 7949, R.S. Mo. 1939, or in any other section of our Banking Code, which are prescribed as incidents and acts of banking.

Said Section 8024, gives incorporators the privilege of organizing as a corporation for any "one or more" of the purposes set forth in the sub-sections of said section. This section means that a trust company, may, if it declares its purpose so to do, do a banking business, along with other acts incident to a trust company business but if the purpose of undertaking any kind of banking business is disclaimed, as here, in the considered

Articles of Incorporation, a trust company may be organized as a corporation for the transaction of any other of the kinds of business set forth in said Section 8024, without violating the terms of said Section 7949, or any other section of our Banking Code, or without being required to include "banking" in its business unless it is expressly provided for in its Articles of Incorporation.

We have examined these proposed Articles of Incorporation of the proposed The Guaranty Trust Company of Missouri, and find that they comply strictly with the provisions of said Section 8024, with respect to the organization of and transacting business by a trust company, excluding positively any purpose or intention, or the asking of any right or privilege, to transact any banking business whatsoever. Under these Articles of Incorporation, and under the terms of said Section 8024, these incorporators have the right to incorporate as a trust company to transact such business as a trust company as is provided in said Section 8024, without including the business of banking.

CONCLUSION.

It is, therefore, the opinion of this Department that The Guaranty Trust Company of Missouri, under the terms of said Section 8024, R.S. Mo. 1939, may organize and incorporate as a trust company for the purpose of carrying out trusts in property rights for others, and for the purpose of transacting such business for which its Articles of Incorporation provide, and that your Department may lawfully issue a charter to said The Guaranty Trust Company of Missouri, as a corporation to operate and carry out the business proposed in its said Articles of Incorporation.

Respectfully submitted,

APPROVED:

J. E. TAYLOR  
Attorney General

GEORGE W. CROWLEY  
Assistant Attorney General

GWC:ir

BANKS; Restrictions on loans:

Banks may not, either directly or indirectly, by any means loan to one person a sum greater than 20% of the capital stock actually paid in and surplus fund of such bank if located in any city having a population of less than 100,000 and over 7,000.

SUPPLEMENT TO OPINION #64  
DATED MARCH 29, 1946.

June 11, 1947

6/12  
**FILED**  
81

Honorable H. G. Shaffner  
Commissioner of Finance  
Jefferson City, Missouri

Dear Mr. Shaffner:

Since our recent conference concerning the request of the Columbia Savings Bank, Columbia, Mo., through the law firm of Clark, Boggs, Peterson & Becker, to obtain a modification of our opinion #64, rendered to Honorable M. E. Morris, March 29, 1946, or at least to indicate if, under their construction of Section 7952, R.S. Mo. 1939, as re-enacted, Laws of Missouri, 1943, page 994, Section 1, we may answer in the affirmative the following question appearing as paragraph two in the opinion of the said law firm to said Columbia Savings Bank of date May 4, 1946, construing said Section 7952, which question is as follows:

"May a bank, subject to the provisions of Section 7952, located in a city of approximately 19,000, acquire by purchase or discount from a dealer in machinery, notes secured by chattel mortgages executed by customers of said dealer, endorsed with recourse, which in the aggregate exceed twenty per centum of the capital stock and surplus of said bank?"

The question submitted does not directly come within the compass of our former opinion #64. There, the question was:

"\* \* \* whether the value of acceptance drafts as mentioned and defined in said sub-section (e), page 997, Laws of Missouri, 1943, are excepted

from the value given evidences of debt mentioned and defined in sub-section 1 of said new Section 7952, as paper not constituting any part of the percentage value a bank may lend any one person, when, for instance, a sight draft is issued along with a shipper's order bill of lading, and the draft for the full value of the amount of the shipment. \* \* \* "

Here, the question is whether a bank may acquire from one dealer, by purchase or discount " \* \* \* notes secured by chattel mortgages executed by customers of said dealer, endorsed with recourse, which in the aggregate exceed twenty per centum of the capital stock and surplus of said bank."

The writer has reviewed said opinion #64, and also has carefully read the opinion of Honorable William H. Becker, a member of the law firm of Clark, Boggs, Peterson & Becker, to Columbia Savings Bank of date May 4, 1946. If, as might be the case, counsel for said bank takes the position that said opinion #64 is in disagreement with their conception of sub-section 1 of Section 7952, in that said opinion #64 holds that a bank may not lend to one person by discount or purchase of the securities or evidences of debt named in said section in excess of the percentage of the "capital stock actually paid in and surplus fund of such bank", we adhere strictly to our said opinion #64.

Said Section 7952, R.S. Mo. 1939, as amended, Laws of Missouri, 1943, page 994, by the enactment of a new Section 7952, was in turn repealed by Senate Bill #189 passed by our Legislature in 1945. Said sub-section 1 of Senate Bill #189 now appearing in Laws of Missouri, 1945, page 919, l.c. 920, is almost identical with sub-section 1, Laws of Missouri, 1943, page 994, l.c. 995. The sense, the objects and purposes of the two sub-sections are identical. That part of sub-section 1 of said Section 7952 pertinent to the question here is as follows:

" \* \* \* A bank subject to the provisions of this article:

"1. Shall not directly or indirectly lend to any individual, partnership, corporation, or body politic, either by means of letter of credit, by acceptance of drafts or by discount or purchase of notes, bills of exchange or other obligations of such individual,

partnership, corporation or body politic  
an amount or amounts in the aggregate  
which will exceed \* \* \* \* \*  
twenty (20) per centum of the capital  
stock actually paid in and surplus fund  
of such bank if located in a city having  
a population of less than one hundred  
thousand and over seven thousand; \* \* \* ".

We note especially that in the question submitted,  
it is said that the notes mentioned would be "endorsed  
with recourse".

The word "recourse" is defined in Webster's Inter-  
national Dictionary, Second Edition, page 2081, as an in-  
transitive verb in definition 1: "to return; revert".

Definition two, the same page, same volume: "to  
have recourse; to resort".

Black's Law Dictionary defines the term "without  
recourse" as making a qualified or restricted endorsement  
of a bill or note, and states:

"by these words the endorser signifies  
that, while he transfers his property  
in the investment, he does not assume  
the responsibility of an endorser."

If, then, one assigns a bill of any sort "without  
recourse" it means that he is without any responsibility as  
an endorser. The converse would undoubtedly be true when  
and where a bill is assigned "with recourse". Such an as-  
signment would create a responsibility and liability upon  
the assignor as an endorser guaranteeing the integrity of  
the bill.

Volume I, Bouvier's Law Dictionary, at the bottom  
of page 881, left column, under the subject of "discount",  
says:

"There is a difference between buying a  
bill and discounting it. The former word  
is used when the seller does not endorse  
the bill and is not accountable for its  
payment". (20 N.C. 350).

We believe that where the dealer - as in the example  
submitted by Mr. Becker - endorses the notes made to him by



his customers for "merchandising" to the bank "with recourse", such notes would become, and are, his individual debt and obligation to the bank, and is, in fact, even though in form it might appear to be a purchase, a loan by discount, and comes definitely within the inhibition of paragraph 1 of said Section 7952, Laws of Missouri, 1943, page 994, l.c. 995, which is as follows:

"A Bank subject to the provisions of this article:

"1. Shall not directly or indirectly lend to any individual, partnership, corporation, or body politic, either by means of letters or credit, by acceptance of drafts or by discount or purchase of notes, bills of exchange or other obligations of such individual, partnership, corporation or body politic an amount or amounts in the aggregate which will exceed fifteen (15) per centum of the capital stock actually paid in and surplus fund of such bank if located in a city having a population of one hundred thousand or over; twenty (20) per centum of the capital stock actually paid in and surplus fund of such bank if located in a city having a population of less than one hundred thousand and over seven thousand; and twenty-five (25) per centum of the capital stock actually paid in and surplus fund of such bank if located elsewhere in the state, with the following exceptions: \* \* \*".

A loan is defined in the leading text authority in this country, Corpus Juris, Volume 38 of that work, page 126, as follows:

"Loan of money. A contract by which one delivers a sum of money to another and the latter agrees to return at a future time a sum equivalent to that which he borrows; the delivery by one party and the receipt by the other party of a given sum of money, upon an agreement, express or implied, to repay the sum loaned, with

or without interest. If such is the intent of the parties, the transaction will be considered a loan without regard to its form."

The case cited and quoted in the brief prepared by Mr. Becker, Meserole Securities Co. Inc. vs. Cosman et al., reported in 170 N.E. (N. Y.) 519, does not, we believe, support the view expressed by Mr. Becker that the transaction identified would be a purchase. The case at best is of doubtful applicability to the question being considered here. That was a case in which the question was whether the plaintiff corporation was authorized to "discount" notes. Here, we have the question of what the effect may be of discounting notes under our statutes, and not the construction of what constitutes lawful authority to discount paper. The question here is whether an endorsement to the bank by the payee "with recourse" and under discount would be a loan or a purchase. It must not be overlooked that said sub-section 1 of said Section 7952, Laws of Missouri, 1943, page 995, prohibits excessive loans by "purchase" of notes and other obligations.

Of course the intention of the parties to the transaction would, like any other contract, furnish the true basis for the construction of the effect of the contract, unless contrary to some statutes or against public policy. Their intention would not necessarily be determined by what they might say, but would be governed by what the facts of the case were, and what the ultimate effect of their agreement was under the application of the law to like facts and circumstances having received previous judicial determination. But how may we arrive at the true view of their intention? We believe it would be by an analysis of the facts of the case, and applying the text of the law and the decisions of the Court to such conditions. Here is a dealer who has automobiles to sell, it is said. He does sell them. He took notes for his sales. He cannot carry the notes because he must pay the maker or distributor. The bank and the broker both, we assume, know this fact. The banker says: "You are all right, but we happen to know that some of your customers who, while not insolvent, are not very prompt to pay. We will take these notes and discount them if you will endorse them 'with recourse'". The dealer agrees, endorses the notes with recourse, and the money is delivered to him or placed to his credit in the bank. What, then, was the

consideration for the advancement of the money by the bank? The answer must be, we think, the endorsement by the dealer "with recourse" upon him to pay any or all of the notes his customers fail to discharge, thus making it his own contract to pay if his customers did not pay.

It is, therefore, we think, shown thereby, that their intention was, and would be, construed to mean that the transaction should be a loan by discount, just as if the dealer were borrowing the money from the bank and had put up his customers' notes as collateral. We think it just as simple as that.

We think that when parts of the decision quoted by Mr. Becker, 170 N.E. 519, supra, preceding and following the part Mr. Becker quotes, are read, the decision will support our view that such a transaction would constitute a loan.

The decision cited and quoted by Mr. Becker in addition to the part quoted in his brief, l.c. 521, 522, states:

"\* \* \* Undoubtedly definitions of the word 'discount' by lexicographers and economists may be found wide enough to cover every purchase of a debt or chose in action, yet in banking or finance it seems to have a meaning somewhat more restricted. Banks are not ordinarily permitted to speculate in the purchase of negotiable instruments made or indorsed by parties of doubtful financial responsibility. Banks of discount loan or advance moneys to the makers or holders of negotiable instruments, receiving at that time, by deduction from the sum loaned or advanced, the interest or compensation to be paid for the advance of the bank's money. See Jevons, Prim. Pol. Econ. 114.

"Ordinarily perhaps the advance or loan is made by discount of negotiable paper created for that purpose and having no legal inception until delivered for discount. Sometimes the loan or advance is made to the maker, sometimes to an indorser, where the maker has signed the note for the accommodation of the borrower. If a bank loans or advances moneys to a customer upon an

existing note indorsed by the customer upon deducting interest to the date when the note becomes due, the transaction may in form be a purchase of the note, for most practical purposes the transaction is the same as if the moneys advanced formed the consideration for the making of the note.

Also, we cite and quote, l.c. 523, of said decision, as pertinent to this question, the following:

"\* \* \* It is the function of a bank of discount to employ its funds in the form of loans or advances to its customers, receiving compensation in the form of interest upon the moneys loaned or advanced. Such loans or advances are made upon the credit of the customers, either with or without the credit of other parties in addition. If it makes such a loan or advance in the form of a discount of a bill or note, payable at a future date, it pays to the maker or holder the face amount of the instrument after deducting interest for the use of the money till the date when the instrument is payable. Where such payment by the bank constitutes the consideration for the execution of the bill or note, the transaction is, both in form and in fact, a loan. Where such payment is the consideration for the transfer of a pre-existing instrument the transaction is in form a purchase; yet in both cases the transaction carried on by the bank is part of its function to loan or advance moneys to its customers, deriving its profit from the receipt of interest in advance."

Of course a note, in order to be negotiable and disposable must be a pre-existing instrument. We may assume that the note, or notes, in this case, would be payable at a future date, since we cannot believe that any bank would accept, at all, notes, at discount, if they were past due, with the possible infirmities that might be attached to them after maturity.

The case cited - 170 N.E. 519 - does distinguish between a sale or a purchase and a discount in the disjunctive, because the plaintiff there had the right, under

Honorable H. G. Shaffner -8-

its certificate of incorporation, to "purchase or sell property" as a brokerage enterprise, but did not have the right, so it is held in the case, to "discount" notes and evidences of debt, because discounting paper was the exclusive privilege of banks. Our statute prohibits both the purchase and discounting, either conjunctively or disjunctively, if either, or both, respectively, becomes, or become, a loan by the bank in excess of the percentage ratio set up in said sub-section 1 of said Section 7952, Laws of Missouri, 1943, as amended in Laws of Missouri, 1945, page 919.

We believe a transaction, such as stated, either factual or hypothetical, as given by Mr. Becker would, whether as an ostensible purchase or as a discount, be a loan by the bank to the dealer, and being in excess of the 20% of the "capital stock actually paid in and surplus fund of such bank" would violate said sub-section 1 of said Section 7952, Laws of Missouri, 1943, page 995, and as amended in Laws of Missouri, 1945, page 919.

CONCLUSION.

It is, therefore, the considered opinion of this Department that our former opinion #64 correctly states the law as we then viewed it, and view it now, and we adhere to the principles and authority submitted in said former opinion.

Respectfully submitted,

GEORGE W. CROWLEY  
Assistant Attorney General

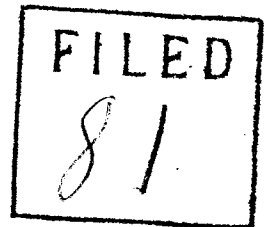
APPROVED:

J. E. TAYLOR  
Attorney General

GWC:ir

TOWNSHIPS: Section 26(a) Article VI of the 1945 Constitution, is a limitation on the amount of indebtedness a township board may incur for the township in any year without popular vote. Valid warrants issued by a township in previous years and still outstanding are not to be counted in computing the amount of indebtedness for the current year.

July 1, 1947



Mr. H. G. Shaffner  
Commissioner of Finance  
Jefferson City, Missouri

Dear Sir:

This is in reply to your letter dated May 15, 1947, which reads in part as follows:

"I am in receipt of the following letter from one of the examiners of the Federal Deposit Insurance Corporation:

"Many banks in Missouri have been accepting township warrants, and a few have made direct loans and have accepted warrants as evidence of such debts.

\*\*\*\*\*

"In view of the importance of township warrants in certain state chartered banks in Missouri, I would appreciate clarification of the following questions.

"Does Article VI, Section 26(a) of the Constitution of the State of Missouri, alter or nullify the provisions of Section 13978, Mo. R. S. 1939?

"Does a township board have authority to borrow, either by issuance of a warrant or execution of a promissory note, without popular vote?"

"May I be favored with an opinion of your Department with regard to the two instances mentioned."

Section 26(a), Article VI of the 1945 Missouri Constitution, provides:

Mr. H. G. Shaffner

"No county, city, incorporated town or village, school district or other political corporation or subdivision of the state shall become indebted in an amount exceeding in any year the income and revenue provided for such year plus any unencumbered balances from previous years, except as otherwise provided in this Constitution."

Section 13978, R.S. Mo. 1939, provides:

"Any person having a claim or account against the township may file such claim or account in the office of the township clerk, to be kept by the said clerk, and laid before the township board at their next meeting: Provided, however, that any person having a claim against the township may present said claim to the township board himself, or by an agent, at any legally convened meeting of said board; said board shall have the power to determine the legality or illegality of any claim or account against the township, and to reject said claim, or any part thereof, as to them appears just and proper; but in no case shall the township board be authorized to allow any claim, or any part thereof, until the claimant makes out a statement, verified by affidavit to the amount and nature of his claim, setting forth that the same is correct and unpaid, or, if any part thereof has been paid, setting forth how much."

The point for clarification presented by the first question may be stated thusly: With regard to township warrants found in a bank, what effect is to be given to Section 26(a), Article VI of the 1945 Constitution; how does it operate with respect to Section 13978; and what warrants issued by townships are to be counted in determining the indebtedness within the prohibition of Section 26(a), Article VI of the Constitution.

At the outset it should be stated that a township warrant does not constitute a new debt or evidence of a new debt, but

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is only the prescribed means for drawing money from the municipal treasury to pay an existing debt. Dillon on Municipal Corporations, Section 851. As is stated in 63 Corpus Juris, page 176, "a township can not create a debt unless there is an antecedent legislative authority, direct, or implied from the necessity of performing a duty involving the spending of money."

The Legislature has provided for the final policy and practices to be followed by the township board in handling public money, and we must therefore look to the statutes relating to township organization. These statutes govern the procedure a township must follow in dealing with the public funds.

Section 13968, R.S. Mo. 1939 provides that the treasury shall not pay out any money belonging to the township for any purpose whatever, except upon the word of the township board of the directors, signed by the chairman of said board and attested by the township clerk.

Section 13983, R. S. Mo. 1939 reads as follows:

"When any claim or account, or any part thereof, shall be allowed by the township board of directors, they shall draw an order upon the township trustee in favor of the claimant for the amount so allowed-- said order to be signed by the president of said board, and attested by the township clerk and delivered to said claimant."

In commenting on these sections including Section 13978 the court said in *Missouri Township, Chariton County v. Farmers' Bank*, 42 S. W. (2d) 353 at l. c. 356:

"These statutes were enacted by the Legislature for a purpose, that is, to safeguard the funds of the public, to establish a regular procedure, and prescribe an orderly manner in which the public funds may be expended. \* \* \*"



Mr. H. G. Shaffner

It will be seen from the foregoing statutes that the township is authorized to issue warrants when they ascertain that there is a sum of money due from the township. The purpose of the warrant is to pay the accounts due from the township to its creditors.

In the early case of International Bank of St. Louis v. Franklin County, 65 Mo. 105 the court was considering sections of the statutes applicable to county courts which are very similar to the above quoted sections applicable to townships. In the course of the discussion the court said at l. c. 111:

"It will be observed respecting warrants of the sort under consideration that the statute (1 W. S. Section 32 p. 415) provides that 'every such warrant shall be drawn for the whole amount ascertained to be due to the person entitled to the same.' So that according to express statutory provision each warrant is an ascertainment that the sum therein mentioned is 'due' to the person in whose favor the warrant is drawn. And it will be further observed that the preceding section (31) makes it the duty of the court, before ordering their clerk to issue a warrant, to ascertain the 'sum of money to be due from the county.' In consequence of these provisions of the statute it follows that each warrant, whether drawn on a general or special fund, for the statute makes no distinction, is both a judicial ascertainment and a written acknowledgement of indebtedness by the county. \* \* \* \* \*

The same reasoning can be applied to township warrants, and it would thus appear that warrants are to be issued only after there has been an ascertainment and determination by the township board that the township is indebted to the party presenting the claim. There is no law expressly authorizing a township board to borrow money from a bank and issue a warrant for such indebtedness.

Mr. H. G. Shaffner

The source of Section 26(a), Article VI of the 1945 Constitution is Section 12, Article 10 of the 1875 Constitution, which reads as follows:

"No county, city, town, township, school district or other political corporation or subdivision of the state shall be allowed to become indebted in any manner or for any purpose to an amount exceeding in any year the income and revenue provided for such year, \* \* \* \* \*."

In commenting on this provision the court in *State ex rel. v. Johnson* 162 Mo. 622 said at l. c. 628:

"A correct answer to the first proposition can only be given by keeping in view section 12 of article 10 of the Constitution, which ordains that 'no county . . . shall be allowed to become indebted in any manner or for any purpose to an amount exceeding in any year the income and revenue provided for such year, without the assent of two-thirds of the voters thereof voting at an election to be held for that purpose; nor, in cases requiring such assent, shall any indebtedness be allowed to be incurred to an amount including existing indebtedness, in the aggregate exceeding five per centum on the value of the taxable property therein.'"

"It was ruled in *Book v. Earl*, 87 Mo. 246, that 'the evident purpose of the framers of the Constitution and the people who adopted it was to abolish in the administration of county and municipal government, the credit system, and establish the cash system by limiting the amount of tax which might be imposed by a county for county purposes, and limiting the expenditures in any given year to the amount of revenue which such tax would bring into the treasury for that year.' But it was at the same time said: 'Under this section the county court might anticipate the revenue collected, and to be collected, for any given year, and con-

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tract debts for ordinary current expenses, which would be binding on the county to the extent of the revenue provided for that year, but not in excess of it.'

"It was then anticipated that, though the county court might not issue warrants in excess of the levy for a year's current expenses, and that a creditor might rely upon the fact that his contract was within the amount of revenue levied and provided, and trust to the power of the State to enforce its taxes, still it might happen from some unforeseen cause enough of the estimated amount of revenue might not be collected to pay all the warrants drawn against it in anticipation. Under such circumstances it has never been ruled that such a creditor's warrant was absolutely void and extinguished by the non-payment in the year in which it was drawn. On the contrary, this court has often said in no uncertain terms that it was valid and payable out of any surplus revenue in the hands of the county treasurer that might arise in subsequent years.  
\*\*\*\*\*"

The case of Andrew County ex rel. v. Schell 135 Mo.31, involved the situation where the county treasurer refused to pay certain county warrants, issued to the holder thereof by the county court in previous years for expenses for those previous years. The amount of these warrants, if added to other outstanding warrants, was in excess of all the revenue provided for the county for the years in which the several warrants in the suit were issued, but the warrants issued by the county for the several fiscal years in which these warrants were issued were not, if taken alone and separate from the unpaid warrants of previous years, in excess of the revenue for the several years when issued. The court said at l. c. 39:

"In view of the agreement that the warrants involved in this controversy were issued against the proper funds for expenses incurred by said county during the various years in which they were

issued, and that, when considered alone, and separate from unpaid warrants of former years were not in excess of the revenues for the several years when issued, and especially in the absence of the evidence as to how the county became in default in the payment of its warrants, whether by drawing more warrants in some preceding year or years, than its revenues or by the loss or failure to collect some part of its revenues, we are not inclined to hold these warrants void, as having been issued in excess of the revenues of the year in which they were respectively issued."

In view of the above then, we think the effect of Section 26(a), Article VI of the 1945 Constitution, can be stated generally as was stated by the court in *State ex rel. Hannibal v. Smith*, 335 Mo. 825, where the court said at l. c. 833:

"In substance, Section 12, Article X of the Missouri Constitution provides specifically against the incurring of an indebtedness in an amount exceeding the income and revenue provided for the year in which said indebtedness was incurred without the consent of two-thirds of the voters voting on the proposition." (Under-scoring ours.)

The above referred to cases were decided in light of the section which is now Section 13978 providing for the presentation of claims against the township. As was pointed out in the Chariton County case, *supra*, this statute is to establish an orderly and safe manner in which public funds are to be expended.

Section 26(a), Article VI is a prohibition as to the amount of indebtedness a township may incur in any one year. When, as you state in your request, township warrants are found in certain banks, and some of these warrants may have been issued several years previously, whether these warrants are to be included in computing the amount of indebtedness so as to come within the debt limit provision of the Constitution would, of course, depend upon the facts of the case and the nature of the warrant. Generally speaking the validity of a township debt upon which an action is brought

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so far as the limitation of indebtedness is concerned must be determined as of the time when the debt was incurred. If at the time of the issuance of the warrants they were valid warrants not exceeding the debt limit provision of the Constitution, then such warrants are valid obligations of the township in subsequent years. It would follow then that these previously issued warrants are not to be included for the purpose of determining the indebtedness of the township for the current year in compliance of Section 26(a), Article VI, where it says no such township:

"\* \* \* \* shall become indebted in an amount exceeding in any year the income and revenue provided for such year plus any unencumbered balances from previous years, \* \* \* \* \*"

The remaining question as to the authority of a township board to borrow money has been in part answered by the foregoing. We feel the law generally, as to the authority of a township to borrow money, is as was stated by the Supreme Court of Pennsylvania in *Georges Township v. Union Trust Co.*, 143 Atl. 10, where they said at l.c. 14:

"Generally speaking, a township, like any other municipality or quasi municipal body, may act only through powers that have been conferred on them by the Legislature, or a necessary implication of power associated with a given function. When a municipality desires to create a debt or borrow money, there must be some antecedent legislative authority either direct or implied from the necessity of performing a duty which must involve the spending of money. \* \* \* \* \*"

We know of nothing that would prevent the Legislature granting to townships the authority to borrow money. The rule as to incurring indebtedness and borrowing money is generally much the same as regards counties, and in certain cases counties by statute have been given this authority, an example of which is the commonly referred to county budget law. As was stated in *Thomas v. Buchanan County*, 51 S.W. (2d) 95, where the court was referring to the constitutional limitation on incurring indebtedness contained in Section 12, Article X, of the 1875 Constitution, at l.c. 99:

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"\* \* \* \* We see nothing in this section forbidding the enactment of state laws authorizing counties to borrow money so long as the indebtedness does not exceed the constitutional limit. Cases which say sections 11 and 12 of article 10 of the Constitution put the counties of the state on a cash basis mean merely that the indebtedness contracted in any year shall not exceed the anticipated revenue for that year. \* \* \* \* \*"

However, from a review of the statutes applicable to townships, we have found no authority granted them to borrow money from a bank and issue a promissory note therefor.

#### CONCLUSION

In view of the above, it is the opinion of this department that Section 13978, R.S. No. 1939, and Section 26(a), Article VI of the 1945 Constitution, are quite reconcilable. That Section 13978 is for the purpose of establishing an orderly manner in which public funds are to be expended with an eye to also providing a safe check to such expenditure. Section 26(a), Article VI, is a constitutional limitation on the amount of indebtedness that a county, city, incorporated town or village, school district or other political corporation or subdivision of the state shall incur. Warrants issued by a township in previous years that are still outstanding, if a valid debt against the township at the time of issuance, generally speaking, are not to be included in computing the amount of indebtedness for such township for the current year within the provisions of Section 26(a), Article VI of the Constitution.

It is further the opinion of this department that the township board has no authority to borrow money and issue warrants therefor.

Respectfully submitted,

APPROVED:

Wm. C. COCKRILL  
Assistant Attorney General

J. E. TAYLOR  
Attorney General

WCC:MA:LR

30  
BANKS: A bank is required by law to pay on demand a depositor's balance due without delay or notice of intention to close an account.

August 13, 1947

FILED

81

Honorable H. S. Shaffner  
Commissioner of Finance  
Jefferson City, Missouri

Dear Mr. Shaffner:

This will acknowledge the receipt of your recent request for an opinion from this Department in which your letter states the following:

"It has been called to my attention that a bank chartered by this Department has placed in its lobby the following notice to the public:

"CLOSING CHECKING ACCOUNTS

Checking accounts may be closed only after forty eight hours notice, and in such manner as the Bank may prescribe.

October 8, 1945."

"Are there any provisions in the State Banking Law which will permit a delay in paying a depositor the balance due on a checking account? Can a bank make special regulations at the time the account is opened or otherwise delay the payment?"

The relationship of a bank and its depositors unless special contractual relations are otherwise entered into between the bank and the depositor of money, is one of debtor and creditor. Corpus Juris Secundum, Volume 9, l.c. 546, under the title of "Banks and Banking states the following text:

"The primary duty of a bank is to its depositors, and it has been said that

the contract between a bank and a depositor is not materially different from any other contract by which one person becomes bound to take charge of and repay another's funds. The relation between a bank and a depositor may be dual in character, the bank being the depositor's debtor with respect to one thing and his agent with respect to another, or his debtor at one time and his agent at another; and while the relation between the bank and a depositor with respect to a general deposit is generally regarded as that of debtor and creditor, yet in another sense the depositor is the owner of the deposit, in that he can demand repayment at any time."

The duty of a bank to pay a depositor's check upon presentation was one of several questions submitted to our Springfield Court of Appeals in the case of Waggoner vs. Bank, 220 Mo. App. 165. The Court, l.c. 168, ruled as follows:

"\* \* \* It is a well-settled general rule that it is the duty of a bank to pay on demand all checks drawn by depositors on their checking account to the amount of their respective deposits. \* \* \*".

Careful reading of the Banking Code of Missouri fails to disclose any statute or part of a statute which would authorize banks to refuse payment of a depositor's money in such bank upon the presentation of a check withdrawing either a part or all of such fund, much less that the bank could enforce such an arbitrary rule of requiring the depositor to give a notice of forty-eight hours or any other period of time as notice of the intended withdrawal of the depositor's funds from the bank. As we read and construe the statutes in the Banking Code, a depositor has the right to demand, upon the presentation of a check therefor, the payment of his deposit closing his account with the bank immediately upon his presentation of such check.

Of course it will not be contended, we are sure, that depositors may not contract with a bank providing



Honorable H. G. Shaffner -3-

for any terms respecting the withdrawal of funds that the bank and the depositor might agree upon. But without the previous consent of the depositor a bank may not make special regulations on the one part, delaying the payment of a depositor's check when the check is presented, withdrawing the whole of the depositor's funds and closing his account with the bank.

#### CONCLUSION.

It is, therefore, the opinion of this Department that unless an agreement to the contrary is made between a depositor of funds in a bank and the bank interested, no bank is authorized to post in its banking house or enforce such a notice as:

#### "CLOSING CHECKING ACCOUNTS

Checking accounts may be closed only after forty-eight hours notice, and in such manner as the Bank may prescribe."

and that a bank is obligated under the law to pay a depositor his balance due on a checking account without delay when a check is presented therefor.

Respectfully submitted,

GEORGE W. CROWLEY  
Assistant Attorney General

APPROVED:

J. E. TAYLOR  
Attorney General

GWC:ir

COMMISSIONER OF FINANCE--  
Liability of surety on bond

: The Commissioner of Finance is an  
: insurer of unclaimed funds named in  
: Sec. 7899, R.S. Mo. 1939. The lia-  
: bility of the surety on his bond is  
: the same as that of the Commissioner  
: himself. No statutory bond should  
: exempt a surety on the bond of a pub-  
: lic official from loss of funds for

September 2, 1947

any cause. The depository of  
funds of a public official  
should not be required to post  
collateral security, since  
the surety on his bond is  
liable for all losses.

Honorable H. G. Shaffner  
Commissioner of Finance  
Jefferson City, Missouri

Dear Mr. Shaffner:

This is in response to your transmission of  
a brief filed with your Department by the American  
Bonding Company of Baltimore, with which you trans-  
mit the following letter:

"The Legal Department of the American  
Bonding Company of Baltimore has brief-  
ed certain thoughts with reference to  
Sections 7897 and 7882, R.S. Missouri,  
1939. These Sections refer to the man-  
ner in which the Commissioner of Finance  
is to handle deposits of insolvent bank-  
ing institutions and the interpretation  
of the bond furnished by the Commissioner.

"May I be favored with your opinion in  
these connections?"

We take it that since you mention independently  
Sections 7897 and 7882, R.S. Mo. 1939, you desire an  
opinion from this Department as to the responsibility of  
the Commissioner of Finance in giving a statutory bond  
under said Section 7882, and the responsibility of his  
surety also. The question of liability under the bond  
of the Commissioner of Finance and his surety being one  
in relation to the deposit of unclaimed deposits of a  
bank, upon liquidation thereof, under said Section 7897,  
if the bank where such funds are deposited should be-  
come insolvent.

Said Section 7882 insofar as it may point out the  
duties of the Commissioner of Finance taking oath of of-  
fice, and executing a statutory official bond is, in part,  
as follows:

7/4

FILED

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"The commissioner of finance, deputy commissioner, other assistants and examiners, and all special agents and other employees shall each, before entering upon the discharge of his duties, take and subscribe the oath of office containing the usual provisions, and, in addition, \* \* \* and said commissioner of finance, deputy, assistants and examiners shall further execute to the state of Missouri good and sufficient bonds, to be approved by the governor and attorney-general, conditioned that they will faithfully and impartially discharge the duties of their offices, and pay over to the persons entitled by law to receive it, all moneys coming into their hands by virtue of their offices; \* \* \*".

Section 7897, pointing out the duties and responsibility of the Commissioner of Finance respecting his liability for unclaimed deposits upon the liquidation of banks, is as follows:

"The commissioner may take and hold as trustee for the owners thereof any sums which remain due to and unclaimed by any creditor, depositor, stockholder or shareholder of any corporation, to which this chapter is applicable, after the completion of the voluntary or involuntary liquidation of the business and affairs of such corporation. Whenever such sums are received by the commissioner and he is not in possession of the business and affairs of such corporation, he shall give his receipt for such moneys and shall forthwith deposit them in one or more solvent state banks, trust companies or savings banks, to the credit of the commissioner in trust for the persons entitled thereto. At the completion of a liquidation by the commissioner or any receiver, he shall in like manner deposit such moneys at the expiration of six months after the order for final distribution. All such deposits by the commissioner shall be entitled to priority of payment in case

of the insolvency or voluntary or involuntary liquidation of the depository of an equality with any other priority given by this chapter."

The brief of counsel for the Bonding Company supplied you, in the third paragraph on page 1, thereof, correctly states the Missouri rule that a public officer is an insurer of any monies coming into his hands according to law, citing, among other cases, Glaze vs. Shumard, 54 S.W. (2d) 726. In that case, l.c. 728, our Kansas City Court of Appeals said:

"Since it is well settled that a public officer is an insurer of public funds which he has lawfully received, unless the Legislature has provided otherwise, it follows that even though the county court of Harrison county did select or appoint the Bethany Savings Bank as the county depository and the officer deposited said funds there, nevertheless, if the county court had no authority, power, or jurisdiction to select a depository for the funds of the drainage district, the depositing of such funds by the county treasurer and ex officio collector, to his account as county treasurer in the Bethany Savings Bank, was at his peril. \* \* \*".

There can be no question, we think, that when the Commissioner of Finance takes into his custody and holds as trustee for the owners thereof, any sums which remain due to and unclaimed by any persons entitled thereto upon the final liquidation of a bank he takes such funds, first or last, under said Section 7882 in his official capacity by virtue of his office, for which said Section 7882 requires that he give adequate surety for the discharge of his duties to pay all such monies to the persons entitled by law to receive such funds.

We take it also that there will be no controversy here that the terms of the statute, with respect to statutory bonds, must be read into and become a part of any surety bond given by any public official required by a

statute in this State. The case of Zellars vs. Surety Company, 210 Mo. 86, l.c. 92, holds to that rule in the following language:

"All statutory bonds are to be construed as though the law requiring and regulating them was written in them. \* \* \*".

In the brief supplied by counsel for the Bonding Company named, the writer thereof very frankly states in the forepart of the last paragraph on page 2, the following:

"We, therefore, have at least two decisions of the Missouri courts upholding the validity of a contractual provision in an official bond but we also have a decision that the provisions of the statute will be read into a statutory bond. We can only conclude that there is some doubt that a depository exclusion, inserted in a statutory bond, the conditions of which are prescribed by law, will be upheld. \* \* \*".

The Naylor case referred to in paragraph 2 on page 2 of said brief, 75 S.W. (2d) 436, decided by our Springfield Court of Appeals, merely holds that where a bond is given, even an official bond, and it is disclosed without denial, that the intention of the parties was to include and effectuate, a clause in a surety bond exempting the surety from liability for any loss of public funds because of the failure of the bank in which such funds are deposited, then such exemption is valid. This case, however, we think, is in direct conflict with the ruling of our Supreme Court in the case of Road District vs. Johnson, et al., 323 Mo. 990. The Supreme Court in construing the liability of a public official, and his surety for the ultimate responsibility of funds coming into the hands of such official, was considering and discussing the case of State ex rel. vs. Wilson, decided by the Springfield Court of Appeals, 151 Mo. App. 723, and the case of University City vs. Schall, 275 Mo. 667, on the measure of liability of a surety on the bond of a public official as compared with the liability of the official himself. Our Supreme Court in the Johnson case, supra, l.c. 997, 998, said:

"The conclusion to be drawn from these cases cannot be otherwise than that the power of the board or council of a city to select a depository of the city's funds, and relieve the treasurer from liability for money lost, through the insolvency of the depository, does not exist, except, when done by grant of authority from the Legislature. The ruling in the University City case was made in recognition of the rule followed in this State, and generally followed, that the liability of the treasurer of a public corporation for its funds coming into his hands, is absolute. \* \* \* \* \*

"\* \* \* \* Under the terms of the bond in suit, the liability of the surety is measured by the liability of the principal. \* \* \* ".

The Johnson case, supra, was a case, the facts related show, where a board of commissioners of a special road district undertook to select the depository for the treasurer of the district. The opinion points out that the board of commissioners had no statutory authority to make a selection of the depository, and that consequently its order in making such selection was void. We do believe that where some statute gives some other authority, or board the right to select a depository for the officer in whose care and custody funds are placed, by law, the right to select a depository, and that if such depository would become insolvent the surety of the officer in charge of the funds, and making such deposit would be perhaps exempted from liability, if the bond contained a provision for such exemption.

There is no provision in our Banking Code giving any authority for anyone to select the place of deposit for such unclaimed funds mentioned in said Section 7897, except the Commissioner of Finance himself. That Section states:

"\* \* \* he shall give his receipt for such moneys and shall forthwith deposit them in one or more solvent state banks, trust companies or savings banks, to the credit of the commissioner in trust for the persons entitled thereto. \* \* \* ".

If, then, the Johnson case, supra, correctly states the rule of law in this State establishing the same measure of liability for the surety as is placed upon the principal, quoted l.c. 398, and we think it does, and if the public official charged with the safe-keeping and proper payment and distribution of the funds in his hands to those entitled to the same is made an insurer of such funds, as is stated in the Glaze vs. Shumard, case, supra, 54 S.W. (2d) 726, l.c. 728, then we believe, under the Johnson case, supra, that if such funds should become lost by the insolvency of the depository, the surety of the officer becomes an insurer also of such funds.

We find no authority in our statutes giving the Commissioner of Finance, or any other public official having the custody of funds, the right to consent to the insertion in his bond a clause exempting his surety from liability for the loss of funds deposited in a depository which becomes insolvent, although, as is above referred to, the Naylor case, 75 S.W. (2d) 436, supra, seems to so hold. But, as we view the Naylor case, it is in conflict with the Johnson case, supra, and we believe that no public official should take the liberty of consenting for such an exemption to be included in a statutory bond covering his official acts. If a public official has that right, the question naturally arises, why have a bond at all? The loss by a depository of the unclaimed funds mentioned in said Section 7937, supra, by the closing of the depository would in all likelihood be the only risk of loss the principal would take at all. So there would be no virtue or value in an officer providing a surety bond if the surety is exempted from liability for about the only risk it would take.

There is no prohibition in our statutes, in text law, or decision, preventing the Commissioner of Finance from asking the depository, as is suggested in the brief supplied your office by counsel for the American Bonding Company, or demanding that, collateral surety be supplied by the depository securing the funds, and we assume the Commissioner of Finance would have the right to make such demand. That sort of demand, would only become responsive to a clause in the bond exempting the surety for loss of such funds by failure of the depository. So if the Johnson case, supra, is to be followed, and the measure of liability of a surety for such funds is the same as that of the principal, it would but confuse matters to demand such collateral surety from the depository.

It is the view of this Department that no such clause as exempting the surety from loss of such funds by

the failure of the depository should be written into a statutory bond.

It is the further belief of this Department that the Commissioner of Finance should not undertake to demand or secure collateral security for the safety of such unclaimed funds from the depository, but should require the bond to be written and executed by the surety assuming full liability for such funds, even upon the closing of the depository, or upon any other eventuality whatever that would make the principal liable for their loss.

#### CONCLUSION.

It is, therefore, the opinion of this Department that:

1) The Commissioner of Finance of this State as trustee thereof, is an insurer for the safety and proper payment to the persons entitled to the unclaimed funds upon the liquidation of banks.

2) That the measure of the liability of the security on the bond of the Commissioner of Finance as required by Section 7882, R.S. Mo. 1939, is the same as that of the Commissioner himself.

3) That no clause exempting the surety from liability for the loss of funds named in said Section 7897, R.S. Mo. 1939, if the depository for such funds should close, should be written into the bond of the Commissioner of Finance.

4) That there would seem to be no need or occasion for the Commissioner of Finance to ask or require collateral security from the depository against loss, in event the depository should close.

Respectfully submitted,

APPROVED:

GEORGE W. CROWLEY  
Assistant Attorney General

J. E. TAYLOR  
Attorney General

GWC:ir

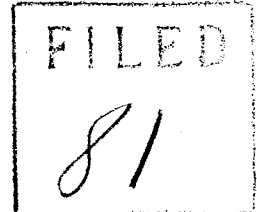


LIQUIDATED BANKS: Proceeds or dividends arising from corporation bonds held by a bank, later liquidated, such bonds being sold as remaining assets of the bank to individuals, are private property. The Commissioner of Finance has no duty to assume respecting such dividends or proceeds.

September 16, 1947

Honorable H. G. Shaffner  
Commissioner of Finance  
of Missouri  
Jefferson City, Missouri

9-17



Dear Mr. Shaffner:

This will acknowledge your letter of recent date, requesting an opinion from this Department on the subject-matter of the letter, which letter is in words and figures as follow:

"Re: Verona Coal Company  
Liquidation Dividend

"This office has been advised there is a liquidation dividend awaiting payment in connection with the bond issue by the above mentioned company.

"Those bonds were in the remaining assets of the Bank of Loose Creek, Loose Creek, Missouri, and by order of the circuit court in session in Osage County on October 18, 1937, were sold to the highest bidder. Efforts to locate the purchaser of those bonds have been unsuccessful.

"Parties making the distribution of those dividends are interested in disposing of those funds; therefore, have asked whether or not the State of Missouri would be entitled to receive this dividend.

"May I be favored with an opinion respecting whether or not these funds will belong to the state under the escheat statutes."

We were first under the impression, after reading your letter, that your Department or the Court in which the Bank of Loose Creek, Loose Creek, Missouri, was liquidated and by which Court a final order of sale of the remaining assets was made, and the sale later, upon report, approved, as you state, had the custody or control over the mentioned dividends arising from the sale of bonds of Verona Coal Company.

The personal conference between yourself and the writer, after your letter was received, reveals that during the existence of the Bank of Loose Creek, Loose Creek, Missouri, said bank became possessed of certain debenture bonds of the Verona Coal Company. Such bonds, it is said, were still in the possession of said bank upon its liquidation, and were sold by order of the Court as part of the remaining assets of the bank, on October 18, 1937. The bonds, as you relate, at the sale, were purchased by an individual. That individual, you further state, paid for such bonds, the purchase price thereof going into the hands of the Deputy Commissioner of Finance in charge of the liquidation of said bank, and into the bank's general assets to be distributed, and which, as you state, were distributed to the depositors on the percentage of recovery of their deposits against the bank upon its final liquidation. It further appears from your statement that the purchaser of such bonds himself disposed of such bonds, or by some method was disposed of such bonds, and they came into the hands of a distinct third person. It is now said, according to the information you give us, that the purchaser of such bonds from the person who became the purchaser at the final sale of the remaining assets of the Bank of Loose Creek is now liquidating, or has immediately liquidated, said bonds, and that he has funds therefrom which he believes the immediate purchaser of said bonds at the sale of the remaining assets of the bank is entitled to, but that the original purchaser of such bonds at the sale of the remaining assets of the bank cannot now be found.

We believe under the circumstances, as related by you in the personal conference, that you have no duty whatsoever to perform in this situation.

If it had been a fact that your office or a Deputy Commissioner of Finance, who is made by the statutes and

upheld by the decisions of this State as a "receiver", now had the custody of such dividends then any such funds as you mention might be directed by the Court having jurisdiction in the bank liquidation proceedings to be paid into the escheat fund under our escheat statutes. But such is not the case.

These funds, the title to them, the custody of them and the whole scheme of their future handling and custody lie in the hands of utter strangers to your Department and the Court having charge of the liquidation of the Bank of Loose Creek, Loose Creek, Missouri. There is just nothing for you to do about it.

The only suggestion we may be able to make, and that a gratuitous one, is that the person in possession of the funds mentioned as arising from the liquidation of said bonds may have the right to ask a Court of competent jurisdiction for a declaratory judgment as to the disposition of such funds.

#### CONCLUSION.

It is, therefore, the opinion of this Department that your Department is not concerned with the disposition of the funds derived from the bonds mentioned in your letter. They are the subject of disposition, and any possible litigation necessary or incident thereto, of private individuals, as private property.

Respectfully submitted,

GEORGE W. CROWLEY  
Assistant Attorney General

APPROVED:

J.E. TAYLOR  
Attorney General

GWC:lr

COUNTY TREASURER

County court must order treasurer to secure surety bond before county is liable for premium.

FILED

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March 8, 1947

4/3

Honorable William E. Shirley  
Prosecuting Attorney  
Adair County  
Kirksville, Missouri

Dear Sir:

We are in receipt of your request for our opinion as to whether a county court in a third or fourth class county is required to pay the premium for a surety bond obtained by a county treasurer when the county court has made no requirement as to the nature of the bond.

House Bill No. 493, now Section 13795, Mo. R.S.A. (page 10, 1946 Pocket Part, Vol. 25), is as follows:

"The person elected or appointed county treasurer under the provisions of this article, shall, within ten days after his election or appointment as such, enter into a surety bond or bonds with a surety company or surety companies, authorized to do business in Missouri, to the county in a sum not less than twenty thousand dollars (\$20,000.00) nor more than the highest amount of money held by the treasurer at any one time during the year prior to his election or appointment, to be fixed and approved by the county court, conditioned for the faithful performance of the duties of his office, and the cost of said bond shall be paid out of the general revenue fund of the county: Provided that the county treasurer in any county of the third class or fourth class may furnish either a personal bond or a surety bond and in case a surety bond is required by the county court in said county, said surety bond shall be paid for by said county."

Since Adair County is a county of the third class, the last clause in the foregoing section is applicable to that county, and it would seem that it is necessary that the county court require a surety bond before being obliged to pay for the premium on such bond.

We believe that this question has been determined by the Supreme Court of Missouri in *Berry v. Linn County*, 195 S. W. (2d) 502. In that case Section 3238, R. S. Mo. 1939, was under discussion, and it provides that any county or municipal officer "may elect, with the consent and approval of the governing body of such \* \* \* county, city \* \* \* to enter into a surety bond, or bonds, with a surety company or surety companies, authorized to do business in the state of Missouri and the cost of every such surety bond shall be paid by the public body protected thereby." That statute is very similar to the one under discussion, except that the consent of the county court is required in one, and the direction of the county court in the other.

In that case Berry was elected Treasurer of Linn County and furnished a surety bond, which was approved by the County Court, and Berry contended that the approval of the bond amounted to a consent of the court to pay the premium. The court found against Berry's contention, in the following language:

"The intent of Section 3238 is clear. It provides when an officer chooses to give a surety company bond, the cost of it shall not be imposed on the county unless the county agrees.

"A county court speaks only through its records. The only record we have here is the formal approval of the bond itself required by other statutes. There is no record showing the necessary authorization for Berry to give a surety company bond. Without such record the county may not be charged for the cost. *Boatright v. Saline County*, 350 Mo. 945, 169 S. W. 2d 371.

\* \* \* \* \*

"In this case Berry has shown no agreement with the county court authorizing him to furnish surety company bonds. Therefore,

Honorable William W. Shirley - 3

the county is not authorized to pay the cost of the bonds and Berry should not recover."

In the present case there is no mention of an order of the county court "requiring" a surety bond by the treasurer elect, and following the decision in the Berry case, supra, it is our conclusion that the county court is not liable for the premium on a surety bond furnished by the county treasurer in a county of the third class, unless such bond is required by the county court, or unless the court agrees in advance to pay such premium.

Section 10400, Mo. R.S.A. (House Bill No. 494), is identical with House Bill No. 493, supra, in so far as it relates to counties of the third and fourth classes, concerning the bond to be given by the county treasurer for school moneys, and the above conclusion applies to House Bill No. 494.

Respectfully submitted,

ROBERT L. HYLER  
Assistant Attorney General

APPROVED:

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J. E. TAYLOR  
Attorney General

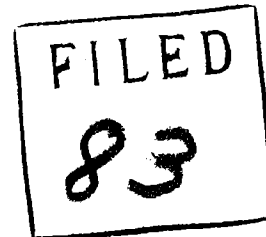
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COUNTY TREASURERS:  
TREASURER'S BONDS:  
SCHOOL FUND:

} County treasurer to give bond under House  
Bill 494 in amount of highest probable amount  
on hands at any one time. The amount of bond  
computed as to school funds from all sources.

January 13, 1947

Honorable Wayne V. Slankard  
Prosecuting Attorney  
Newton County  
Neosho, Missouri



Dear Sir:

We have your letter of January 9, 1947, requesting an opinion from this department, which reads as follows:

"I would like your opinion on the following:

"Under Sec. 10400 (HB 494) the County Treasurer is required to give bond 'in the probable amount of school money that shall come into his hands.'

"Should this amount be the total of all school money regardless of the source, including the capital school fund and all of the various other school funds? In this county all of these funds together would at times total as high as \$250,000.00 although much of this is school money received from the state which is immediately distributed to the various districts by the treasurer."

This request involves the construction of Section 10400 (House Bill 494 of the 63rd General Assembly), which reads in part as follows:

"The county treasurer in each county shall be the custodian of all moneys for school purposes belonging to the different districts, until paid out on warrants duly issued \* \* \* and on his

election, before entering upon the duties of his office, he shall give a surety company bond, with sufficient security, in the probable amount of school moneys that shall come into his hands, \* \* \*

That part which provides that the county treasurer shall give bond in the probable amount of school moneys that shall come into his hands, might be said to indicate an intention on the part of the General Assembly to require bond in the probable total amount of all funds which pass through the county treasurer's hands during the term. We think not. If this construction were given it would result in a bond of an excessive and unreasonable amount. Such a surety bond would not only be impracticable but would result in adding expense to the county common school fund to which the expense of surety bonds is chargeable.

This interpretation would mean that a county treasurer would be required to give bond in the amount which would correspond to the total of all funds passing through his hands during the entire term. This would be unjust and unreasonable in that the county treasurer would probably never have more than a fraction of the total in his custody at any one time during the term. Such interpretation is not viewed favorably by the courts, as was said in *St. Louis County v. Marvin Planing Mill Co.*, 58 S. W. (2d) 769, at page 770:

"\* \* Nor should we give the statute such construction as would make it unreasonable and absurd, for it is to be presumed that such was not the legislative intent.' In the same case the court quoted with approval from *Thompson v. State*, 20 Ala. loc. cit. 62, wherein it was said that in construing a statute the court is often required 'to look less at the letter or words of the statute than at the context, the subject-matter, the consequences and effects, and the reason and spirit of the law, in endeavoring to arrive at the will of the law giver.'"

And also in the case of *Chrisman v. Terminal R. Ass'n of St. Louis*, 157 S. W. (2d) 230, p. 234:



"\* \* \* Statutes should receive a sensible construction, such as will effectuate the legislative intention, and, if possible, so as to avoid an unjust or absurd conclusion. \* \* \*"

On the other hand it is possible to give this statute a more just and reasonable interpretation. The rule set out in the case of State v. Ball, 171 S. W. (2d) 787, at page 793; is as follows:

"Another rule applicable in construing statutes is that they should not be so construed as to lead to absurd results if they are susceptible of reasonable interpretation. State v. Irvine, 335 Mo. 261, 72 S. W. 2d 96, 93 A.L.R. 232."

The county treasurer should be required to give bond in the amount of the highest probable amount of moneys in his custody at any one time during the term, rather than in the amount of the total of all funds that pass through his hands during the term.

This interpretation will result in a surety bond which will serve the purpose of the statute as intended by the General Assembly and, at the same time, will be reasonable and practicable with regard to the county treasurer.

"\* \* \* Laws are passed in a spirit of justice and for the public welfare and should be so interpreted if possible as to further those ends and avoid giving them an unreasonable effect. Gist v. Raekliffe-Gibson Constr. Co., 224 Mo. 369, 384, 123 S. W. 921. \* \* \*"

--Bowers v. Missouri Mut. Ass'n.,  
62 S. W. (2d) 1058, p. 1063.

Further, the probable amount should be computed with regard to funds obtained from any and all sources from which school funds are received in custody by the county treasurer. This is expressly provided in Section 10400, supra, where it is stated that "the county treasurer in each county shall be the

custodian of all moneys for school purposes belonging to the different districts \* \* "

Conclusion

Therefore, it is the opinion of this department that a county treasurer should be required to give a surety bond, under Section 10400 (House Bill 494 of the 63rd General Assembly), in the amount of the highest probable amount of school funds in his custody at any one time during the term, and further, that the amount of said bonds should be computed with regard to all school funds, irrespective of the source, received in custody by the county treasurer.

Respectfully submitted,

DAVID DONNELLY  
Assistant Attorney General

APPROVED:

---

J. E. TAYLOR  
Attorney General

DD:EG

COUNTY SCHOOL FUNDS:  
COUNTY COURT:

Government bonds purchased out of county capital school funds should be taken in the name of the county court as trustee of the particular school fund invested.

January 23, 1947

FILED

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Honorable Wayne V. Slankard  
Prosecuting Attorney  
Newton County  
Neosho, Missouri

Dear Sir:

This is in reply to your letter of recent date, requesting an official opinion of this department, and reading as follows:

"I would like your opinion on the following.

"The County Court of this county desires to purchase government bonds with the funds in the capital school fund. In what name should these bonds be taken?"

Section 10376 of Senate Bill No. 162 of the 63rd General Assembly provides as follows:

"It is hereby made the duty of the several county courts of this state to collect diligently and, when authorized by law, to invest securely the proceeds of all moneys, stocks, bonds and other property belonging to or accruing to the county school fund. On and after the effective date of this act, all real estate loans and investments now belonging to the county school funds, except those invested as hereinafter provided, shall be liquidated without extension of time upon the maturity thereof, and the proceeds thereof and the money then on hand belonging to said school fund of the county shall be reinvested

in registered bonds of the United States, or in bonds of the state, or in approved bonds of any city or school district thereof, or in bonds or other securities the payment of which is fully guaranteed by the United States Government, and shall be preserved as a county school fund; PROVIDED, that all interest accruing from such reinvestment of the county school fund, the clear proceeds of all penalties, forfeitures and fines collected for any breach of the penal laws of the state, the net proceeds from the sale of estrays, and all other money lawfully coming into said fund, shall hereafter be collected and distributed annually to the schools of the county as hereinafter provided in this article."

Section 10381, R. S. No. 1939, provides as follows:

"The county courts, respectively, shall have the care and management of the school funds of the several townships within their respective jurisdictions, and shall cause accounts thereof to be stated and kept so as to exhibit the funds of each township separately, and the disposition thereof."

Section 10383 of Senate Bill No. 162 provides as follows:

"On and after the effective date of this act, all real estate loans and investments now belonging to the capital of the school fund of any township, except those invested as hereinafter provided, shall be liquidated without extension of time upon the maturity thereof, and the proceeds thereof and the money then on hand belonging to said capital of township funds, shall be reinvested in registered bonds of the United States, or in bonds of the State, or in approved bonds of any city or school district thereof, or in bonds or other securities the payment of which is fully guaranteed by the United States government; Provided, that all interest accruing from such reinvestment of the capital of township school funds and all other moneys lawfully coming into said funds, shall hereafter be collected and distributed annually

Honorable Wayne V. Slankard - 3

for the use of schools in any townships or parts of townships in the county as herein-after provided in this article."

In defining the relationship of the county court to the county school fund, the Supreme Court of Missouri said in *Butler County v. Campbell*, 182 S. W. (2d) 589, 1. c. 592:

" \* \* \* The county courts act for the counties in relation to funds held in trust for public school purposes. Secs. 10376, 10378, and 10384, R. S. 1939, Mo. R.S.A.; *Montgomery County v. Auchley*, 103 Mo. 492, 502, 15 S. W. 626. \* \* \*"

Since the county court is designated to act for the county in the investment of the school funds, the bonds purchased should be taken in the name of the County Court of Newton County as trustees for the particular school fund invested.

#### CONCLUSION

It is the opinion of this department that when government bonds are purchased out of capital school funds, the bonds should be taken in the name of the county court as trustee of the particular school fund invested.

Respectfully submitted,

C. B. BURNS, Jr.  
Assistant Attorney General

APPROVED:

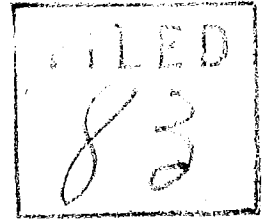
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J. E. TAYLOR  
Attorney General

CBB:HR

FEES: Board of prisoners in counties of the first class and the City of St. Louis.

February 13, 1947



2/25

Honorable Forrest Smith  
State Auditor  
Jefferson City, Missouri

Attention: Mr. E. E. Hagland,  
Chief Clerk

Dear Sir:

We have your letter of December 16, 1946, requesting an opinion from this department, which reads as follows:

"This Department desires an Opinion from your Office with reference to the matter of Board of Prisoners in Counties of the 1st Class and the City of St. Louis.

"There are two Counties in this Class, namely, Jackson and St. Louis. Section 13472 Article 4 R.S. Mo., 1939, which we believe covers Jackson County, fixes the amount for Board of Prisoners and such amount shall not exceed 30¢ per day for each prisoner. Has this Section of the Law been repealed? If so what is the maximum that can be charged against the State from this County for boarding prisoners where the costs are chargeable against the State? It is our understanding that another Section of the Statutes covers matter of board of prisoners in St. Louis County. Has such a Section of Statutes been repealed? If so, what is the legal amount chargeable against the State?

"What is the maximum allowable cost of board of prisoners from the City of St. Louis which is chargeable against the State?

"Have Sections 13416, 13417, and 13418 been repealed? If so, what new law or Sections have been enacted in lieu thereof."

Sections 13416, 13417 and 13418, R. S. No. 1939, have not been repealed. Section 13416 is as follows:

"Hereafter sheriffs, marshals and other officers shall be allowed for furnishing each prisoner with board, for each day, such sum, not exceeding seventy-five cents, as may be fixed by the county court of each county and by the municipal assembly of any city not in a county in this state: Provided, that no sheriff shall contract for the furnishing of such board for a price less than that fixed by the county court."

This section is a general provision which authorizes a maximum cost of seventy-five cents per day for board of prisoners in each county and in the City of St. Louis.

Your attention is directed to House Bills 939, 899 and 872 of the 63rd General Assembly, which set up new provisions for board of prisoners in counties of the second, third and fourth classes respectively. Assuming the constitutionality of these statutes, they serve to modify Section 13416 under the principle that a later act will repeal a former act when the subject-matter of the two are the same. However, the former act is repealed only as to the repugnant part. The rule is set out in *State v. Smith*, 139 S. W. (2d) 929, at page 934:

"\* \* \* where there are two acts on one subject, the rule is to give effect to both if possible, but if the two are repugnant in any of their provisions, the later act, without any repealing clause, operates to the extent of the repugnancy as to repeal the first. *Moriwether v. Love*, 137 Mo. 514, 67 S. W. 250; \* \* \*"

Thus, Jackson County and St. Louis County, counties of the first class, and St. Louis City remain under Section 13416.

Now we must note Section 13472, R. S. No. 1939, which allows a maximum of thirty cents per day for board of each prisoner in counties having a population of 150,000 and not more than 500,000, and reads as follows:

"Immediately after the taking effect of this article, and at the end of each year thereafter, and oftener if thought proper, the county court shall fix the amount per day that may be expended by the marshal for furnishing board to the prisoners confined in the county jails, and the amount so fixed per day shall be the amount of costs taxed for that purpose against prisoners who shall be convicted, and be paid by the state for boarding those chargeable by law to the state: Provided, that such amount shall not exceed the sum of thirty cents per day. The food provided for prisoners shall be wholesome and properly prepared, and the marshal shall exercise business economy on behalf of the county, paying no more than the most reasonable rates for articles of food and the hire of employees, and he shall, in the exercise of his trust, be under the superintending control of the county court at all times. It shall be the duty of the marshal at the end of each month to report in writing, duly verified by affidavit, to the county court, the names of all prisoners in the county jails of the county to whom he has furnished board, the number of days each has been so furnished by him, and all expenses incurred for that month in providing and causing to be furnished food to such prisoners, showing name, amount and exact cost of each article of food, voucher therefor, with the name of person from whom purchased, also the name of each employee, the purpose for which he was employed, and the exact amount to be paid him for his services, without any bonus or rebate or profit from either to the marshal or any intermediary whomsoever, instigated or created by the marshal; and any such marshal, deputy or employee of any such marshal who shall violate any provision of this section shall, upon conviction thereof, be punished by imprisonment in the penitentiary not exceeding three



years, or by imprisonment in the county jail not less than six months or more than one year, or by fine not less than one hundred dollars nor exceeding one thousand dollars, or by both such fine and imprisonment. The county court shall allow and cause to be issued a warrant upon the county treasury, to the marshal, for the exact expense so incurred in boarding such prisoners, not exceeding in aggregate the amount aforesaid per day fixed by it."

And also Section 13529, R. S. Mo. 1939, which states that Section 13416 shall not apply to counties of a population of 200,000 and not more than 400,000, and reads as follows:

"The provisions of Section 13416 Revised Statutes of Missouri 1939 shall not apply to said counties but the county courts of such counties shall make the order in the manner and form provided by Section 13417 Revised Statutes of Missouri, 1939, which said order shall also provide for furnishing each prisoner with board for each day at a sum not to exceed 75¢ per day, to be paid by the county or the county may designate any person or persons to supply said board: Provided, that no such person or persons shall contract for the furnishing of such board for a price less than that fixed by the county court."

Under the rule that a special statute will modify a general one on the same subject, it would seem at first glance that the above two later special statutes modify and repeal Section 13416, a general statute, to the extent that Jackson County, falling within the population classification of Section 13472, and St. Louis County, falling within the population classification of Section 13529, were taken from under the provisions of the general statute. However, we believe that this construction cannot be given.

Section 8 of Article VI of the 1945 Constitution of Missouri, is in part as follows:

" \* A law applicable to any county shall apply to all counties in the class to which such county belongs."

Under this provision a law relating to one county in a certain class must apply to all counties in that class. And according to Section 2 of the Schedule of the Constitution of 1945 all laws inconsistent with the Constitution (Section 8, Article VI) are repealed as of the effective date of the Constitution. This section is in part as follows:

"\* \* \* All laws inconsistent with this Constitution, unless sooner repealed or amended to conform with this Constitution, shall remain in full force and effect until July 1, 1946."

If Sections 13472 and 13529 are considered special statutes modifying Section 13416 which is the general statute applicable to all counties of the first class, there will result the situation which the Constitution made express provisions to avoid, that is, a different law will apply to each county in the first class.

Therefore, Sections 13472 and 13529, being inconsistent with the above provision of the 1945 Constitution, were repealed as of the effective date of the Constitution. Since Section 13416, applying to all counties of the first class, is consistent with the above constitutional provisions, it will be held controlling as to Jackson and St. Louis Counties, which will be allowed under that section, seventy-five cents per day for board of each prisoner.

Section 31 of Article VI of the 1945 Constitution, recognizes St. Louis City as both a city and a county. This provision is as follows:

"The city of St. Louis, as now existing, is recognized both as a city and as a county unless otherwise changed in accordance with the provisions of this Constitution. As a city it shall continue for city purposes with its present charter, subject to changes and amendments provided by the Constitution or by law, and with the powers, organization, rights and privileges permitted by this Constitution or by law."

Viewing this provision alone, it might be argued that St. Louis City should be classified along with a certain class of counties according to its population, with respect to allowances for board of prisoners. However, Section 655, R. S. Mo. 1939, relating to rules for construction of statutes must be considered. Section 655, paragraph nineteen, reads as follows:

"whenever the word 'county' is used in any law, general in its character to the whole state, the same shall be construed to include the city of St. Louis, unless such construction be inconsistent with the evident intent of such law, or of some law specially applicable to such city;"

This provision states that a general law concerning counties shall be construed to include St. Louis City unless there is a similar law specially applicable to that city. Section 13416, allowing a maximum of seventy-five cents per day for board of prisoners, specifically includes St. Louis City by saying that the county court of each county and the municipal assembly of any city not in the county shall set the amount. In either case Section 13416 is applicable to the City of St. Louis, as it is both a general statute and one which is expressly applicable to that city. Therefore, the City of St. Louis is allowed the maximum of seventy-five cents per day for board of each prisoner.

The amount fixed by Section 13416 is certified by the county clerk to the circuit clerk as provided in Section 13417. The reason for this certification is to enable the circuit clerk, prosecuting attorney and circuit judge to properly audit and approve the amount of the charges for board of prisoners which are chargeable as costs in criminal cases against the county or state, as the case may be.

#### Conclusion

Therefore, it is the opinion of this department that St. Louis County and Jackson County, counties of the first class, and the City of St. Louis are allowed a sum not to exceed seventy-five cents per day as fixed by the county court or the municipal

Hon. Forrest Smith

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assembly for board of each prisoner. These are the maximum allowable costs which are chargeable to the state.

Respectfully submitted,

DAVID DONNELLY  
Assistant Attorney General

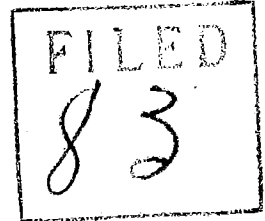
APPROVED:

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J. E. TAYLOR  
Attorney General

DD:EG

SPECIAL ROAD DISTRICTS: Special road districts should severally vote road bonds to provide funds for participation in "milk route" road bill appropriation.



February 26, 1947

Honorable Wayne V. Slankard  
Prosecuting Attorney  
Newton County  
Neosho, Missouri

3/8

Dear Sir:

Reference is made to your inquiry, requesting an official opinion of this office, and reading as follows:

"I would like your opinion on the following:

"In counties having special road districts may the county court call an election for voting bonds for funds to be used to match those set up under C. S. H. B. No. 214, Secs. 8619.1-8619.7, Mo. R. S. A., or must each individual road district vote these bonds and participate in the state fund individually?"

You have not specified the type or types of special road districts which exist in Newton County. We note that your county is not one under township organization; therefore, it is possible that you have within your county special road districts organized under the provisions of both Article 10 and Article 11 of Chapter 46, R. S. Mo. 1939. It, therefore, becomes pertinent, at the outset, to determine whether such special road districts have authority, under existent statutes, to issue road bonds for the purpose of providing funds to be used to match the appropriation to be made to effectuate the purposes of Committee Substitute for House Bill No. 214, commonly known as the "milk route" road bill, passed by the 63rd General Assembly.

Section 8609, R. S. Mo. 1939, as reenacted in House Bill No. 906 of the 63rd General Assembly, reads as follows:

"The board of commissioners of any special road district organized and incorporated under the provisions of Article 10, Chapter 46, for and on behalf of such district, and the county courts of the several counties under township organization on behalf of any township in their respective counties, are hereby authorized to issue road bonds to an amount, including existing indebtedness, not exceeding five per centum of the value of the taxable tangible property of such special road district or township, as the case may be, as shown by the last completed assessment for state and county purposes. Such bonds shall be issued in denominations of one hundred dollars, or some multiple thereof, to bear interest at not exceeding six per centum per annum, payable semi-annually, and to become due and payable at such times as the board of commissioners or county courts shall determine by order of record, not exceeding twenty years from date of issue."

Succeeding statutes provide the machinery for conducting an election to test the sense of the inhabitants of such special road districts upon the question of whether or not such bonds shall be issued.

With respect to special road districts incorporated under the provisions of Article 11 of Chapter 46, R. S. Mo. 1939, similar authority is granted to the commissioners of such special road districts under the provisions of Section 8717, R. S. Mo. 1939. This section is not set out verbatim herein as it is quite lengthy. It will suffice to say that the authority contained therein is quite similar to that granted under Section 8609, quoted supra, and that further provisions of the same section also provide the machinery for conducting the election to test the sense of the inhabitants of such special road districts upon the question of issuing the bonds.

From the foregoing, it is readily apparent that authority does exist in special road districts of both types to issue bonds to provide funds for the necessary road and bridge purposes.

The complete control of all public highways located within special road districts incorporated under either Article 10 or Article 11 of Chapter 46, R. S. Mo. 1939, has been granted to the commissioners thereof under pertinent statutory enactments.

Section 8682, R. S. Mo. 1939, relating to special road districts incorporated under the provisions of Article 10 of Chapter 46, R. S. Mo. 1939, reads, in part, as follows:

"Said board shall have sole, exclusive and entire control and jurisdiction over all public highways within its district outside the corporate limits of any city or village therein to construct, improve and repair such highways, \* \* \*."

Similar authority is found in Section 8714, R. S. Mo. 1939, relating to special road districts incorporated under Article 11 of Chapter 46, R. S. Mo. 1939, which reads, in part, as follows:

" \* \* \* Said commissioners shall have sole, exclusive and entire control and jurisdiction over all public highways, bridges and culverts within the district, to construct, improve and repair such highways, bridges and culverts, \* \* \*."

Viewing these statutory enactments in their relationship to each other, it is quite clear that special road districts of the types referred to herein have complete control over the public highways located within their boundaries, and that, in addition to the ordinary tax levies which they are permitted to make, provision has been made for the issuance of road bonds, upon a vote of the inhabitants of such special road districts, to carry out their corporate functions. A complete scheme has thereby been provided for the construction, maintenance and repair of all public highways within the boundaries of such special road districts.

We now come to a consideration of Committee Substitute for House Bill No. 214 of the 63rd General Assembly, found as Sections 8619.1 to 8619.7, Mo. R. S. A. A brief resume of the essential provisions of this Act is deemed helpful to a complete understanding of the question which you have presented.

Section 8619.1 creates the County Aid Road Fund to receive appropriations made by the General Assembly for the purpose of aiding and assisting the improvement, construction, reconstruction and restoration of county roads.

Section 8619.2 authorizes the Missouri State Highway Commission to assist and cooperate with the various county courts in

the improvement, construction, reconstruction and restoration of county roads.

Section 8619.3 prescribes the types and kinds of county roads for which the fund may be used by the county court. It contains the following, which we deem pertinent to the question at hand:

" \* \* \* The county courts in counties having special road districts or counties under township organization, when authorized by any such special road district or county township organization, may represent and cooperate with, enter into contracts with, or for, and receive funds, plans and proposals from or for such special road districts and townships, for the purpose of carrying out the provisions of this act. \* \* \*" (Emphasis ours.)

Section 8619.4 provides for the formulation of a program by the county court, with the advice and assistance of the county highway engineer, or the county surveyor, as the case may be, for the use of such money as may be set aside to such county.

Section 8619.5 provides the method for advertising for bids and the awarding of contracts for county road work to be done. It also includes the following, which we deem pertinent:

" \* \* \* In the event that no bids are received, or in the event that such bids are in excess of the estimate of cost thereof as prepared by the county highway engineer, the county court, the special road district, or the township board in those counties having township organization, may perform the work provided for in the specifications, provided, however, that the amount to be paid from the County Aid Road Fund shall in no event exceed fifty per cent of the estimate of cost prepared by the county highway engineer, or the sum of \$750.00 per mile, whichever sum is less." (Emphasis ours.)

Section 8619.6 provides for the payment for work done on the county roads.

Section 8619.7 provides for the matching of the funds in the County Aid Road Fund by the Federal Government, and the formulation of rules and regulations necessary to comply with any Federal aid law and requisite for participation in such Federal aid program.



From the verbatim quotations set out supra, taken from Sections 3 and 5 of the Act, it seems that the continued jurisdiction and control by the boards of commissioners of special road districts over the public highways found within their territorial boundaries has been recognized. Such being true, the commissioners must necessarily continue to perform their statutory duties with respect to such roads as they have in the past. Should they see fit to engage in a program of improvement under the provisions of the "milk route" bill, they may appoint the county courts of their respective counties as their agents for the purpose of carrying out the provisions of the Act.

We think that these provisions, coupled with the continued authority to issue bonds, as has been discussed hereinbefore, clearly reflect the intention of the Legislature that the various special road districts are to be recognized as separate units.

Therefore, in the premises, each of such special road districts should act for itself in providing the funds necessary to match those available through state aid for the various road purposes enumerated in the Act.

#### CONCLUSION

In the premises, it is our opinion that each special road district should provide its own funds, either from current revenues, the issuance of bonds or other sources, to be used for matching the money available through appropriations made by the General Assembly as a county aid road program.

Respectfully submitted,

WILL F. BERRY, Jr.  
Assistant Attorney General

APPROVED:

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J. E. TAYLOR  
Attorney General

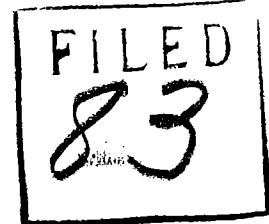
WFB:HR

STATE PURCHASING AGENT: Supplies used by Missouri State Highway Patrol should be purchased through the State Purchasing Agent.

March 7, 1947

FILED 83

Mr. William L. Smith  
State Purchasing Agent  
Jefferson City, Missouri



Dear Sir:

Reference is made to your letter of recent date, requesting an official opinion of this office, and reading as follows:

"I would appreciate having an opinion as to whether or not the State Highway Patrol has the power or authority to let their own contracts for painting their quarters, and are also authorized by law to make their own purchase of automobiles, office supplies and equipment."

For convenience, we will treat your opinion request in separate parts, for reasons which will appear in the course of the opinion. We will first consider the question as to the purchase of automobiles, office supplies and similar equipment.

The 62nd General Assembly adopted a statute designated as Section 8365a, Mo. R. S. A., which related to the purchases of equipment and supplies by the Missouri State Highway Patrol. This enactment is found in Laws of 1943, page 652, and reads as follows:

"All salaries and expenses of members of the patrol and all expenditures for vehicles, equipment, arms, ammunition, supplies and salaries of subordinates and clerical force and all other expenditures for the operation and maintenance of the patrol in the enforcement of any State Motor Vehicle Law or in the regulation of traffic on highways maintained and constructed by the State Highway Commission under the duties described in Section 8358 of this Act shall be paid monthly and shall be

paid by the state treasurer out of the proceeds of state motor vehicle fees and license taxes and state taxes on the sale or use of motor vehicle fuels as provided in section 44-a of Article IV of the Constitution of this State as amended by a vote of the people at the general election November 6, 1928, upon warrants drawn by the state auditor based upon bills of particular and vouchers certified by the officer or employee designated by the commission."

At the time the above quoted statute was enacted, there existed the State Purchasing Agent Act of 1933, found as Chapter 105, R. S. Mo. 1939. This chapter, in general terms, provided for the purchases of supplies and equipment for the various state departments by a state purchasing agent. However, the adoption of Section 8365a, MO. R. S. A., had, in our opinion, the effect of authorizing the Missouri State Highway Patrol to make its own purchases of supplies and equipment. We reach this view by reason of the fact that the statute relating to the Missouri State Highway Patrol was special in nature and was enacted later than the general statutes relating to state purchases, found as Chapter 105, R. S. Mo. 1939.

Such being the case, we think the following rule declared by the Supreme Court of Missouri in *State v. Mangiaracina*, 125 S. W. (2d) 158, quoting approvingly from *State v. Harris*, 87 S. W. (2d) 1026, to be applicable:

"Where there is one statute dealing with a subject in general and comprehensive terms and another dealing with a part of the same subject in a more minute and definite way, the two should be read together and harmonized, if possible, with a view to giving effect to a consistent legislative policy; but to the extent of any necessary repugnancy between them the special will prevail over the general statute. Where the special statute is later, it will be regarded as an exception to, or qualification of, the prior general one. \* \* \*"

However, this matter has again been the subject of legislative action taken by the 63rd General Assembly of Missouri. That body enacted Senate Committee Substitute for Senate Bill No. 297, creating the Department of Revenue, and providing, among other things, for the creation of a Division of Procurement, headed by a state purchasing agent.

Mr. William L. Smith - 3

Your attention is directed to Section 64 of the legislative enactment mentioned, which reads as follows:

"The purchasing agent shall purchase all supplies for all departments of the state, except as in this act otherwise provided. The purchasing agent shall negotiate all leases and purchase all lands, except for such departments as derive their power to acquire lands from the constitution of the state."

Also, to the further provisions of Section 73, as follows:

"The term 'supplies' used in this act shall be deemed to mean supplies, materials, equipment, contractual services and any and all articles or things, except as in this act otherwise provided. Contractual services shall include all telephone, telegraph, postal, electric light and power service, and water, towel and soap service. The term 'department' as used in this act shall be deemed to mean department, office, board, commission, bureau, institution, or any other agency of the state, except the legislative and judicial departments." (Emphasis ours.)

This Act, by its clear and unambiguous terms, would clearly have the effect of requiring that all supplies and equipment needed by the Missouri State Highway Patrol be procured through the Division of Procurement. However, Section 8365a Mo. R.S.A., has not been expressly repealed, and we, therefore, are confronted squarely by this question: Does the subsequent enactment of a general statute dealing in a comprehensive way with a particular subject matter have the effect of repealing, by implication, a prior special statute relating to the same subject matter?

It is true that repeal, by implication, of a special law by the subsequent enactment of a general law is not favored. See *Collins v. Twellman*, 126 S. W. (2d) 231. It is equally true, however, that a later general statute dealing with an entire subject matter in a comprehensive manner will have that effect. This rule of construction exists as an exception to the general rule, mentioned supra, and has been recognized repeatedly by the Supreme Court of Missouri. We direct your attention to *Manker v. Faulhaber*, 94 Mo. 430, 1.c. 440:

"In order that the latter shall operate a repeal of the former, the two acts must be ir-

reconcilably inconsistent, or it must clearly appear that the legislature intended by the latter act to prescribe the only rule that should govern in the case provided for.\* \* \*  
(Emphasis ours.)

Again, in State v. Smith, 125 S. W. (2d) 883, 1. c. 885:

" \* \* \* where the general act is later, the special will be construed as remaining an exception to its terms, unless it is repealed in express words or by necessary implication.  
\* \* \*"

In determining whether or not the enactment of the later general statute has the effect of repealing the prior special statute, recourse must be had to the intent of the Legislature. We quote from State v. Koeln, 61 S. W. 750, 1. c. 755:

" \* \* \* The whole purpose of the many and harmonious rules of statutory construction is said to be to aid in arriving at the intention of the Legislature, as ascertained from the enactment itself, by calling in aid such of the rules as appear to have special application to the particular statute under consideration. In furtherance of such purpose we adopt and apply in this case a rule, or combination of rules, expressed in the following quotation: 'While the rule is that a general affirmative act, or the general provisions of an act, without express words of repeal, ordinarily will not repeal or affect a previous special or local act on the same subject, yet it is not a rule of positive law, but one of construction only; a special act may be impliedly repealed by a general one and the question whether it has been so repealed is always one of legislative intention.' Schott v. Continental Auto Ins. Underwriters, 326 Mo. 92, 31 S. W. (2d) 7; 59 C. J., sec. 536. 'The special act is not repealed unless a different intent is plainly manifested, or where the two acts are irreconcilably inconsistent or repugnant, or where the general act covers the whole subject matter of the special one \* \* \* or is clearly intended to establish a uniform rule or system for the whole state.' 59 C. J. sec. 536; and cases cited in footnotes 85 and 89." (Emphasis ours.)

Mr. William L. Smith - 5

We think that certain guideposts to the intent of the Legislature appear from the provisions of S.C.S.S.B. 297 of the 63rd General Assembly, which clearly indicate the present situation is one falling within the exception to the rule against the repeal, by implication, of prior special statutes by the enactment of later general statutes. For example, the later general statute purports to deal in a comprehensive manner with the purchases of supplies and equipment made by all state departments, with certain specific exceptions. We think the failure to include the Missouri State Highway Patrol as one of such exceptions is, in itself, a tacit imposition upon that department of the requirements made of other departments of the state government that their purchases be made through the State Purchasing Agent.

To the same effect is the portion of Section 64 of the Act expressly requiring all such purchases be made by the State Purchasing Agent, except as otherwise provided in the Act itself. We quote from this section:

"The purchasing agent shall purchase all supplies for all departments of the state, except as in this act otherwise provided. \* \* \*"

This, to us, again clearly indicates that in dealing with the general subject matter the Legislature meant to provide for all exceptions within S.C.S.S.B. 297 itself. Further, at no place in S.C.S.S.B. 297 has the Missouri State Highway Patrol been exempted, in express terms, from its provisions.

From the foregoing, we are persuaded to the view that it was the intention of the 63rd General Assembly, in the adoption of S.C.S.S.B. 297, to provide a complete scheme for the purchases of supplies and equipment for the various departments of state, including the Missouri State Highway Patrol; and that the adoption of such statute had the effect of repealing, by implication, the provisions of Section 8365a, Mo. R.S.A., to the extent that such statute authorized the Missouri State Highway Patrol to purchase its own supplies and equipment

Your further question relating to the power of the Missouri State Highway Patrol to negotiate contracts for the painting of its offices requires consideration of statutes relevant to the repair and rehabilitation of the public buildings of the State of Missouri.

Under the provisions of Section 8365, Mo. R.S.A., found in Laws of 1943, page 652, the Board of Permanent Seat of Government was required to furnish to the Missouri State Highway Patrol

Mr. William L. Smith - 6

offices for its general headquarters. This statute reads, in part, as follows:

"The Board of the Permanent Seat of Government shall provide suitable offices for General Headquarters at Jefferson City, Missouri,  
\* \* \*"

Although you have not so stated in your opinion request, we are cognizant of the fact that such general offices are located in the Missouri State Office Building, in Jefferson City, Missouri, at the seat of government.

At the time Section 8365, Mo. R.S.A., was enacted, such public buildings were under the control of the Board of Permanent Seat of Government, and repairs and rehabilitation thereof one of the duties of the Commissioner of the Permanent Seat of Government. The adoption of S.C.S.S.B. 297 of the 63rd General Assembly transferred such duties to the Division of Public Buildings, headed by the Board of Public Buildings, with a Director of Public Buildings also provided for. To the Board of Public Buildings was transferred the authority previously exercised by the Board of Permanent Seat of Government, as appears from the following portion of Section 114 of the Act:

"The Board of Permanent Seat of Government is hereby abolished and there are hereby transferred to and vested in the Board of Public Buildings all powers, duties, rights, liabilities and privileges heretofore vested in the Board of the Permanent Seat of Government insofar as the same are consistent with this act.  
\* \* \*"

Also, the duties previously exercised by the Commissioner of the Permanent Seat of Government were transferred to the newly created office of Director of Public Buildings, as appears from Section 115 of the Act.

Further duties have also been enumerated by the Act and placed upon the Director of Public Buildings, among which are those contained in paragraph (d) of Section 118, reading as follows:

"The Director shall serve as an advisor and consultant to all department heads in obtaining architectural plans, letting contracts, supervising construction, purchase of real estate, inspection and maintenance of buildings. No contracts shall be let for repair,

rehabilitation, or construction of buildings, without approval of the Director, and no claim for repair, construction or rehabilitation projects under contract shall be accepted for payment by the state without approval by the Director; \* \* \* (Emphasis ours.)

The painting of the interior of a public building is an act amounting to the maintenance of the building. It, therefore, falls within the scope of duties imposed upon the Director of Public Buildings. It is his duty to advise the head of any department with respect to the letting of contracts for such maintenance work, in accordance with the provisions of the statute, quoted supra. Upon determination that contractual services are necessary for such maintenance and rehabilitation, the negotiation of the actual contract therefor should be made through the State Purchasing Agent, in accordance with the provisions of the statutes quoted at length in connection with the consideration of the first question discussed in this opinion.

Having provided such a scheme for the maintenance and rehabilitation of the public buildings of the state, including the one in which the general offices of the Missouri State Highway Patrol are located, we believe it the intent of the Legislature that all contracts relating to such subjects should be negotiated by the State Purchasing Agent, after approval of such proposed contractual services has been made by the Director of Public Buildings. The exceptions found in the Act do not refer in any manner to the Missouri State Highway Patrol.

#### CONCLUSION

In the premises, we are of the opinion that the enactment of S.C.S.S.B. 297 of the 63rd General Assembly served to repeal, by implication, the provisions of Section 8365a, found in Laws of 1943, page 652, in so far as said section purported to authorize the Missouri State Highway Patrol to purchase supplies and equipment direct.

It is further our opinion that all purchases of supplies and equipment for the use of the Missouri State Highway Patrol should be made through the State Purchasing Agent, under the provisions of the general statutes relating to the purchase of all supplies and equipment for the use of state departments.

It is our further opinion that the Missouri State Highway Patrol does not have authority to contract for the painting of its quarters, but that such contracts must be negotiated by the



Mr. William L. Smith - 8

State Purchasing Agent, after approval thereof by the Director of Public Buildings, in accordance with the general provisions of the statutes relating to the repair and maintenance of the public buildings of the State of Missouri.

Respectfully submitted,

WILL F. BERRY, Jr.  
Assistant Attorney General

APPROVED:

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J. E. Taylor  
Attorney General

WFB:HR

APPROPRIATIONS:

LIBRARY ADVISORY BOARD:

Appropriation to Library Advisory Board under head "Personal Service" for "salaries, wages and per diem of employees" does not include pay for travel and subsistence of such employees.

April 15, 1947

4/18  
FILED

83

Honorable Forrest Smith  
State Auditor  
Jefferson City, Missouri

Dear Sir:

This is in reply to your letter of recent date wherein you request an opinion from this department on the following statement:

"In House Bill No. 1036, Section 9, there is an appropriation under A. Personal Service and B. State Aid for the State Librarian of the State Library Advisory Board.

"We would like an opinion from your office as to whether travel and subsistence can legally be paid out of the appropriation in Section 9, subdivision A. Personal Service and B. State Aid."

Section 9 of House Bill No. 1036 of the 63rd General Assembly provides as follows:

"There is hereby appropriated out of the State Treasury, chargeable to the General Revenue Fund, the sum of Two Hundred Twelve Thousand Dollars (\$212,000.00), to the use of the State Librarian of the State Library Advisory Board for the purposes and in the amounts as are in this section specifically designated and set forth respectively; for the period beginning July 1, 1946 and ending June 30, 1947, as follows:

"A. PERSONAL SERVICE:

The salaries, wages and per diem of employees necessary to the administration

and apportionment of monies appropriated  
by the General Assembly for state aid to  
public libraries. . . . . \$12,000.00

"B. STATE AID:

For state aid to public libraries of  
Missouri pursuant to the provisions of  
state law . . . . . \$200,000.00

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"TOTAL OUT OF GENERAL REVENUE \$212,000.00"

On the question of whether or not pay for travel and subsistence may be paid out of subdivision "B" of said section, we do not think there is any doubt but that such pay may not be paid out of this subdivision "B" entitled "State Aid." Subdivision "A" of the section provides for the payment of the salaries, wages and per diem of employees necessary to the administration and apportionment of monies appropriated by the General Assembly for said aid to public libraries. This language is plain and definitely provides that the pay for the administration and apportionment of monies apportioned for the state aid under subdivision "B" of the section shall be paid out of the funds appropriated in subdivision "A". A rule of statutory construction is applied by the Missouri Supreme Court in the case of State ex rel. Publishing Co. v. Hackmann, 314 Mo. 33, l.c. 50. The rule is:

"When the language of a statute. . . . conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation; the statute must be given its plain and obvious meaning. . . . The current of authority is in favor of reading statutes without resorting to subtle and forced constructions for the purpose of either limiting or extending their operation. . Seeking hidden meanings at variance with the language used is a perilous undertaking which is as apt to lead to an amendment of a law by judicial construction as it is to arrive at the actual thought in the legislative mind." (25 R.C.L. 962-3, par. 217.)"

Then we come to the question of whether or not "travel and subsistence" may be paid out of the appropriation for "salaries, wages and per diem of employees," described in subdivision "A", entitled "Personal Service" of the foregoing section. Two conditions must exist before public funds may be paid out of the State Treasury, namely: (a) a law authorizing the payment of such funds; (b) the funds must be appropriated. Sections 23 and 28 of Article IV of the Constitution of 1945 are the authorities for the foregoing principle and they read as follows:

"Sec. 23. The fiscal year of the state and all its agencies shall be the twelve months beginning on the first day of July in each year. The general assembly shall make appropriations for one or two fiscal years, and the 63rd General Assembly shall also make appropriations for the six months ending June 30, 1945. Every appropriation law shall distinctly specify the amount and purpose of the appropriation without reference to any other law to fix the amount or purpose."

"Sec. 28. No money shall be withdrawn from the state treasury except by warrant drawn in accordance with an appropriation made by law, nor shall any obligation for the payment of money be incurred unless the comptroller certifies it for payment and the state auditor certifies that the expenditure is within the purpose of the appropriation and that there is in the appropriation an unencumbered balance sufficient to pay it. At the time of issuance each such certification shall be entered on the general accounting books as an encumbrance on the appropriation. No appropriation shall confer authority to incur an obligation after the termination of the fiscal period to which it relates, and every appropriation shall expire six months after the end of the period for which made." (Underscoring ours.)

It will be noted that Section 23 follows the language of Section 19 of Article X of the 1875 Constitution in that it requires that the appropriation shall distinctly specify the amount and purpose of the appropriation.

It will also be noted that under Section 28 of Article IV of the 1945 Constitution the duty is imposed upon the Auditor to determine that the proposed expenditure under the appropriation for travel and subsistence for the Librarian and State Library Advisory Board under said Section 9 is within the purpose of the appropriation and that there is in the appropriation an unencumbered balance to pay it.

From an examination of the Library Advisory Board Act, Senate Bill No. 369, Laws of Missouri 1945, page \_\_\_\_\_, Sections 14731 to 14736a, R. S. A. 1939, it will be found that the law would authorize the expenditure of state monies for subsistence and travel expense in the administration of that act. So the expenditures of funds for subsistence and travel allowance would be authorized under the law, provided these have been appropriated. In the case of State ex rel. Bradshaw v. Hackmann, 276 M. 600, the appropriation for the warehouse commissioner was made for travel within and without the state. The court, in that case, held that the appropriation did not comply with the constitutional provision, Section 19, Article X of the 1875 Constitution, because the warehouse act did not provide for travel without the state. That case is not exactly in point here, but it does construe the provision of the Constitution that the purpose for which the monies are appropriated must be authorized by law and that the monies must be appropriated.

This again brings us to the question of whether or not "travel and subsistence" may be paid out of the appropriation for salaries, wages and per diem under the heading of "Personal Service." From an examination of the appropriation acts of the 63rd General Assembly, and of prior general assemblies, it will be found that travel and subsistence expenses have been paid out of the subdivisions of the appropriation bills headed as "Operation" or "General Expense." In none of these appropriations do we find where such items have been paid under the subdivision "Personal Service."

The terms "salaries, wages" are synonymous terms. Bouvard v. K. C., Ft. S. & M. R. Co., 83 Mo. App. 498, 501, in Words and Phrases, Permanent Edition, Vol. 44, page 502:

"Terms 'wages' and 'salary' are for all practical purposes synonymous and mean sum of money periodically paid for services rendered, though in good usage word 'salary' suggests more important services and larger

compensation than 'wages.' Flamm v. City  
of Passaic, 184 A. 748, 749, 14 N. J.  
Misc. 362."

The term "per diem" is generally considered as compensation paid either for personal service or for subsistence and allowance on a daily basis. In Vol. 32, Words and Phrases, Permanent Edition, page 14, we find the following definition and application of the term "per diem":

"Term 'per diem,' as used in Const. art. 2, section 23, fixing compensation of members of Legislature, is synonymous with salary, and term 'salary' imports idea of compensation for personal service, and not repayment of money expended in discharge of duties of office. Peay v. Nolan, 7 S.W. (2d) 815, 817, 157 Tenn. 222, 60 A. L. R. 408."

Since the appropriation for the Library Advisory Board under the heading of "Personal Service" only appropriates monies for the pay of salaries, wages and per diem of the employees of that department, and since no monies are appropriated under the heading "Operations" or "General Expense" to reimburse such employees for subsistence and travel pay, we do not think the appropriation would be broad enough to include reimbursement for subsistence and travel pay.

#### CONCLUSION

From the foregoing, it is the opinion of this department that travel and subsistence of employees of the State Library Advisory Board and to the State Librarian may not be paid out of the appropriation to that department set out under the heading "Personal Service" in Section 9 of House Bill No. 1036 of the 63rd General Assembly. We are further of the opinion that the reimbursement for travel and subsistence for the aforesaid purposes may not be paid out of the appropriation under the heading "State Aid" set out in subdivision "B" of said appropriation.

Respectfully submitted,

APPROVED:

TYRE W. BURTON  
Assistant Attorney General

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J. E. TAYLOR  
Attorney General

TWB:VLM

COUNTY COLLECTORS: Annual settlements of county collectors cover the period from March 1 to February 28.

May 12, 1947

FILED

83

Honorable Forrest Smith  
State Auditor  
Jefferson City, Missouri

Dear Sir:

This is in reply to your letter of recent date wherein you request an opinion from this department on the question of the period covered by the annual settlements with the county court by the collectors of the state, including those in counties having township organization,

From your request, it appears that the question now in your mind is that since the enactment of House Bill No. 721 passed by the 63rd General Assembly, which provides that the fiscal year and calendar year of all counties shall be the same, that there might be some question now as to whether or not the annual settlements of the collectors should be for the period January 1 to December 31. In other words, on a calendar year basis. Section 1 of House Bill No. 721, passed by the 63rd General Assembly, provides as follows:

"Unless otherwise provided in a charter adopted by a county under the provisions of Sections 18 or 31, 32 and 33 of Article VI, of the Constitution of this state, the fiscal year of the several counties of the state shall commence on January first and terminate on the thirty-first day of December in each year, and the books, accounts and reports of all county officers shall be made to conform thereto."

It will be noted that this bill requires the "books, accounts and reports" of county officers to conform to the fiscal year. The county collector, in making his monthly reports and in keeping his books, will be able to comply with the provisions of this section and still make his annual or final settlement in March as is required by other sections of the statutes. In the case of State ex rel. v. Pike County, 77 S.W. (2d) 94, the court, in speaking of the annual settlements of county collectors, said at l. c. 96:

"The annual settlement, which is required to be made, is recognized by law as something more than a mere report of the collector of the amounts collected and taxes remaining delinquent. It partakes of the nature of a settlement of the collector's accounts with the county and state. \* \* \*"

Also in the case of State of Missouri ex rel. Brewer v. Federal Lead Company, 265 Fed. 305, the court, in distinguishing between annual settlements and monthly settlements of the county collectors, said at l.c. 309:

"\* \* \* To the end that the collector may be relieved, upon the performance of either one or the other of the above contingencies, annual settlements with the county court are required. These settlements, to distinguish them, perhaps, from the 'monthly statements' and the monthly payments also required to be made by the collector (section 11473, supra), are called 'final settlements' in the statutes (section 11465, supra)."

These two opinions clearly demonstrate that the courts have distinguished between annual settlements and monthly settlements of accounts of the county collector. Undoubtedly the lawmakers, when they passed House Bill No. 765, did not overlook the fact that the provisions of Sections 11089, 11091 and 11092 provided for the annual settlement of the collector to be made in March because in said House bill, Sections 11090, 11093, 11095, 11098 and 11099 were repealed by that bill and new sections enacted in lieu thereof relating to the same subject matter.

From an examination of Sections 11089, 13990 and 14000, it will be found that they show conclusively that the collector must include any money collected after December 31 for any tax that might come into his hands after that date. In view of the attention that the lawmakers have paid to these various sections, repealing some and leaving some as they are, we do not think that there is any doubt but that they did not intend to repeal by implication the sections of the statute which provide for the annual settlement of county collectors to be made at the March term.



Said Section 11089, R. S. Mo. 1939, which relates to the duties of county collectors in counties not under township organization, reads in part as follows:

"At the term of the county court to be held on the first Monday in March, the collector shall return the delinquent lists and back tax books, and in the city of St. Louis the uncollected tax bills and back tax books, under oath or affirmation, to such court, and settle his accounts of all moneys received by him on account of taxes and other sources of revenue, and the amount of such delinquent lists, or so much thereof as the court shall find properly returned delinquent, shall be allowed and credited to him on his settlement. \* \* \* "

Section 13989, R. S. Mo. 1939, provides that the county treasurer of counties having adopted township organization shall be *ex officio* county collector. This section reads as follows:

"The county treasurer of counties having adopted or which may hereafter adopt township organization shall be ex officio collector, and shall have the same power to collect all delinquent personal property taxes, licenses, merchants' taxes, taxes on railroads and other corporations, the delinquent or nonresident lands or town lots, and to prosecute for and make sale thereof, the same that is now or may hereafter be vested in the county collectors under the general laws of this state. The ex officio collector shall, at the time of making his annual settlement in each year, deposit the tax books returned by the township collectors in the office of the county clerk, and within thirty days thereafter the clerk shall make, in a book to be called the 'back tax book,' a correct list, in numerical order, of all tracts of land and town lots which have been returned delinquent by said collectors, and return said list to the

ex officio collector, taking his receipt therefor."

Section 13990, R. S. Mo. 1939, relates to annual settlements of such ex officio collectors, and it reads as follows:

"At the meeting of the county court on the first Monday in March in each year, or at such other time as may be directed by law, the county treasurer shall make a full and complete settlement of his accounts, and exhibit his books and vouchers relating to the same, which settlement of his accounts, when accepted by the court, shall be entered of record by the county clerk."

Section 14000, R. S. Mo. 1939, relating to the duties of township collectors, in respect to making settlements, reads as follows:

"The township collector of each township shall, at the term of the county court to be held on the first Monday in March of each year, make a final settlement of his accounts with the county court for state, county, school and township taxes and produce receipts from the proper officers for all school and township taxes collected by him, less his commission on same, at which time he shall pay over to the county treasurer and ex officio collector all moneys remaining in his hands, collected by him on state and county taxes, and shall at the same time make his return of all delinquent or unpaid taxes, as required by law, and shall make oath before said court that he has exhausted all the remedies required by law for the collection of said taxes. He shall also, on or before the twentieth day of March in each year, make a final settlement with the township board. If any township collector shall fail or refuse to make the settlement required by this section, or shall fail or refuse to pay

over the state and county taxes, as provided in this section, the county court shall attach him until he shall make such settlement of his accounts or pay over the money found due from him; and it shall be the duty of said court to cause the clerk thereof to notify the state auditor and the prosecuting attorney of said county at once of the failure of such township collector to settle his accounts, or pay over the money found due from him, and the state auditor and the prosecuting attorney shall proceed against such collector in the manner provided in section 14014 of these statutes, and such collector shall be liable to the penalties in said section imposed."

We note from your request that all of the collectors have been, for the past number of years, making their annual settlements at the March term for the period from March 1 to February 28, but that the enactment of said House Bill No. 721 has raised the question as to whether or not the period covered by such settlement should be for the calendar year, that is January 1 to December 31. We think these statutes, relative to collectors' settlements, are in the nature of special statutes and are exceptions to any general statute which would require settlements of accounts and reports on the calendar year basis.

Since the annual and final settlements of the various collectors are made at the March term of the county court, the time of the expiration of the term of such officers is relevant here, we think. Under House Bill No. 729 of the 63rd General Assembly, the term of the office of the county treasurer, who is ex officio collector in counties under township organization, expires on April 1. Under the provisions of Section 11073, R. S. Mo. 1939, the terms of office of county collectors in counties not under township organization expire on the first Monday in March of the year in which they are required to make their last and final settlement.

Under Section 11090 of H.C.S.H.B. No. 765, passed by the 63rd General Assembly, it is provided that the county collector shall make a final settlement with the county court on the first Monday in March of each year. Under Section 25 of S.C.S.S.B. No. 297, it is provided as follows:

"All officers and others bound by law to pay money directly to the state collector of revenue the director of revenue or the department of revenue shall exhibit their accounts and vouchers to the state collector of revenue on or before the thirty-first day of December, to be adjusted and settled, except the county and township collectors of revenue, who shall, immediately after their final settlement with the county court on the first Monday in March in each year, exhibit their accounts and vouchers to the state collector of revenue for the amount due the state to be adjusted and settled."

This section indicates that the collectors in counties other than township collectors shall make their final settlement to the county court on the first Monday in March in each year.

Section 13020, R. S. Mo. 1939, which was repealed by Senate Bill No. 448 of the 63rd General Assembly, provided that the fiscal year of the state would commence on January 1 and terminate on the 31st day of December of each year, and provided that the books, accounts and reports of public officers would be made to conform thereto. This section was repealed on account of Section 23 of Article IV of the Constitution of 1945 which changed the fiscal year of the state and all of its agencies to 12 months beginning on the first day of July in each year. However, on a review of the decisions of the court wherein said Section 13020 was under consideration, we find that the courts have held that the fiscal year for the county as well as the state began January 1 and ended December 31 (State ex rel. v. Allison, 155 Mo. 325). Therefore, it will be seen that the provisions of said House Bill No. 721, relating to the fiscal year of counties, conform to the rulings of the courts on the question.

It might be argued that if the annual settlement of the collector is for a period other than the fiscal year as provided for in said House Bill No. 721 that it would be in violation of said section because that act provides that the books, accounts and reports of all county officers shall be made to conform to the fiscal year period, that is from January 1 to December 31. The books, accounts and reports could be kept on a calendar year basis and not be in conflict with a final settlement made on March 1.

It would seem that one of the reasons for placing the counties on the fiscal year basis, from January 1 to December 31, is to enable the court to determine the amount of receipts of taxes for such period. The fact that the settlement of the county collector covered the period from March 1 to February 28 would not interfere with the county court in determining the amount of revenue which is collected during the calendar year because county and township collectors are required to make monthly reports and remittances of their collections to the county court. Section 11098 of H.C.S.H.B. No. 765 provides in part as follows:

"Every county collector and ex officio county collector, except in the City of St. Louis, shall, on or before the fifth day of each month, file with the county clerk a detailed statement, verified by affidavit, of all state, county, school, road and municipal taxes, and of all licenses by him collected during the preceding month, and shall, on or before the fifteenth day of the month, pay the same, less his commissions, into the county treasuries and to the Director of Revenue. \* \* \*"

The information contained in the settlements made by the county collectors would be sufficient to enable the county courts to determine the amount of revenue collected during the calendar year.

Under Section 13827, R. S. Mo. 1939, county courts are required to annually prepare and publish a financial statement for the year ending December 31. As stated above, the information contained in the collectors' monthly reports required under said Section 11098 would be sufficient to enable the county court to comply with the provisions of said Section 13827, in so far as it requires the publication of the amount of funds collected during the year.

Said House Bill No. 721 would be classed as a general statute relating to the books, accounts and reports of the county officers. The sections of the laws herein referred to, relating to settlements of county collectors and ex officio county collectors, would come within the classification of special statutes applicable to such officers. In such cases where there appears to be an inconsistency in the provisions of different laws which relate to the same subject

matter, then the provisions of the special act will prevail as far as the particular subject matter comes within its provisions. This principle is announced in the case of State ex rel. McDowell v. Smith, 67 S.W. (2d) 50. In view of the fact that the 63rd General Assembly enacted legislation relating to the settlements of county officers including county collectors, it would appear that that body did not intend to change the provisions of the law relating to the duties of collectors in making annual or final settlements at the March term of the county court. That being the case, the annual settlement of collectors of revenue in all counties should include the collections for the period from March 1 to February 28.

CONCLUSION

It is therefore the opinion of this department that the annual settlements of county collectors, township collectors and ex officio collectors in township organization counties should be for the period from March 1 to February 28.

Respectfully submitted,

TYRE W. BURTON  
Assistant Attorney General

APPROVED:

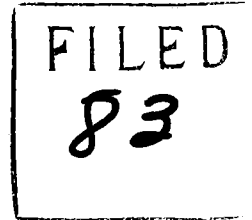
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J. E. TAYLOR  
Attorney General

TWB:VLM

DIVISION OF PROCUREMENT: Director of Revenue to procure supplies, material, equipment and contractual services through the State Purchasing Agent.

June 2, 1947



Mr. Wm. L. Smith  
State Purchasing Agent  
Division of Procurement  
Jefferson City, Missouri

Dear Sir:

Reference is made to your request for an official opinion, reading as follows:

"Section 4 of Senate Bill #143 recently passed, provides that the Director of Revenue shall procure either through the Purchasing Agent, or by other means authorized by law, supplies, material, equipment or contractual services for the department of revenue and for each division in the department.

"I would like to have your opinion as to whether or not there is any means authorizing the Director of Revenue to make purchases and contracts, without the approval of the Purchasing Agent and without the formality of soliciting bids as provided in S.C.S.S.B. No. 297."

Section 4 of Senate Bill No. 143 of the 64th General Assembly reads, in part, as follows:

"The director of revenue shall: \* \* \*  
(b) procure, either through the purchasing agent, or by other means authorized by law, supplies, material, equipment or contractual services for the department of revenue and for each division in the department; \* \* \*"

The adoption of the State Purchasing Agent Act, for which has now been substituted the provisions relating to the Division of Procurement, found as Sections 11008.62 to 1008.84, inclusive, Mo. R.S.A., with the retention of substantially the same

duties, represented an effort to consolidate the purchases made by the State into one agency. It is true that certain branches of the state government are constitutionally exempted, with respect to certain purchases, from the provisions of the statutes, and it is further equally true that the General Assembly might, through the enactment of specific legislation designed for that purpose, exempt other branches of the state government from the provisions. The inclusion of the words "by other means authorized by law" in the quoted portion of Senate Bill No. 143 merely recognizes the right of the General Assembly to make such exemption. However, we are unable to discover any legislative enactments which would authorize the Director of Revenue to make any purchases of the items enumerated except through the office of the State Purchasing Agent. In the absence of such legislation, we therefore believe that the purchases made by the Director of Revenue on behalf of the Department of Revenue, and for each division thereof, are to be made in accordance with the general laws relating to the purchase of similar items by other state departments.

#### CONCLUSION

In the premises, we are of the opinion that the Director of Revenue, in procuring supplies, material, equipment or contractual services for the Department of Revenue, and for each division in the department, must make such purchases in accordance with the general laws relating to the Division of Procurement and rules and regulations lawfully promulgated thereunder by the State Purchasing Agent.

Respectfully submitted,

WILL F. BERRY, Jr.  
Assistant Attorney General

APPROVED:

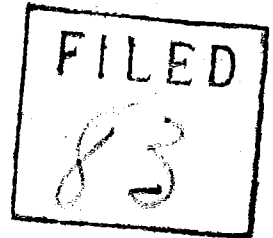
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J. E. TAYLOR  
Attorney General



DIVISION OR PROCUREMENT: Duty of State Purchasing Agent to maintain inventory of removable equipment owned by State.

June 7, 1947



Mr. Wm. L. Smith  
State Purchasing Agent  
Division of Procurement  
Jefferson City, Missouri

Dear Sir:

Reference is made to your inquiry of recent date, requesting an official opinion of this office, and reading as follows:

"Section 69 of SCSSB 297 provides that the Purchasing Agent shall keep current inventories of all removable equipment owned by the State.

"I would like to have your opinion as to whether or not any department of the State may be exempt, such as the General Assembly or the Legislative Research department particularly."

Section 69 of Senate Committee Substitute for Senate Bill No. 297 of the 63rd General Assembly now appears as Section 11008.69, Mo. R. S. A., and reads as follows:

"The purchasing agent shall have the power to transfer supplies from any department where they are not needed to any other department where they are needed and to direct that proper charges and credits be made on the inventories of the departments concerned. He shall also have power, subject to the same provisions as for bids for purchases, to sell any surplus or unneeded supplies or property in his hands or owned by the state or any department thereof. He shall keep currently an inventory of all removable equipment owned by the state." (Emphasis ours.)

At first glance, it might be thought the emphasized portion of the act might require the State Purchasing Agent to maintain the inventory referred to therein with respect to all removable equipment owned by the State. A literal interpretation of the wording would lead to this result. However, for reasons pointed out subsequently, we do not believe that this is the proper construction to be placed upon the sentence.

It is an elementary rule of statutory construction that the legislative intent is to be ascertained and effect given thereto. This intent often must be gathered from a consideration of every part of an act, and when such intention is so ascertained it will always prevail over a literal sense of the terms employed. We quote from State ex rel. v. Smith, 115 S. W. (2d) 816, 1. c. §23:

" \* \* \* In construing an act, the true intention of the framers must be followed, and where necessary the strict letter of the act must yield to the manifest intent of the Legislature. City of St. Louis v. Christian Bros. College, 257 Mo. 541, 165 S. W. 1057.  
\* \* \*"

With this rule in mind, we have examined the entire group of statutes relating to the Division of Procurement, found as Sections 11008.62 to 11008.84, Mo. R. S. A., giving particular attention to Sections 11008.69, 11008.71 and 11008.73. The first section mentioned, which has been quoted supra, gives the Purchasing Agent power to transfer supplies and directs him to make proper charges and credits on the inventories of the departments concerned. It further authorizes him to dispose of surplus or unneeded supplies or property. Then follows the sentence now under consideration in this opinion.

It seems the purpose of this section is to place in the State Purchasing Agent the power to have immediately available information relative to all supplies and property owned by the State of Missouri but under the control of the various departments. Parenthetically, we might say that Section 11008.73 defines two of the terms which frequently appear in the statutes relating to the Division of Procurement, and reads as follows:

"The term 'supplies' used in this act shall be deemed to mean supplies, materials, equipment, contractual services and any and all articles or things, except as in this act

otherwise provided. Contractual services shall include all telephone, telegraph, postal, electric light and power service, and water, towel and soap service. The term 'department' as used in this act shall be deemed to mean department, office, board, commission, bureau, institution, or any other agency of the state, except the legislative and judicial departments."

To effectuate the obtention of such information over and above the records available in his own office relating to purchases and sales, the State Purchasing Agent is empowered under Section 11008.71 to require reports from various departments. This section reads as follows:

"Each department shall make such reports of supplies on hand, or which may be needed, as the purchasing agent may direct. All reports, bids, specifications and contracts, and all records of purchases and sales of any kind, whether by the purchasing agent or by departments as authorized by him, shall be kept in the office of the purchasing agent and shall be open to inspection by the public."

Here, then, is a complete scheme by which an inventory of equipment which is comprehended within the term "supplies" may be kept and maintained by the State Purchasing Agent. It then becomes pertinent, we think, to consider the exclusion of the legislative and judicial departments from the definition of the term "department" found in Section 11008.73.

It is apparent that the State Purchasing Agent has no powers or duties with respect to the purchase of equipment for these departments. It is equally apparent that he has no power or authority to require these two departments to make reports to him of such equipment as they may have on hand. Considering the effect of construing the emphasized portion of Section 11008.69 in accordance with the literal meaning of the words used, it becomes clear that such construction would lead to an unreasonable and absurd result. The Purchasing Agent has no sources of information respecting equipment purchased, in the control of or sold by the departments exempted in the definition of "department." The mechanics of maintaining a current inventory of such equipment under the control of the exempted departments would necessarily entail taking a daily inventory thereof. In these

Mr. Wm. L. Smith

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circumstances, we think another rule of statutory construction to be applicable. We quote from State v. Irvine, 72 S. W. (2d) 96, 1. c. 100:

" \* \* \* The courts will not so construe a statute as to make it require an impossibility or to lead to absurd results if it is susceptible of a reasonable interpretation. \* \* \* "

We think the rule to be of particular applicability for the reasons discussed heretofore.

#### CONCLUSION

In the premises, we are of the opinion that the State Purchasing Agent is required to keep a current inventory of the removable equipment owned by the State and under the control of any departments thereof, as the term "department" is defined in Section 11008.73, Mo. R. S. A., which said definition excludes the legislative and judicial departments.

Respectfully submitted,

WILL T. BERRY, Jr.  
Assistant Attorney General

APPROVED:

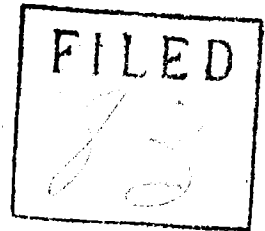
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J. E. TAYLOR  
Attorney General

WFB:HR

SCHOOLS: First-grade certificate which expired in 1925 or 1926 cannot be renewed by County Superintendent of Schools except under rules and regulations of State Board of Education.

June 14, 1947



Hon. Wayne V. Slankard  
Prosecuting Attorney  
Neosho, Missouri

Dear Sir:

We have your letter of recent date which reads as follows:

"I would like to have your opinion for the benefit of our County Superintendent of Schools in the interpretation of the 'faithful performance' portion of Section 10628, in regard to renewal certificates.

The facts are that the applicant for a first-grade certificate (renewal) commenced teaching in approximately 1907. He received a first-grade certificate in 1909. Thereafter, in 1912, he received a second-grade certificate, and carried on from then with second or third-grade certificates until the year 1922, when he was issued another first-grade certificate. After this time he discontinued teaching for approximately eight years (held the office of County Assessor during such period). He returned to teaching in the year 1931, and taught under second and third-grade certificates up to and including the year 1942.

He is now applying for first-grade certificate under the provision of the 'grandfather' clause, in Section 10628, and I am rather inclined to believe that he is entitled to the issuance of such certificate, unless his discontinuance of teaching for several years is a failure to comply with the 'faithful performance' clause.

I would like to have your opinion on this as soon as possible."

You refer to the "faithful performance" portion of Section 10628. That provision reads as follows:

"Provided, that any teacher who had had five years' experience in teaching and was employed as a teacher January 1, 1912, and holds a first grade certificate shall have his or her county certificate renewed an unlimited number of times, on condition that said teacher is faithful in the performance of his or her professional duties."

Section 10628, R.S. Mo. 1939, was repealed by the 1945 Legislature, and a new section by the same number was re-enacted in lieu thereof, (L. 1945 P. 1694). The new section 10628 reads as follows:

"The state board of education shall have the authority to prescribe the manner and method for the renewal of county certificates. The county superintendent of public schools shall renew county certificates in conformity with the rules and regulations prescribed therefor by the state board of education. Provided, however, that all county certificates now in force and effect shall be subject to renewal or shall be renewed in accordance with the laws in effect at the time of their issuance."

Since the repeal of Section 10628, R.S. Mo. 1939, the "faithful performance" clause referred to in your letter is no longer in effect. Under the present law, the County Superintendent can only renew county certificates in conformity with the rules and regulations prescribed by the State Board of Education, with the exception that county certificates which were in force at the time said Section 10628 passed by the 1945 Legislature went into effect could be renewed in accordance with the laws in effect at the time of the issuance of such certificates. According to your letter, the certificate you inquire about was issued in 1922. Under the law then in effect regarding such certificates (Section 11358 R.S. Mo. 1919) said certificate was valid for three years only. Since said certificate was not in effect at the time the 1945 act went into effect, it can now be renewed only in accordance with the provisions of Section 10628, Laws 1945, supra. Under said act the County Superintendent can only renew such certificate in accordance with the rules and regulations prescribed by the State Board of Education.

Conclusion

It is, therefore, the opinion of this office that a first grade teacher's certificate issued by a County Superintendent of Schools which expired in 1925 or 1926 cannot now be renewed by the County Superintendent of Schools except under the rules and regulations prescribed therefor by the State Board of Education.

Yours very truly,

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Harry H. Kay  
Assistant Attorney General

APPROVED:

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J. E. Taylor  
Attorney General

HHK/vlv.

MAGISTRATES: Only fee to be allowed and collected by  
magistrate in criminal proceedings is  
magistrate court fee, provided for in  
Senate Bill No. 108.

FILED

June 20, 1947 6/24

Honorable Forrest Smith  
State Auditor  
Jefferson City, Missouri

Dear Sir:

This will acknowledge your request for an official  
opinion, which reads:

"Section 8459, R.S. Mo. 1939, provides  
in part:

"Every justice of the peace and each  
judge of the courts of criminal cor-  
rection of the City of St. Louis shall  
forward to the commissioner a record  
of the conviction of any person in his  
court for a violation of any of said  
laws for which he shall receive a fee  
of fifty cents to be taxed as costs in  
the case."

"Senate Bill No. 108, enacted by the  
64th General Assembly, and approved by  
Governor Donnelly on June 2, 1947, pro-  
vides in part:

"In each criminal proceeding and in  
each preliminary hearing instituted in  
any magistrate court, a magistrate  
court fee of two dollars and fifty  
cents (\$2.50) shall be allowed and col-  
lected to be in full for the services  
of the magistrate or the clerk of said  
court. Such fees shall be charged,  
collected and disposition thereof shall  
be made as provided by law applicable  
thereto."



"Your opinion is respectfully requested on the following question. Should the magistrate judge charge the fee provided for in Section 8459, R.S. Mo. 1939, in addition to the fee provided for in Senate Bill No. 108, enacted by the 64th General Assembly."

Section 8459 (b), R.S. Mo. 1939, provides as follows:

"Every court having jurisdiction over offenses committed under this article or under the provisions of any statute of this State regulating the operation of motor vehicles on highways, or any felony in the commission of which a motor vehicle is used, shall forward to the commissioner a record of the conviction of any person in said court for a violation of any of said laws, and every such court, except justice of the peace courts, and courts of criminal correction in the City of St. Louis shall have the power of suspending or revoking the license of any licensee under this article or the certificates of registered chauffeurs or registered operators under Sections 8372 and 8373, and amendments thereto, and shall certify to the commissioner a record of such suspension or revocation. Every justice of the peace and each judge of the courts of criminal correction of the City of St. Louis shall forward to the commissioner a record of the conviction of any person in his court for a violation of any of said laws for which he shall receive a fee of fifty cents to be taxed as costs in the case, and may recommend to the commissioner a suspension or revocation of said person's license or the certificate of such chauffeur or registered operator. The commissioner may suspend or revoke the license or certificates of any of the persons convicted as aforesaid."

(Underscoring ours.)

The above statute is contained in Article 3, Chapter 45 of the Revised Statutes pertaining to motor vehicles. Under the above statute, whenever a person was convicted in the justice of the peace court for violation of any motor vehicle law constituting a misdemeanor, the justice of the peace was required to forward to the commissioner of motor vehicles a record of the conviction for which he received a fee of 50¢ to be taxed as costs in the case.

Section 656,1, Mo. R.S.A., page 12 of the Pocket Part (Laws of 1945), provides:

"Whenever, in any statute, the word 'justice' (referring to justice of the peace) or the words 'justice of the peace' appear, said word or words shall hereafter be deemed to include and refer to 'magistrate,' unless there be something in the subject or context repugnant to such construction."

By the terms of the above statute, the word "magistrate" is substituted where theretofore statutes enacted stated the "justice of the peace" had certain duties. Consequently, under the provisions of Section 8459, supra, the magistrate would have to perform the same duties as were formerly imposed on the justice of the peace regarding the forwarding of records of conviction to the commissioner of motor vehicles.

The forwarding of such a record would be a service performed by the magistrate in connection with a criminal proceeding for which, in the absence of any contrary statutory provision, he would receive a fee of 50¢, as provided in Section 8459, supra. However, the 64th General Assembly enacted Senate Bill No. 108 with an emergency clause, which was approved by the Governor on June 2, 1947, and became effective on that date. Section 1, subparagraph (2) of said bill provides as follows:

"In each criminal proceeding and in each preliminary hearing instituted in any magistrate court, a magistrate court fee of two dollars and fifty cents (\$2.50) shall be allowed and collected to be in full for the services of the magistrate or the clerk of said

court. Such fees shall be charged, collected and disposition thereof shall be made as provided by law applicable thereto."

(Underscoring ours.)

We believe that the effect of the above statutory provision is to provide that the magistrate court fee of \$2.50 shall be in lieu of all fees that the magistrate was formerly entitled to for services performed in criminal proceedings, and that no fees in criminal proceedings, other than the \$2.50 magistrate court fee, would be allowed and collected by the magistrate.

Conclusion.

It is, therefore, our opinion that the magistrate should not charge and collect the fee provided for in Section 8459, R.S. Mo. 1939, in addition to the \$2.50 magistrate court fee provided for in Senate Bill No. 108, enacted by the 64th General Assembly, which is now in effect, and, further, that the \$2.50 magistrate court fee shall be the only fee collected in criminal proceedings in the magistrate court for services performed by the magistrate or by the clerk of the magistrate court.

Respectfully submitted,

RICHARD F. THOMPSON  
Assistant Attorney General

APPROVED:

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J. E. TAYLOR  
Attorney General

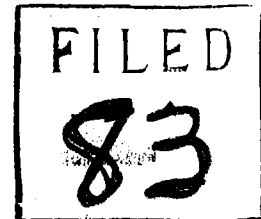
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TOWNSHIP TREASURERS:  
COMPENSATION PAYABLE  
FROM GENERAL FUNDS:

Compensation of township treasurers in  
counties under township organization  
payable out of general revenue funds.

July 9, 1947

FILED 83



Honorable Forrest Smith  
State Auditor  
Jefferson City, Missouri

Dear Sir:

We have your letter of recent date wherein you submit  
the following questions and statement for an official  
opinion:

"We have received several inquiries from  
township treasurers in counties of town-  
ship organization as to whether their com-  
missions which they are allowed under  
section 13987 R.S.Mo. 1939, should be  
taken out of the school fund, road and  
bridge fund, or all out of the general  
revenue fund.

"In other words, if warrants in the amount  
of \$250.00 are written on incidental fund  
of the school district; a warrant for  
\$250.00 on the road and bridge fund, and  
a warrant for \$500.00 on the general  
revenue fund of the township, whether the  
treasurer would retain  $\frac{1}{4}$  of the 2% from  
each of the school and the road district  
and 50% from the general revenue from the  
fund of the township, or whether he is to  
retain the total commission out of the  
general revenue fund of the township.

"We would also like a further opinion as  
to whether the limit of \$1,000.00 would  
apply to the overall disbursements or  
whether the treasurer would be entitled  
to 2% on the first \$1,000.00 disbursed  
in the school fund; another 2% on the  
first \$1,000.00 disbursement on the road  
and bridge fund, and another 2% on the  
general revenue fund, or if the 2% applies  
to the first \$1,000.00 disbursed, regard-  
less of the various funds affected."

Section 13987, R. S. Mo. 1939, which is referred to in your request and relates to the compensation of township trustee and ex officio treasurer, reads as follows:

"The township clerk, as clerk, the township trustee, as trustee, members of the township board, and judges and clerks of election, shall each receive for their services two dollars and fifty cents per day: Provided, that the township clerk shall receive fees for the following, and not per diem, for serving notices of election, or each: For filing any instrument of writing, ten cents; for recording any order or instrument of writing, authorized by law, ten cents for every hundred words and figures; for copying and certifying any record in his office, ten cents for every hundred words and figures, to be paid by the person applying for the same; and provided further, that the township trustee as ex officio treasurer shall receive a compensation of two per cent for receiving and disbursing all moneys coming into his hands as such treasurer when the same shall not exceed the sum of one thousand dollars and one per cent of all sums over said amount."

In considering questions of this type, the rule that the compensation of county officers is payable out of the general revenue fund of the county unless otherwise provided by statute is applicable. In the case of State ex rel. Hall vs. McElroy, 274 S. W. 753, the court, in discussing the mode of payment of the parole board of Jackson County, applied the foregoing rule and said at l.c. 754:

"\* \* \*The law, after creating the office and prescribing the duties, fixes a salary of \$125 per month for the performance of those duties. The law does not say from what fund this salary shall be paid. We realize that in the creation of an office, the lawmakers might designate a fund out of which the salary shall be paid, and this fund may be other than the salary fund of the county. But such was

not done in this case. In such situation it will be presumed that the Legislature intended the salary to be paid as other official salaries are paid, i. e., out of the salary fund of the county. \* \* \*

Referring again to said Section 13987, supra, it will be noted that this act provides for the compensation of the township trustee and ex officio treasurer, but it does not state from what fund this compensation shall be paid. Then, applying the principle announced in the McElroy case above, the compensation would be payable out of the general revenue fund. We are supported in our conclusion that this compensation is payable out of the revenue fund by the fact that some of the other county officers in counties under township organization are authorized to retain their fees out of taxes collected. We refer to the collectors and county treasurers in counties under township organization. In Section 13993, R. S. Mo. 1939, the county treasurer in such counties is allowed two per cent on delinquent taxes collected, and this compensation is taxed as costs against such delinquents and collected as other taxes.

Then, referring to Section 11106, R. S. Mo. 1939, which relates to the commission which the various county collectors may retain as their compensation, it will be noted that the following provision, relating to the payment of such fees, is made in said section:

"\* \* \*All such commissions hereinbefore enumerated shall be deducted and retained by such collector out of the amounts collected for state, school, county and city, respectfully, and upon settlement with such collector shall be credited to his account and charged to the respective revenue accounts.\* \* \*"

These provisions relating to the collectors and county treasurers in counties under township organization clearly indicate that the lawmakers did not intend that their compensation be paid out of general revenue.

Referring to the last paragraph of your request, in which you inquire as to the manner in which the township treasurer's commission is calculated, we find that this department, on August 10, 1937, rendered an opinion to the Honorable Charles

Honorable Forrest Smith

-4-

D. Brandom, Prosecuting Attorney of Daviess County, in which it was held that the township trustee is entitled to two per cent on the first \$1,000.00 received and disbursed, and one per cent on the remainder, and that the basis for the calculation of the amount of the commission is the total of moneys received and disbursed and not the total for each individual fund. We are enclosing a copy of this opinion for your information.

#### CONCLUSION

Therefore, the opinion of this department is that the compensation of the township trustee and ex officio treasurer in counties under township organization is payable out of the general revenue fund of such township and that his commissions are based on the total amount of all funds received and disbursed by him, and are calculated on the basis of two per cent on the first \$1,000.00 of such a total and one per cent balance of such total.

Respectfully submitted,

TYRE W. BURTON  
Assistant Attorney General

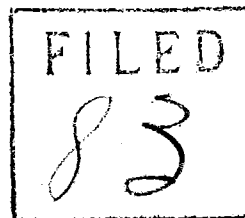
APPROVED:

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J. E. TAYLOR  
Attorney General

ROAD DISTRICTS: Special road district and township in Bates  
TOWNSHIPS: County are both entitled to have bonds registered  
ELECTIONS: when bonds of both political subdivisions were  
BONDS: voted on same day and proceedings for election  
by township were initiated before proceedings  
by special road district.

July 31, 1947



Honorable Forrest Smith  
State Auditor  
Jefferson City, Missouri

Dear Sir:

This is in reply to your letter of recent date requesting an official opinion of this department, and reading as follows:

"We are enclosing herewith copy of a letter received from Fred J. Hupp, County Clerk, Bates County, Missouri, relating to Lone Oak Township and Cornland Special Road District elections held on June 17, 1947, in which the special road district and the township voted on bond issues and both of the issues carried. We would like to have your opinion concerning the question raised in said letter."

Mr. Hupp's letter reads as follows:

"In Bates County we have a township, Lone Oak, that has a special road district in it (Cornland Special Road District).

"On June 17, 1947, both the special road district and the township voted on a bond issue and both of the issues carried.

"We understand that if the special road district has an indebtedness, the township cannot vote bonds, so we are wondering which bonds should be registered.



Both elections were held on the same date; however, the notice of publication for the township appeared in the newspaper first."

Section 8843, R. S. Mo. 1939, authorizes the issuance of bonds and provides the procedure to be followed in holding an election to determine the question of whether or not such bonds shall be issued in special road districts in counties under township organization.

Section 8609, Laws of Missouri, 1945, page 1499, authorizes the issuance of bonds by a township or by a special road district organized and incorporated under the provisions of Article 10, Chapter 46, R. S. Mo. 1939, the special road district authorized to be organized and incorporated under Article 10, Chapter 46, R. S. Mo. 1939, being the eight mile road district in counties not under township organization.

Section 8610, R. S. Mo. 1939, provides for the holding of an election in a township or any special road district.

Section 8611, R. S. Mo. 1939, provides the form of ballot when a township or any special road district votes on the question of issuing bonds.

Section 8612, R. S. Mo. 1939, provides for the procedure to be followed in selling the bonds voted by a township or any special road district.

Section 8613, R. S. Mo. 1939, provides as follows:

"The four next preceding sections, to wit: sections 8609, 8610, 8611 and 8612, shall not apply to any township, the whole or any part of which is included in a special road district that has issued bonds, the whole or any part of which are outstanding and unpaid; nor shall said sections apply to any special road district which includes the whole or any part of any township which has issued bonds for road purposes, the whole or any part of which bonds are outstanding and unpaid, nor shall said sections apply to any special road district which includes the whole or any part of the territory of any other special road district which has incurred an indebtedness evidenced by an issue of bonds, the whole or any part of which are outstanding and unpaid."

Section 5 of an Act of the 46th General Assembly, Laws of Missouri, 1911, page 367, entitled "An Act authorizing township road bonds and providing for the payment thereof, with an emergency clause," provides as follows:

"Township as used in this act shall be held to include any township whose boundaries and name have been fixed according to law."

Townships whose boundaries and names have been fixed according to law are those provided for in Article 3, Chapter 100, R.S.A. (counties not under township organization), and Chapter 101, R.S.A. (counties under township organization).

Section A of House Bill No. 337, Laws of Missouri, 1917, page 445, provides, in part, as follows:

" \* \* \* and also an act of the forty-sixth general assembly, entitled 'An act authorizing township road bonds and providing for the payment thereof, with an emergency clause,' approved March 18, 1911; and also an act of the forty-sixth general assembly, entitled 'An act authorizing special road districts to issue bonds and providing for the payment thereof, with an emergency clause,' approved March 18, 1911; \* \* \* be and the same are hereby repealed, and the following five articles, in relation to the same subject matter, be enacted in lieu thereof: \* \* \*"

Therefore, Section 88 of House Bill No. 337, Laws of Missouri, 1917, page 472, which authorized the issuance of road bonds by townships or any special road district, refers both to townships organized as authorized by Chapter 101, R.S.A., and by Article 3 of Chapter 100, R.S.A. Section 88 of such bill, as reenacted, Laws of Missouri, 1919, page 624; Laws of Missouri, 1923, page 346, and Laws of Missouri, 1945, page 1499, is now Section 8609, Laws of Missouri, 1945, page 1499, which provides for the issuance of road bonds both by townships organized under the provisions of Chapter 101, R.S.A., and Article 3 of Chapter 100, R.S.A., and issuance of road bonds by special road districts organized under the provisions of Article 10 of Chapter 46, R.S.A.

In the case of State ex rel. v. Hackmann, 297 Mo. 417, the question of whether a township in Howard County (a county not under township organization) could vote bonds when such township was included in a road district was before the court. The Supreme Court cited Section 10751, R. S. 1919, which, as reenacted, Laws of Mis-

souri, 1923, page 356, is now Section 8613, R. S. Mo. 1939, as the section to be construed to determine whether the township could vote road bonds. The court held in that case that such section prohibited any township which was in the whole or in part included in a special road district from issuing road bonds. After this case was decided, what is now Section 8613, R. S. Mo. 1939, was repealed and reenacted as Section 10751, Laws of Missouri, 1923, page 356, in the form in which it now appears, so that such section now prohibits the issuance of bonds by a township only if a special road district in which the township is in part at least included has issued bonds which are outstanding and unpaid.

Section 8843, R. S. Mo. 1939, which authorizes the issuance of bonds by a special road district in counties under township organization, was enacted as Section 10 of House Bill No. 728, Laws of Missouri, 1919, page 735. Before House Bill No. 728, Laws of 1919, was enacted, the only authorization for the issuance of road bonds by a special road district in counties under township organization was Section 88, Laws of 1917, page 472, supra. However, since House Bill No. 728, Laws of 1919, is a special law, referring only to special road districts in counties under township organization, such law is now the authority for the issuance by such road districts of road bonds, and provides the complete scheme for the holding of an election and the issuance of such bonds.

In the case of *State ex rel. Buchanan County v. Fulks*, 296 Mo. 614, 1. c. 626, the Supreme Court of Missouri said:

"Where there is one statute dealing with a subject in general and comprehensive terms and another dealing with a part of the same subject in a more minute and definite way, the two should be read together and harmonized, if possible, with a view to giving effect to a consistent legislative policy; but to the extent of any necessary repugnancy between them, the special will prevail over the general statute. Where the special statute is later, it will be regarded as an exception to, or qualification of, the prior general one; and where the general act is later, the special will be construed as remaining an exception to its terms, unless it is repealed in express words or by necessary implication." (See *Lazonby v. Smithey*, 151 Mo. App. 285, 289 and cases cited in *State ex rel. Lashley v. Becker*, 290 Mo. 1. c. 620.)"

We believe that the court, in the case of Lewis W. Thompson & Co. v. Conran-Gideon S. Road Dist., 19 S. W. (2d) 1049, held, in effect, that Article 18, Chapter 46, governed the entire procedure of the issuance of bonds by a special road district in counties under township organization. In this case a special road district in a county under township organization had issued bonds under the provisions of what is now Article 11, Chapter 46, R. S. Mo. 1939, and the court said that the bonds should have been issued under the provisions of what is now Article 18, Chapter 46, R. S. Mo. 1939. The court said, l. c. 1053:

" \* \* \* Under the record admission that New Madrid county was then under township organization, it must be assumed, for the purpose of this demurrer, that the trial court held that the bonds were issued under a statute that permitted their issuance, such as article 13 (sections 10937-10960), or even the general road law appearing in sections 10747 to 10750, R. S. 1919, rather than under a statute which did not permit their issuance in counties having township organization, such as article 8 (sections 10833-10857). \* \* \*"

It is to be noted that the court in that case did not specifically rule that bonds could not have been voted under the provisions of the general road law, that is, Sections 8610 to 8613, R. S. Mo. 1939, but held that the bonds would be presumed to have been issued under the provisions of what is now Article 18, Chapter 46, R. S. Mo. 1939. This holding by the court we believe to be authority for holding that the provisions of Article 18, Chapter 46, R. S. Mo. 1939, govern the proceedings for issuance and the issuance of bonds by special road districts in counties under township organization.

The action of the 63rd General Assembly, in amending Section 8609 so that such statute, in the Laws of 1945, refers only to townships and to special road districts organized under the provisions of Article 10, Chapter 46, R. S. Mo. 1939, was a legislative recognition that Sections 8843 and 8717, R. S. Mo. 1939, provided complete schemes for issuing bonds by special road districts in all special road districts except those organized under Article 10, Chapter 46.

Since Section 8843, R. S. Mo. 1939, provides the complete scheme for the issuance of bonds by special road districts organized in counties under township organization, the effect of Section 8613, R. S. Mo. 1939, is only to prohibit the issuance

of road bonds by a township which contains the whole or a part of a special road district, which special road district has issued bonds, the whole or any part of which are outstanding and unpaid, and to prohibit the issuance of road bonds by a special road district, which district is included in whole or in part in a township in a county not under township organization, which township had issued bonds which are outstanding and unpaid, and Section 8613 does not prohibit the issuance of bonds by a special road district when the township in a county under township organization in which all or a part of the special road district is located has issued bonds which are outstanding and unpaid.

We note from the notices of the bond elections held in the special road district and in the township that the proceedings for the election in the township were initiated prior to the date that proceedings were initiated for such election in the special road district. We deem it unnecessary then to discuss the question of what would have been the effect if the special road district had first initiated the special bond election proceedings, or what would have been the effect if the road district election had occurred before the township election.

#### CONCLUSION

It is the opinion of this department that the bonds authorized to be issued by both the Lone Oak Township and Cornland Special Road District in Bates County, Missouri, should be registered by the State Auditor, and the bonds issued by the township and by the special road district, after registration, will be valid obligations of such political subdivisions.

Respectfully submitted,

C. B. BURNS, Jr.  
Assistant Attorney General

APPROVED:

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J. E. TAYLOR  
Attorney General

CBB:HR

COUNTY COLLECTOR:  
TAXATION:

Two per cent fee allowed collector under provisions of Sec. 11182, Laws of 1945, page 1851, such fee to be collected from taxpayer, is not collectable from taxpayer who pays taxes in month of January after such taxes have become delinquent.

September 24, 1947

FILED

83

Honorable Forrest Smith  
Auditor, State of Missouri  
Jefferson City, Missouri

Dear Mr. Smith:

This is in reply to your letter of recent date, requesting an official opinion of this department, and reading as follows:

"Please advise this department with an official opinion as to whether or not the 2% compensation allowed to County Collectors for collecting delinquent taxes under Section 11182 Laws of Missouri 1945 is to be charged against tax payers who pay their taxes during the month of January after they fall due and upon which no interest is chargeable under Section 11085 Laws of Missouri 1945."

The determination of whether the two per cent fee allowed to the county collector under the provisions of Section 11182, Laws of Missouri, 1945, page 1851, such two per cent to be taxed as costs and collected from the taxpayer, is to be collected from a taxpayer who pays his taxes in January of the year when such taxes become delinquent, depends upon whether, in such month of January, the collector renders "services" under Article 9, Chapter 74, Mo. R. S. A.

Section 11182, Laws of Missouri, 1945, page 1851, provides as follows:

"In all counties having a population of less than 100,000, fees shall be allowed for services rendered under the provisions of this article, as follows: To the collector, except in such cities, two per cent

on all sums collected, in such cities, two per cent on all sums collected--such per cent to be taxed as cost and collected from the party redeeming. To the county collector, for recording the list of delinquent land and lots, twenty-five cents per tract, to be taxed as cost and collected from the party redeeming such tract."

Section 11085, Laws of Missouri, 1945, page 1908, provides, in part, as follows:

"If any taxpayer shall fail or neglect to pay such collector his taxes at the time and place required by such notices, then it shall be the duty of the collector after the first day of February then next ensuing, to collect and account for, as other taxes, an additional tax, as penalty, the amount provided for in Section 11124. Collectors shall, on the day of their annual settlement with the county court, file with said court a statement, under oath, of the amount so received, and from whom received, and settle with the court therefor; \* \* \*"

Section 11108, Mo. R. S. A., provides as follows:

"All real estate upon which the taxes remain unpaid on the first day of January, annually, shall be deemed delinquent, and the said county collector shall proceed to enforce the lien of the state thereon, as required by this chapter; and any failure to properly return the delinquent list, as required by this chapter, shall in no way effect the validity of the assessment and levy of taxes, nor of the judgment and sale by which the collection of the same may be enforced, nor in any manner to affect the lien of the state on such delinquent real estate for the taxes unpaid thereon."

Section 11112, Laws of Missouri, 1945, page 1848, provides, in part, as follows:

"Tangible personal property taxes assessed on and after January 1, 1946 and all personal taxes delinquent at that date, shall constitute a debt, as of the date on which such taxes

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were levied for which a personal judgment may be recovered against the party assessed with such taxes before any court of this State having jurisdiction. \* \* \* For the purpose of this chapter, personal tax bills shall become delinquent on the first day of January following the day when said bills are placed in the hands of the collector, and suits thereon may be instituted on and after the first day of February following, and within five days from said day. \* \* \*

Section 11124, Laws of Missouri, 1945, page 1912, provides, in part, as follows:

"Between the first of February and the first of July in the year 1947 and annually thereafter, the county collector shall make out and record, in a book to be provided for that purpose, a list of lands and lots, returned and remaining delinquent for taxes, \* \* \*"

From these quoted statutes it appears that both real and personal property taxes become delinquent on January first following the date that the tax bills are placed in the hands of the collector, but that the penalty of one per cent per month does not attach, and the collector does not collect such penalty, unless the taxes are paid on or after February first following the date such taxes become delinquent.

It is to be noted also that by the provisions of Section 11112, supra, suits for delinquent personal property taxes cannot be brought before February first following the date when taxes become delinquent, and by the provisions of Section 11124, supra, the collector is to record lands and lots for which the taxes are delinquent, between February first and July first.

In the case of State ex rel. v. Fendorf, 317 Mo. 579, the Supreme Court of this state had before it for determination the question as to the time when the four per cent (now two per cent) allowed the collector by what is now Section 11182, Laws of Missouri, 1945, page 1851, and which was to be collected from the taxpayer, had to be paid by the taxpayer, and the court held that such four per cent (now two per cent) had to be paid by the taxpayer when taxes were paid on or after January first following the date when the tax bills were placed in the hands of the collector.



At the time the Fendorf case was decided, Section 12906, R. S. Mo. 1919 (reenacted as Section 11085, Laws of Missouri, 1945, page 1908), provided that the penalty of one per cent per month on delinquent taxes was to be collected on all taxes paid on or after January first, on which date such taxes became delinquent, and the court held that the computing, apportioning and accounting for such penalty of one per cent per month constituted a "service", as such term is used in Section 11182, Laws of Missouri, 1945, page 1851. The court said, l. c. 584-585:

"Section 12959, the last section of Article 9, provides that fees shall be allowed for services rendered under the provisions of this article, and sets out the per centum to be allowed on all sums collected.

"There is no distinction in this last section for fees allowed for the collection of 'back taxes' or 'delinquent taxes.' It merely says for services rendered under the article, and it seems clear that the Legislature meant any service performed under the article. We have held in construing Section 12932 that the tax became delinquent on January 1st of each year. (State ex rel. v. Renshaw, 166 Mo. 682, l. c. 691.) This same construction necessarily applies to Section 12928. Therefore with both real and personal taxes becoming delinquent on January 1st the penalty of one per centum per month accrues under the provisions of Section 12906. Beginning with January 1st, the collector has the duty of collecting this penalty, which is in the nature of an additional tax, and of computing, apportioning and accounting for the same. This section (12906) fixing this penalty of one per centum per month is a part of Article 8, but it specifically postpones the duty of computing, collecting and accounting of it until after January 1st, and Sections 12928 and 12932 (both in Article 9) fix January 1st as the date of delinquency when this penalty accrues, and places the duty on the collector to enforce the lien thereof. Section 12906 from its context seems to treat this penalty as something different from the ordinary undelinquent taxes for which the fees allowed by Section 12927 are applicable. Also

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Section 12906 sets up the method of effecting a settlement for the penalty between the county court and the collector. It seems clear that the collection of the penalty provided for by Section 12906, after January 1st, is the enforcement of the lien of the State made the duty of the collector by Sections 12928 and 12932, and that this duty begins on January 1st and entails labor on the part of the collector prior to the first Monday in March which would be a service within the meaning of Section 12959. In reading Article 8 it seems to relate to the duties of the collector and the collection of taxes before the delinquency date of January first, and that January 1st is the line of demarcation between Article 8 and Article 9, and that Article 9 deals with the duties of the collector and the collection of taxes after January 1st." (Emphasis in 2nd paragraph ours.)

Under the provisions of Section 11085, Laws of Missouri, 1945, page 1908, the collector does not compute, apportion or account for the penalty on delinquent taxes paid during the month of January following the date the tax bills are placed in the hands of the collector. Neither are any other services enjoined upon the county collector during the month of January following the date when the tax bills are placed in the hands of the collector.

Therefore, the reasoning found in the Fendorf case leads us to the conclusion that, under the present laws, the collector does not perform "services," as such term is used in Section 11182, Laws of Missouri, 1945, page 1851, when he accepts payment of delinquent taxes during the month of January following the date when the tax bills are placed in his hands.

#### CONCLUSION

It is the opinion of this department that the two per cent fee to be collected by the county collector as provided for in Section 11182, Laws of Missouri, 1945, page 1851, such fee to be paid by the taxpayer, is not to be collected from a taxpayer

Honorable Forrest Smith

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September 24, 1947

who pays delinquent taxes during the month of January following the date the tax bills are placed in the hands of the collector.

Respectfully submitted,

C. B. BURNS, Jr.  
Assistant Attorney General

APPROVED:

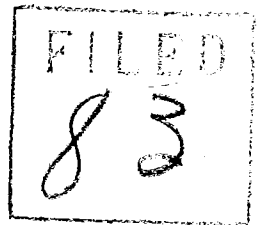
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J. E. TAYLOR  
Attorney General

CBB:HR

COUNTY JUDGES: County judges in Jasper County, to receive salary of \$1,250.00 for period of July 1, 1946 through December 31, 1946; not entitled to receive compensation during said period as members of county board of equalization.

October 22, 1947



Honorable Forrest Smith  
State Auditor  
Jefferson City, Missouri

Dear Mr. Smith:

We are in receipt of your letter of October 18, 1947, requesting an opinion from this department, which reads as follows:

"We would like to have your opinion as to the amount of salary the county court members of Jasper County are entitled to receive from July 1, 1946 to December 31, 1946, that being a county of the second class.

"Also, as to whether the members of the county court would be entitled to per diem as members of the Board of Equalization and Appeals during said period."

In answer to your first question we direct your attention to Section 2494.1, Mo. R.S.A., which provides for the compensation of judges of the county court in counties of the second class, and reads as follows:

"In all counties of the second class, the judges of the county court shall receive for their services, an annual salary of \$3600.00, to be paid monthly in twelve equal installments out of the county treasury. Such salary shall be in lieu of all fees and other compensation heretofore allowed such judges for services rendered, including the per diem allowed them as members of the board of equalization and board of appeals."

Said section was made effective as of July 1, 1946, and allows said judges a salary of \$300.00 per month for their services as such. Prior to that date the judges of the County Court of Jasper County, said county having a population of 78,705 according to the 1940 National Census, received an annual salary of \$2,500.00, under the provisions of Section 2494, R.S. Mo. 1939, before its repeal by Sections 2494.1 and 2494.2, Mo. R.S.A. Said section read, in part:

"In all counties of this state now or hereafter having seventy-five thousand inhabitants and less than ninety thousand inhabitants, the judges of the county court shall receive an annual salary of twenty-five hundred dollars. Said salary to be in lieu of the per diem heretofore allowed by law to said judges as judges of the county court, and in lieu of the salary heretofore allowed by law to said judges as members of the board or road overseers, under the provisions of section 8528.

\* \* \*

Thus, the judges of the County Court of Jasper County, a county of the second class, are entitled to receive a substantial increase in salary under Section 2494.1. However, reference is made to Section 13 of Article 7 of the Constitution of 1945, which provides as follows:

"The compensation of state, county and municipal officers shall not be increased during the term of office; nor shall the term of any officer be extended."

In view of the above constitutional provision, judges of the County Court of Jasper County must be compensated until the termination of the current terms of office, according to the old salary scale as was set out in Section 2494, and therefore are entitled to receive \$1,250.00 for their services as such for the six month's period beginning July 1, 1946, and ending December 31, 1946.

With regard to the further question presented, we will again call your attention to the fact that said judges receive

an annual salary for their services as judges of the county court.

Section 11008, Mo. R.S.A., has a bearing on this matter, and provides as follows:

"The judges of the county court, the county surveyor, the county assessor, the sheriff, the county clerk, and those sitting as members as may otherwise be provided, shall receive five dollars per day for each day they shall be present and act in the performance of their duties as members of the county board of equalization. Provided, that the above county officers who are now or may hereafter be compensated by salary shall not be entitled to the compensation provided in this section." (Underscoring ours.)

The above provision is plain and unambiguous in prohibiting county judges who are compensated by salary from receiving compensation for their services as members of the county board of equalization, and must be given effect as written. Since the county judges of Jasper County are compensated by a salary under Section 2494 and will also, at the expiration of the current terms of office, be compensated by a similar salary under Section 2494.1, they are not entitled to receive additional compensation for their services as members of the county board of equalization. It necessarily follows then that they are not entitled to receive said compensation during the specified period.

#### Conclusion.

In view of the foregoing, it is the opinion of this department that judges of the County Court of Jasper County, a county of the second class, are entitled to receive compensation in the amount of \$1,250.00 for their services as such during the six month's period beginning July 1, 1946, and ending December 31, 1946. It is our further opinion that said judges are not entitled to receive additional compensation for their services as members of the county board of equalization during said period.

Respectfully submitted,

APPROVED:

DAVID DONNELLY  
Assistant Attorney General

J. E. TAYLOR  
Attorney General

DD:ml

PRINTING:)  
COURTS:)

Purchasing agent lets the contract for printing and binding court reports, but Supreme Court controls storage, distribution and sale of said reports.

*Purchasing Agent*

November 7, 1947

FILED

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Honorable Wm. L. Smith  
State Purchasing Agent  
Jefferson City, Missouri

Dear Mr. Smith:

We have your letter of recent date which reads as follows:

"I am enclosing herewith a conformed copy of specifications, that have previously been handled through the Supreme Court.

They are contemplating issuing a new contract for the printing and storing of all reports.

I would like to ask your opinion to clarify the following questions.

'(1) Is the state purchasing agent authorized to act under Sec. 2080 R.S. 1939 in letting a two year contract? In other words, is this section to be treated as still in force but amended only to the extent that Section 76 of the Department of Revenue Act requires the contract to be let by the state purchasing agent instead of the Supreme Court?

(2) Are Sections 2081, 2082, 2083, and 2085, R. S. 1939 still in force and applicable to the contract in question.

(3) In view of the provisions of Section 82 of the Department of Revenue Act dealing with storage, is the state purchasing agent authorized to let a contract containing substantially the same storage provisions as are contained in the storage paragraph of the contract dated December 21, 1945?

(4) In view of the provisions of Section 82 of the Department of Revenue Act that 'except as otherwise provided by law' the purchasing agent shall be the sales agent for the state for any publication sold, is the purchasing agent authorized to enter into a contract providing that the distribution shall be in the hands of the printer subject to the directions of the Supreme Court; that is, containing substantially the same provisions as the paragraph on distribution contained in the contract of December 21, 1945? The position heretofore taken by the respective chief justices who authorized the form of contract in question was that the duties placed upon the court, particularly under Secs. 2082, 2083, and 2085, authorized the Supreme Court to use the printer as an agency of the state for making the distribution. This is a long established practice which has been approved in several audits made by the state auditor.

Do the words 'except as otherwise provided by law' in Sec. 82 of the Department of Revenue Act authorize the continuance of this practice under Secs. 2082, 2083, and 2085, R. S. 1939, which indicate an intent that the Supreme Court shall control the sale and distribution in accordance with what it believes to be in the best interests of the state? In this connection, it might be pointed out that not only are free copies provided for local and state officials, but hundreds of volumes are sent under exchange arrangements to state Supreme Court libraries and law school libraries all over the United States. The library of the Missouri Supreme Court and the library of the law school of the University of Missouri receive free of charge the official reports of other states'."

Sections 2080, 2081, 2082, 2083 and 2085, R. S. Mo. 1939, referred to in your letter, read as follows:



Section 2080 - "The supreme court of the state of Missouri is hereby authorized, empowered and directed to contract for the printing, stereotyping and binding of the decisions of the supreme court and the courts of appeals of the state of Missouri. On or before January 1st, 1927, and every two (2) years thereafter the supreme court, or any committee of the members thereof who may be appointed by the court to act hereunder, shall give notice by advertisement, published for thirty (30) days in at least one newspaper of general circulation printed in the English language in the city of St. Louis or Kansas City, that on a specified day and date bids will be received from responsible printers and binders for furnishing to the state the type-setting, plates or matrices, and for the printing and binding of the decisions of the supreme court and of the courts of appeals for a period of two years thereafter."

Section 2081 - "The specifications of the material, the composition, and the workmanship, and all other details necessary to the economical and prompt production of said volumes, as well as all proper safeguards and guarantees such as bid and contract bonds, shall be designated by the supreme court on terms most advantageous to the state."

Section 2082 - "The supreme court is hereby further authorized to designate the number of copies of each volume to be so printed and bound, keeping in mind the requirements of the state, and the public and legal profession, both in and out of the state, and each volume of said reports shall be copyrighted in the name of the clerk of the supreme court for the benefit of the people of the state of Missouri."

Section 2083 - "The supreme court is further authorized to fix the price at which said reports are to be sold to the citizens of this state and other states, provided said price to the citizens of Missouri shall not exceed the cost of manufacture and distribution. The custody of said books, stereotype plates and matrices shall be and remain in the charge of the supreme court or such officers of said court as shall be designated by said court to have charge thereof. Said officers so designated shall keep a record of the books, plates, and matrices received from the printer, shall deliver to the proper officers of the state such volumes as are or may be required to be delivered to or distributed through said officers to the officials authorized to receive same."

Section 2085 - "The contracts for the printing and binding of the current volumes of reports shall also specify the prices at which the contractor will print, bind and deliver reprints from the plates and from the matrices of the volumes previously issued."

The above statutes have been in existence many years, and they authorized the Supreme Court to contract for the printing and binding of the official reports of the Appellate Courts and to distribute and sell said reports. However, the 63rd General Assembly passed many statutes which changed the policies of the state as to many of its fiscal and business affairs, and it is necessary to examine these new statutes to see what, if any, changes have been made in the handling of the printing, binding and distribution of the official reports of the Appellate Courts.

The new statutes appropos of the questions we are considering are found at page 1449 - 1456, L. 1945, and they read as follows:

Section 76 - "The state purchasing agent shall purchase all public printing and binding of the state, including that of all executive and administrative departments, bureaus, commissions, institutions and agencies, the general assembly and the supreme court. In such capacity the state purchasing agent is hereby empowered and authorized to take over as a part of the records of his office, all

books, documents, and records which are now in the hands of the Commissioners of Public Printing and the Secretary of State relative to public printing. It shall be the duty of all state officers to order all of their printing and binding through the state purchasing agent. The purchasing agent may authorize any state penal, eleemosynary or educational institution, to procure all or any part of its own printing and binding."

Section 78 - "It shall be the duty of the state purchasing agent to advise with the officials and heads of departments as to the preparation of manuscript or copy for any printed matter, so the same may be handled in the most economical manner in the editing and printing. The form, style, size and arrangement of type, the spacing of lines, the width of borders and margins, the kind of binding, the method and material of all public printing shall, when not otherwise prescribed by law, be determined by the state purchasing agent having proper regard for economy and workmanship and the purpose for which the work is needed; provided that the form of the legislative printing shall remain substantially the same as that used during the session of the Sixty-second General Assembly, until changed by resolution; and provided that the clerk of the supreme court shall have authority to determine the typography of work done for the courts, after consultation with the purchasing agent; and provided that the Board of Curators of the University of Missouri and the Boards of Regents of the state colleges shall be authorized to determine for their respective institutions the typography of work done for those institutions after consultation with the state purchasing agent. The state purchasing agent, with the assistance of the purchasing committee provided in this act, shall standardize as many items of printing as shall be deemed practicable and shall from time to time prepare instructions to the using agencies describing the standards adopted and thereafter the purchasing agent shall not honor requisitions which do not comply with such standards."

Section 79 - "The state purchasing agent shall prepare specifications for all printing to be contracted for and shall invite all bids and let all contracts upon such specifications which shall be a part of each contract and shall not be changed or modified after the contract is awarded. Such specifications prepared by the purchasing agent shall state clearly and distinctly the kind and character of the work to be done, the quality of paper desired, the number of copies to be furnished, and wherever possible shall have attached a sample of previous issues of the publication or form. Copies of such specifications shall be made available to all bona fide applicants therefor."

Section 80 - "The state purchasing agent shall have the public printing of the state executed upon competitive bids, and shall award the contract to the lowest responsible bidder and shall in all instances reserve the right to reject any and all bids; provided that printing jobs of less value than \$50 may be purchased on the open market if approved by the comptroller. The purchasing agent may combine orders or subdivide individual jobs for the purpose of advertising and contracting as shall be to the best interests of the state. The purchasing agent shall exercise diligence in soliciting bids from all printing firms in the state that might reasonably be expected to be interested in bidding on any particular item and shall at all times endeavor to maximize competition among potential bidders. Bonds satisfactory to the purchasing agent shall be given by the parties to whom contracts are awarded, to secure the faithful performance of such contracts."

Section 82 - "The purchasing agent shall make rules governing the delivery, inspection, storage and distribution of all printing purchased under this law. He shall establish storage facilities for the storing of documents and printed matter of all state

agencies; provided however that the using agencies may be authorized by the purchasing agent to maintain in the vicinity of their own quarters sufficient quantities of documents and forms to meet their immediate needs. He shall establish facilities for the handling of mailing lists and shall maintain such mailing lists as the using agencies shall request, and may establish a duplicating unit to perform such work for the various state agencies. He may sell surplus paper and other such materials as may become obsolete. Except as otherwise provided by law, the purchasing agent shall be the sales agent for the state to sell any publication which by law may be authorized or required to be sold. Funds arising under this section shall go into the general revenue fund of the state."

Sections 2080 - 2085, R.S. 1939 have not been expressly repealed, so that we have them as well as the 1945 laws, supra, all dealing with the same subject matter. We must determine which of the various laws now control as to the printing, binding and distribution of the official reports of the Appellate Courts.

The 1945 Laws, supra, are a part of a general act dealing with the Division of Procurement. That act provides for the purchase of supplies and printing for the state government generally. It might be suggested that since Sections 2080 - 2085, R. S. 1939 are special statutes dealing with the one subject of printing and binding of official reports of the Appellate Courts, they were not repealed by the general statutes enacted in 1945 which deal with that same subject as a part of the general subject of state printing and binding. However, reference to Section 76 of the 1945 Laws, supra, will show that the printing and binding for the Supreme Court was specially provided for. The first sentence of that section provides that "The state purchasing agent shall purchase all public printing and binding of the state, including that of \* \* \* the general assembly and the supreme court." It thus appears that the 1945 Laws are

special as to the printing and binding for the Supreme Court, and clearly show that the Legislature intended to include that printing and binding in the duties of the state purchasing agent. In such a situation we think the 1945 act prevails over the 1939 sections dealing with the same subject matter. The rule applying to such a situation is stated in *State ex rel v. Smith*, 182 SW 2d, 571, 574, as follows:

"The settled rule, of course, is that in case of inconsistency the later act controls. (50 Am. Jur. 357, Sec. 355)"

Even if the 1945 act be considered a general act, we think it would still prevail over the 1939 statutes because the later provisions are inconsistent with the 1939 provisions and also clearly indicate an intention on the part of the Legislature to provide the only method that should be followed in the printing and binding of the court reports. With such a situation, the rule of construction applicable is stated in *Manker v. Faulhaber*, 94 Mo. 430, 439:

"The two statutes should be so construed as that both may stand if possible. Repeals by implication are not favored by the courts for cogent and sufficient reasons not necessary to repeat, and the prior law is to be upheld if the two acts may well subsist together. The charter act, conferring upon the mayor and aldermen the power to remove a municipal officer in the city of Sedalia, is special and particular. The act of 1877, providing for the removal of such an officer by a proceeding in the circuit court, is general and affirmative, containing no words negating the power conferred by the prior act. In order that the latter shall operate a repeal of the former, the two acts must be irreconcilably inconsistent, or it must clearly appear that the legislature intended by the latter act to prescribe the only rule that should govern in the case provided for."

Also in *State ex rel v. Smith*, 125 SW 2d 883, 885, it is said:

"It is a familiar doctrine that when there is one statute dealing with a subject in general and comprehensive terms and another dealing with a part of the same subject in a more minute and definite way, the two should be read together and harmonized, if possible, with a view to giving effect to a consistent legislative policy, but to the extent of any necessary repugnancy between them, the special will prevail over the general statute. Where the special statute is later, it will be regarded as an exception to, or qualification of the prior general one; and where the general act is later, the special will be construed as remaining an exception to its terms, unless it is repealed in express words or by necessary implication."

Also in *State ex rel v. Koeln*, 61 S.W. 2d 750, 755, it is said:

"The whole purpose of the many and harmonious rules of statutory construction is said to be to aid in arriving at the intention of the Legislature, as ascertained from the enactment itself, by calling in aid such of the rules as appear to have special application to the particular statute under consideration. In furtherance of such purpose we adopt and apply in this case a rule, or combination of rules, expressed in the following quotation: 'While the rule is that a general affirmative act, or the general provisions of an act, without express words of repeal, ordinarily will not repeal or affect a previous special or local act on the same subject, yet it is not a rule of positive law, but one of construction only; a special act may be impliedly repealed by a general one and the question whether it has been so repealed is always one of legislative intention.' *Schott v. Continental Auto Ins. Underwriters*, 326 Mo. 92, 31 S.W. (2d) 7; 59 C. J. Sec. 536. 'The special act is not repealed unless a different intent is plainly manifested, or where the two acts are irreconcilably inconsistent or repugnant, or where the general act covers the whole subject matter of the special one \* \* \* or is clearly intended to establish a uniform rule or system for the whole

state.' 59 C. J. Sec. 536; and cases cited in footnotes 85 and 89."

We conclude, therefore, that wherein the 1939 statutes and the 1945 statutes regarding the printing and binding of court reports are irreconcilably in conflict, the 1945 statutes prevail, but that such provisions of the two sets of statutes as are not so repugnant to each other that both cannot stand should be given effect. With the foregoing as a background, we will take up your questions in order.

Your first question, in effect, is whether the contract for printing and binding the official court reports of the Appellate Courts shall be let for a period of two years as required by Section 2080, R.S. 1939. It seems to us that Section 2080 is repealed by implication by the 1945 act since the latter act provides an entirely new procedure for letting the contracts in question. Section 2080 refers solely to contracts let by the Supreme Court. It authorizes the Court to let such contracts and directs it to let them every two years and prescribes the method of advertising and letting. Since the court no longer has the power to let such contracts, said section has no meaning. Had the sections merely directed that contracts for printing and binding the court reports should be let every two years, it might be contended that to that extent said section could still be effective. However, an entirely new setup has been created by the 1945 act which is wholly inconsistent with the directions given to the Supreme Court by Section 2080, and for that reason said section 2080 cannot longer be of any effect.

We find no specific directions to the purchasing agent as to when or for how long he shall let such contracts. Section 80 of the 1945 act, supra, gives that officer broad powers and wide discretion as to letting the contracts. Apparently, he can request bids whenever the case arises, and it is presumed he will offer contracts on such terms as would secure the best bids. However, there are certain limitations upon the powers of all officers to contract on behalf of the state. Section 60, page 1448, Laws 1945, provides as follows:



"No expenditure shall be made and no obligation incurred by any department without the following certifications: (1) Certification by the comptroller pursuant to the provisions of Section 36 of this act; (2) certification by the auditor that the expenditure is within the purpose of the appropriation and that there is in the appropriation an unencumbered balance sufficient to pay it. At the time of issuance each such certification shall be entered on the general accounting books by the comptroller as an encumbrance on the appropriation and on the allotment, provided that if the obligation shall not be incurred after such certification shall have been entered on the general accounting books as an encumbrance on the appropriation and on the allotment, such certification shall be removed from the general accounting books as an encumbrance on the appropriation and on the allotment. Any officer or employee of the state who shall make any expenditure or incur any obligation without first securing such certifications from the comptroller and the auditor shall be personally liable and liable on his bond for the amount of such expenditure or obligation. To prevent inconvenience and delay, the comptroller and the auditor shall be authorized to establish a system for certification of emergency or anticipated minor obligations and expenditures, and non-budgetary expenditures."

Section 36, which is referred to in the foregoing section, reads in part as follows:

"The division of the budget and comptroller shall have the power and its duties shall be: \* \* \* (2) To certify approval of the incurring of all obligations for the payment of money. As a prerequisite to such certification, the comptroller shall ascertain that the obligation to be incurred is within the work program and budget allotment. Each such certification from the comptroller to the state auditor shall be accompanied by a copy of the purchase order."

Therefore, a valid obligation could not be incurred by the purchasing agent unless he first obtained the certification of the comptroller to the effect that the contract obligation is within the budget allotment and also the certification of the auditor that the obligation is within the purpose of the appropriation, and that there is in the appropriation an unencumbered balance sufficient to pay it. Furthermore, Section 28, Art. IV, of the Constitution provides in part as follows:

"No appropriation shall confer authority to incur an obligation after the termination of the fiscal period to which it relates, and every appropriation shall expire six months after the end of the period for which made."

It follows, therefore, that no contract for printing and binding the official reports of the Appellate Courts could be made which incurred an obligation for an amount greater than the unencumbered appropriation for that purpose. Section 23, Art. IV, of the Constitution reads as follows;

"The fiscal year of the state and all its agencies shall be the twelve months beginning on the first day of July in each year. The general assembly shall make appropriations for one or two fiscal years, and the 63rd General Assembly shall also make appropriations for the six months ending June 30, 1948. Every appropriation law shall distinctly specify the amount and purpose of the appropriation without reference to any other law to fix the amount or purpose."

If, therefore, the appropriation out of which the expense of printing and binding the court reports is for one year only, the purchasing agent would necessarily be limited in his power to contract to the amount provided by said appropriation. If, however, the Legislature appropriated for a period of two years for said purpose, the purchasing agent would be free to contract up to the amount of said appropriation. The limitations of the appropriations would necessarily determine for what period the purchasing agent could make the contract extend. He would, of necessity, have to let a contract for each period provided for by the appropriation.

Your second question is whether Sections 2081, 2082, 2083 and 2085, R. S. 1939, are still in force and applicable to the printing and binding contract in question. Section 2081 provides that the "specifications of the material, the composition, and the workmanship, and all other details necessary to the economical and prompt production of said volumes, as well as all proper safeguards and guarantees such as bid and contract bonds, shall be designated by the supreme court \* \* \*". This section is an express authorization to the supreme court in connection with its powers to let the contracts as set forth in Section 2080. Since Section 2080 no longer has any effect, we think Section 2081 is likewise ineffective. Of course, Section 78 of the 1945 act provides that the purchasing agent shall determine the specifications of the printing "when not otherwise provided by law". It might be contended that as to the Appellate Court reports the method of determining the specifications has been "otherwise provided by law", i.e. by Section 2081. However, said Section 78 further provides that "the clerk of the supreme court shall have authority to determine the typography of work done for the courts, after consultation with the purchasing agent". The act of 1945 shows an intention on the part of the Legislature to give the supreme court some voice in determining the type or style of printing done for the supreme court. Had the Legislature considered that Section 2081 would still be effective, there would have been no reason to insert in Section 78 of the 1945 act the proviso giving the clerk of the supreme court the right to determine the typography of the work done for the courts. If we say Section 2081 is still in force, then we would have two inconsistent provisions as to determining the typography of the printing for the courts. Section 2081 would give the supreme court the right to determine the typography, and Section 78 of the 1945 act would give the clerk of the supreme court the same authority. Since the two provisions are repugnant the later will prevail. For these reasons we think Section 2081 is no longer of any force and effect.

Section 2082 authorizes the Supreme Court to designate the number of copies of each volume of court reports to be printed and bound, and directs that each copy shall be copyrighted in the name of the clerk of the Supreme Court for the benefit of the people of the state. Section 84 of the 1945 act reads in part as follows:

"The state purchasing agent shall except as otherwise directed by the general assembly have the power to determine the number of copies and number of pages of subject material in each document printed under his supervision."

Under the rules of construction heretofore discussed, Section 2082 would be considered as an exception to Section 84 of the 1945 act. Section 84 assumes that there are or may be instances in which authorities other than the purchasing agent will determine the number of documents and reports to be printed. Section 2082 specifically provides for such designation of the number of copies of court reports to be printed. We, therefore, have a specific exception in the 1945 act as to who shall determine the number of court reports to be printed. Moreover, there is no express repeal of Section 2082, and repeals by implication not being favored, we think Section 2082 is still in force.

Section 2083 authorizes the Supreme Court to fix the price at which the court reports shall be sold and gives the court custody of certain printing equipment. We find no specific provision in the 1945 act authorizing the purchasing agent to set a price on the court reports. While Section 2083 gives the Supreme Court specific authority to fix the price at which reports shall be sold and gives the court the custody of the printed reports and authorizes the court to distribute to the proper officers of the state such volumes as are or may be required to be delivered to or distributed through said officers to the officials authorized to receive same, it does not specifically authorize the court to sell said reports. The only volumes said section specifically authorizes the court to dispose of are those which are to be distributed to officials authorized to receive them. However, under the familiar rule that where an officer is given express authority to do an act he is also given such implied authority as is necessary to make the express grant of authority effective, the supreme

court would have the right to sell such volumes as might be demanded by the public. (State ex rel Bybee v. Hackmann 276 Mo. 110, 207 S.W. 64) There would be no point in the legislature providing a price at which the reports could be sold and giving the custody of said reports to the Supreme Court, and not making any provision for actually selling the reports. The power to sell the reports is impliedly embodied in the powers given by said section.

It might be suggested that since Section 82 of the 1945 act provides that "except as otherwise provided by law, the purchasing agent shall be the sales agent for the state to sell any publication which by law may be authorized or required to be sold", the authority to sell the court reports is now vested in the purchasing agent. However, since the supreme court is authorized to determine the number of volumes of court reports to be printed, to fix the price at which the reports shall be sold, to have complete custody of said printed reports and to distribute such reports to officials who are authorized to receive them, we think that the supreme court also has the implied authority to sell the reports to such as may want to purchase. It seems to us that the legislature intended that the supreme court should handle its own reports and the reports of other appellate courts, and that, therefore, the provision of Section 82, last quoted, does not apply to court reports since other provisions have been made by law for their sale.

Section 2085 provides that contracts for printing and binding court reports shall specify the prices at which the contractor will print, bind and deliver reprints of the volumes issued. There is nothing in the 1945 act which is repugnant to the provisions of said section. The purchasing agent is given the power by the 1945 act to contract for the printing and binding of court reports, but the requirement of Section 2085 that he include a certain provision in the contract is not repugnant to the powers given to him by said act. Under the rules of construction heretofore discussed, if section 2085 and the 1945 act can be so construed that both can be given effect, such construction should be adopted. We think this can be done with the result that the purchasing agent can let the contract as provided by the 1945 act but must include in it a provision as required by Section 2085, R. S. 1939.

What we have said answers your third and fourth questions also. Since the purchasing agent does not have the custody and storage of the printed reports, it would not be within his province to contract for such storage. The same applies to the distribution of such reports. The supreme court can make contracts as to storage of the printed reports and other supplies and equipment committed to its custody by Section 2083, R.S. 1939. Being given the custody and control of such reports, matrices, etc., and the sale and distribution of the reports, it necessarily has the power to contract for such storage, distribution and sale, but upon such terms as are reasonable. The court would not be expected physically to store and handle such articles, but it could contract with the printer or such other agency as it chose to keep same.

The construction we have placed upon the statutes referred to in your letter results in the purchasing agent letting the contract for printing and binding the official court reports of the appellate courts but the supreme court controlling the matter of the printing and binding, storage, sale and distribution of said reports in all other respects. This situation is not out of harmony with the general theory of the law. The judicial department of the government is an independent branch and the handling of its own printed decisions, which make up a large part of the law which governs the citizens of the state, is a natural and necessary incident of its function. The supreme court is the over-all superintending authority of the judicial branch, and it is the proper authority to control the distribution and sale of the reports of all the appellate courts, including its own reports.

#### Conclusion

It is, therefore, the opinion of this office that:  
(1) Sections 2080 and 2081, R.S. Mo. 1939 are not in force and effect, having been repealed by implication by the Revenue Act of 1945 (pp. 1449 - 1456, Laws 1945);  
(2) Sections 2082, 2083 and 2085, R.S. Mo. 1939 are still in force and effect; (3) the purchasing agent

cannot enter into a contract for printing and binding the reports of the appellate courts for a longer period than the period of the appropriation currently available for that purpose; and (4) the supreme court may contract for the storage and distribution of the court reports of the appellate courts and that the contract may be with the printing company if the court so elects.

Yours very truly,

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HARRY H. KAY,  
Assistant Attorney General

APPROVED:

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J. E. TAYLOR,  
Attorney General.

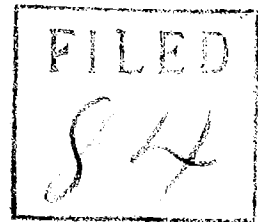
HHK/vlv

**DRAINAGE DISTRICTS:**

**LEVYING OF ADDITIONAL  
TAXES:**

County courts may levy additional taxes to pay claims against the district, provided a total of all levies against the district does not exceed the total amount of benefits assessed.

January 28, 1947



Honorable Edward W. Speiser  
Prosecuting Attorney  
Chariton County  
Koytesville, Missouri

Dear Sir:

This is in reply to your letter of January 18, 1947, in which you request an official opinion from this department on the following statement of facts:

"About three years ago the Bee Branch Drainage District was organized in Chariton County, pursuant to the authority contained in Chapter 79, Article 3, commencing with Section No. 12398 of the Missouri Revised Statutes Annotated.

"Thereupon in strict accordance with the procedure outlined in Article 3, the contract for the work was duly let and thereafter completed. The construction of the drainage ditch was duly accepted and confirmed by the County Court. It appears that there was not sufficient money available from taxes levied to pay the contractor in full, and they still owe him the amount of \$700.00. The contractor has complied in every way with the provisions of the contract, and undoubtedly is entitled to this balance due him. The County Court desires to pay him this money, but are hesitant concerning the proper procedure for raising the money with which to make the payment. Bonds were issued in this case and have all been sold, and the proceeds of the bonds and taxes levied have been spent.

"The County Court has instructed me to request an opinion from you as to whether or not under the circumstances stated, they have the authority and power to levy



an additional tax in accordance with the provisions set forth in Section 12413 of said Article 3, or possibly under some other authority. They are hesitant about proceeding unless they have an opinion from your office concerning the authority to do so. It is my opinion that they have this authority in view of said Section 12413, and also in view of the holding of the Court in Charidon vs. Fleming, 93 Missouri 321."

Section 12413, R. S. Mo. 1939, to which you refer in your letter, seems to be the authority for county courts to levy taxes for the construction of drainage districts. This section reads as follows:

"The list and schedule specified in section 12412 shall be prepared in the form of a well-bound book which shall be named and indorsed 'drainage tax record of drainage district number of county, Missouri,' which indorsement shall also be printed or written at the top of each page in said book and the same shall be signed by the county clerk, attested by the seal of the county court and shall hereafter remain a permanent record in the office of said clerk. In case the proceeds of the taxes levied as herein provided are not sufficient to construct the improvements as described in the report of the viewers and engineer as confirmed by the court, then the court shall make, certify and provide for the collection of such additional tax levies as are necessary to complete the improvement: Provided, however, that the aggregate of all such levies, exclusive of taxes levied for interest on bonds, does not exceed the total benefits assessed and confirmed. If any sum be needed to pay any judgment against the district and upon the filing of a certified copy of said judgment with the clerk of the county court, it shall be the duty of the county court, at the next term, to levy sufficient taxes to pay the same and to add thereto sufficient taxes to pay the interest on said judgment. The court shall levy, certify and provide for the collection of said taxes as hereinbefore provided and shall apportion

the same to the lands or other property in proportion to the original assessment of benefits, but not in excess thereof, and if in excess thereof then in such proportion as will not, with other lawful tax levies, made and collected be in excess of the benefits reported by the viewers and confirmed by the court."

The only limitation in this section seems to be that the aggregate of all such levies, exclusive of taxes levied for interest on bonds, does not exceed the total benefits assessed and confirmed. I believe this question has been answered a number of times by the Supreme Court, and one of the latest cases that we find wherein it was under discussion is the case of State ex rel. Ross v. General American Life Insurance Company, 85 S.W. (2d) 68, l.c. 75. The court, in discussing this question, referred to two other cases, namely, State ex rel. D. D. No. 8 of Pemiscot County v. Duncan, 68 S.W. (2d) 679, and State ex rel. Sturdivant Bank v. Little River D. D., 68 S.W. (2d) 671; and in connection with this discussion, the court said:

" \* \* \* In both of these cases the court had occasion to say that under section 10759, R. S. 1929 (now Section 12340, R. S. Mo. 1939), and under the laws of Missouri drainage districts have no inexhaustible power to tax but are restricted to the amount of benefits assessed, and said section so provides. \* \* \* "

Said Section 12340, R. S. Mo. 1939, relates to drainage districts organized by circuit courts. Section 12413, R. S. Mo. 1939, contains similar provisions, and it relates to drainage districts constructed and improved by county courts. In both of these sections, it will be found that the total benefits assessed and confirmed is the maximum amount to which courts may go in levying taxes. In the case of State ex rel. Sturdivant Bank v. Little River D. D., 68 S.W. (2d) 671, l.c. 673, the court made the following statement relative to this question:

"\* \* \* Under sections 10757 and 10781 (Mo. St. Ann. Sections 10757, 10781, pp. 3484, 3506), if the estimated cost of construction exceeds the total assessed benefits allowed by the court the improvement cannot be made and the district must be dissolved. The act does not provide for new

or supplemental benefit assessments thereafter except, on certain conditions, under section 10790 (Mo. St. Ann. Section 10790, p. 3518), for maintenance purposes; or where, because of a change in boundaries or for other reasons, the plan for reclamation is changed. See sections 10784, 10786, 10793 (Mo. St. Ann. Sections 10784, 10786, 10793, pp. 3508, 3512, 3520). In other words, the mere fact that the total benefit assessment proves inadequate to finance the cost of construction or to pay bonds issued for that purpose will not authorize an increase in the assessment.

"Section 10759 (Mo. St. Ann. Section 10759, p. 3486) requires a total or aggregate tax to be levied on all the land in the district, without unnecessary delay, of such portion of said assessed benefits as the board of supervisors shall find necessary to pay the cost of constructing the proposed drainage works and improvements, plus 10 per cent. for emergencies. See *Elaborry Drainage Dist. v. Winkelmeier*, 278 Mo. 268, 275, 212 S.W. 893, 895. This tax is apportioned to the various tracts of land in the district according to the benefits charged to each, and cannot exceed the assessed benefits. Section 10760 (Mo. St. Ann. Section 10760, p. 3488) directs that the board of supervisors 'shall each year thereafter determine, order and levy the amount of the annual installment of the total taxes levied under the preceding section.' Under section 10793 (Mo. St. Ann. Section 10793, p. 3520), if the initial total tax levy made pursuant to section 10759 is found to be insufficient to pay the cost of constructing the drainage improvement contemplated by the plan for reclamation, additional levies may be made for that purpose, 'provided, the total of all levies of such tax does not exceed the total amount of benefits assessed.'"

We think the language of the foregoing statute and the rulings of the court relating to this question clearly demonstrate that the county court may levy additional taxes necessary to complete the improvement, provided that the aggregate

of all levies, exclusive of taxes levied for interest on bonds, does not exceed the total benefits assessed and confirmed.

However, from a reading of said Section 12413, one might be in doubt as to whether the provisions of that section, following the part which provides a method for paying judgments, was limited to paying judgments or whether it was meant to include any excess cost of the drainage district over the estimated cost. The section provides a method for paying judgments if the claim for doing the drainage work is unpaid and has been reduced to judgment. The statute reads: "Upon the filing of a certified copy of said judgment \* \* \* it shall be the duty of the county court \* \* \* to levy sufficient taxes to pay the same \* \* \*."

"The court shall levy, certify and provide for the collection of said taxes as hereinbefore provided and shall apportion the same to the lands or other property in proportion to the original assessment of benefits, but not in excess thereof, \* \* \*" By using the above term, "as hereinbefore provided," it is clear that reference is had to all the provisions of the section that precede the words "as hereinbefore provided." It would seem, therefore, to follow that the section means that the county court shall follow the procedure set forth by the statute as it appears in that part thereof before the words "as hereinbefore provided." This is true regardless of whether it is to raise the additional money to pay a judgment or to pay drainage expenses that have not been reduced to judgment.

The statute then provides that the additional taxes so raised shall be apportioned to the property in proportion to the original assessment. It says: "The court \* \* \* shall apportion the same to the lands or other property in proportion to the original assessment of benefits." If it referred to paying off in that way only those drainage expenses that had been reduced to judgment, it would have so stated. The words used are inconsistent with the limitation to pay only that part of the excess expenses that have been reduced to judgment.

If the cost of the construction is more than the estimated cost, the statute permits the court to make the levy to meet it, provided that such additional levy coupled with other lawful tax levies are not "in excess of the benefits reported by the reviewers and confirmed by the court."

Hon. Edward W. Speiser

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CONCLUSION

It is therefore the opinion of this department that the county court may levy a tax, in addition to the tax necessary to retire the bonds issued for the improvement of a drainage district, provided it is necessary to make such levies, and providing that the aggregate of all the levies against the district, exclusive of taxes levied for interest on the bonds, does not exceed the total benefits assessed and confirmed.

Respectfully submitted,

TYRE W. BURTON  
Assistant Attorney General

APPROVED:

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J. E. TAYLOR  
Attorney General

TWB:VLM

ROADS AND BRIDGES: Maximum tax levy for township expense is 20¢ per \$100  
TAXATION: valuation, but when levies for county purposes and town-  
TOWNSHIPS: ship expense total more than maximum levy provided in Sec.  
11, Art. X, of Constitution, 80% of tax is paid to county  
and 20% to township. Tax levy authorized by Sec. 8529,  
H.C.S.H.B. 784, in addition to tax levy authorized by  
Sec. 8820, H.C.S.H.B. 798.

April 18, 1947

FILED

84

Honorable Edward W. Speiser  
Prosecuting Attorney  
Chariton County  
Keytesville, Missouri

Dear Sir:

This is in reply to your letter of recent date, requesting  
an official opinion of this department, and reading as follows:

"I will appreciate an opinion from your of-  
fice on the following proposition:

"There seems to be considerable confusion  
in the minds of the various Township Boards  
of this county concerning the limits of tax-  
ation imposed on these respective adminis-  
trative bodies by the new Constitution and  
the laws enacted since its adoption.

"The Township organizations are particular-  
ly concerned to know the limits of the levy  
that the respective boards may make for  
raising taxes for general township purposes.  
The levy made by the County Court in this  
county for general purposes is forty cents  
on the \$100.00 assessed valuation. Some of  
the Township Boards in this county state  
that their current needs for general township  
purposes will require as high as a fifty cent  
levy in their townships in order to raise  
such taxes to take care of their current needs.  
In fact, some of them have already made fifty-  
cent levies. The combined levies, therefore,  
would be ninety cents for general County and  
Township purposes. Would these be valid  
levies? If the Boards can't legally make such  
levies, could they be legally made by the sen-  
timent of the voters? Section 11047 of Mis-

souri Revised Statutes Annotated - Re-enacted Laws, 1945, states that the combined rate for both county and township shall not exceed the maximum rate provided by the Constitution. Does this mean the maximum rate set out in Section 11, Article 10 of the Constitution, or does it refer to Section 26B and 26C of Article 6, or possibly some other section? If it refers to the first referenced section, does it mean that in this county where there is a levy of forty cents for county purposes, that the township would be limited to ten cents for general township purposes?

"Also, I wish to refer you to Section 8529, M.R.S.A. - House Bill No. 784 - Re-enacted Laws, 1945. This section provides that by the majority of the qualified voters voting, in any general road district an additional levy of thirty-five cents may be had for road and bridge purposes. I assume this is in addition to the thirty-five cents levy the Board may make as provided by Section 8820 M.R.S.A. Is this assumption correct?

"In general, we would like to have a statement of the laws concerning the townships' rights and limitations in regard to the levying of taxes for general purposes, and also, for road and bridge purposes.

"We have endeavored to find a solution from a careful study of the provisions of the new Constitution and the various laws enacted pursuant thereto, but we have been unable to arrive at any positive conclusion. Your help in straightening out these matters in our minds will be greatly appreciated.

"Due to the fact that these matters concern every taxpayer in this county, I would like to have an early reply."

Section 13985 of House Bill No. 904 of the 63rd General Assembly provides as follows:

"The township board of directors shall, annually, not less than twenty nor more than

sixty days prior to the first day of September, make out and file with the clerk of the county court of their county an estimate of the amount of money required to defray the expenses of said township during the next ensuing year. Said estimate shall be signed by the president and attested by the clerk of the board. The clerk of the county court shall cause the same to be placed on the tax books of said township: Provided that the amount of such expenses shall not exceed in any one year twenty cents on the hundred dollars assessed valuation of the taxable property within said township."

Section 11047 of House Committee Substitute for House Bill No. 468 of the 63rd General Assembly provides as follows:

"In all counties in this state which have now or may hereafter adopt township organization, if the amount of revenue desired and estimated by the county court for county purposes and the amount desired and estimated by any township board for township purposes shall together exceed the rate per cent on the one hundred dollars valuation allowed by Section 11 of Article X of the Constitution of Missouri 'for county purposes,' then it shall be the duty of the county court to apportion the tax 'for county purposes' between the county organization and the township organization in the following manner, to wit: Eighty per cent of the taxes which may be legally levied 'for county purposes' shall be apportioned to the county organization for county purposes, and twenty per cent of such taxes shall be apportioned to the township organization for the purposes provided by Section 13980 of the township organization law, as specified by the township board; but the combined rate for both the county and township organizations shall not exceed the maximum rate provided by the Constitution."

These two sections provide that (1) the township board shall make its estimate, which estimate shall not require a tax levy in excess of twenty cents per one hundred dollars, and (2) that



if the total of the levy for county purposes levied by the county court plus the tax levy required by the estimate of the township board exceeds the limit set by Section 11 of Article X of the Constitution, the maximum rate allowed by Section 11 of Article X of the Constitution shall be levied and eighty per cent of such levy shall go to the county and twenty per cent to the township.

In Chariton County, if the county court levies forty cents per one hundred dollars and the various township boards wish to levy more than ten cents per one hundred dollars for township expenses, the maximum levy will have to be made by the county court, that is, a levy of fifty cents per one hundred dollars, the maximum allowed by Section 11 of Article X of the Constitution, of which eighty per cent, or forty cents per one hundred dollars, will go to the county, and twenty per cent, or ten cents per one hundred dollars, will go to the township for its expenses.

We are unable to find any authority in the Constitution or laws of this state for an increase of tax rates for township expenses, by election or otherwise, over the rates allowed by Section 13985 of House Bill No. 904 and Section 11047 of House Committee Substitute for House Bill No. 468.

Your question regarding Section 8529 of House Committee Substitute for House Bill No. 784 of the 63rd General Assembly is answered by an official opinion of this department rendered under date of February 4, 1947, to Herbert S. Brown, a copy of which opinion we are enclosing.

We are also enclosing copies of official opinions of this department rendered under date of May 1, 1945, to R. Kip Briney, March 21, 1947, to Roy S. Miller, and March 24, 1947, to Herbert S. Brown, in answer to your request for a statement as to the laws concerning taxes for road and bridge purposes.

#### CONCLUSION

It is the opinion of this department:

(1) That Section 13985 of House Bill No. 904 of the 63rd General Assembly sets a maximum tax levy of twenty cents per one hundred dollars valuation for township expenses, and that under the provisions of Section 11047 of House Committee Substitute for House Bill No. 468 of the 63rd General Assembly, if the tax

Honorable Edward W. Speiser - 5

levy for county purposes and the tax for township expenses total more than the constitutional limit as set out in Section 11 of Article X of the Constitution, taxes collected from the maximum levy for county purposes shall be paid, eighty per cent to the county and twenty per cent to the township; and

(2) That a tax levy authorized by Section 3529 of House Committee Substitute for House Bill No. 784 is in addition to the tax levy authorized by Section 8820 of House Committee Substitute for House Bill No. 798 of the 63rd General Assembly.

Respectfully submitted,

C. E. BURNS, Jr.  
Assistant Attorney General

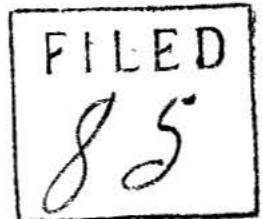
APPROVED:

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J. E. TAYLOR  
Attorney General

CBB:HR

ARTICLES: Applicability of Motor Vehicle Safety Responsibility Act to taxicabs.



July 18, 1947

8/1

Mr. Hinkle Statler, Supervisor  
Motor Vehicle Registration Unit  
Division of Collection  
Department of Revenue  
Jefferson City, Missouri

Dear Sir:

Reference is made to your inquiry of recent date, requesting an official opinion of this office, and reading as follows:

"Will you please give this Department an opinion on the following questions.

"Under the laws of this State, are taxicabs classed as common carriers? If so, are they liable under the provisions of House Bill No. 317?"

We are further informed that your first question is to be answered in the light of the following exemption clause found as a part of subsection (b) of Section 8470.15, Mo. R. S. A., forming a part of the Motor Vehicle Safety Responsibility Act:

"(b) Notwithstanding anything else herein contained, this Act shall not apply with respect to any motor vehicle owned by the United States, the State of Missouri, or any political subdivision of this State, or any municipality therein, nor shall this Act apply to any common carrier or contract carrier whose operations are subject to the jurisdiction of and are regulated by the Interstate Commerce Commission or the Public Service Commission of Missouri, or by regulatory ordinances of the municipalities served by such common or contract carrier, and which shall have satisfied any applicable requirements concerning bond, insurance or proof of financial responsibility

imposed by the regulatory authority having jurisdiction over the carrier's operations.  
(Emphasis ours.)

The Motor Vehicle Safety Responsibility Act does not contain within itself a definition of the phrase "common carrier." We, therefore, must look to the general law of the state to determine the meaning to be accorded thereto. We quote from State ex rel. Anderson v. Witthaus, 102 S. W. (2d) 99, 1. c. 101, wherein the Supreme Court of Missouri promulgated the following definition:

"In State ex rel. v. Public Service Commission, 275 Mo. 483, 205 S. W. 36, 42, 18 A.L.R. 754, the following from 1 Wyman on Public Service Corporations, 227, was quoted with approval: 'The fundamental characteristic of a public calling is indiscriminate dealing with the general public. As Baron Alderson said in the leading case: "Everybody who undertakes to carry for any one who asks him is a common carrier. The criterion is whether he carries for particular persons only, or whether he carries for every one. If a man holds himself out to do it for every one who asks him, he is a common carrier; but if he does not do it for every one, but carries for you and me only, that is a matter of special contract." This regular course of public service without respect of persons makes out a plain case of public profession by reason of the inevitable inference which the general public will put upon it. \* \* \* "

Neither does the Motor Vehicle Safety Responsibility Act define the term "taxicab." However, in the Public Service Commission Act, particularly Section 5720, subsection (d), Mo. R.S.A., we find the following:

"(d) The term 'taxicab,' when used in this article, shall mean every motor vehicle designated and/or constructed to accommodate and transport passengers, not more than five in number, exclusive of the driver, and fitted with taximeters and/or using or having some other device, method or system, to indicate and determine the passenger fare charged for distance traveled, and the principal opera-

tions of which taxicabs are confined to the area within the corporate limits of cities of the state and suburban territory as herein defined."

Under Section 5721, Mo. R.S.A., taxicabs, as above defined, are exempted from the provisions of the Public Service Commission Act and are relieved from the control and supervision of that body. This section reads, in part, as follows:

"The provisions of this article shall not apply to any motor vehicle of a carrying capacity of not to exceed five persons, or one ton of freight, when operated under contract with the federal government for carrying the United States mail and when on the trip provided in said contract; \* \* \* nor taxicab, as herein defined; \* \* \*" (Emphasis ours.)

This exemption was upheld by the Kansas City Court of Appeals in the recent case of State ex rel. Crown Coach Co. v. Public Service Commission, 185 S. W. (2d) 347. We quote therefrom, l. c. 357:

"It is evident that under Section 5720(c), R.S. Mo. 1939, motor vehicles of the type therein described and used for hire as common carriers are either 'taxicabs' or they are not 'taxicabs', depending on the location of their principal operations. Under the evidence in this case the motor vehicles in question were common carriers for hire. See State ex rel. Anderson v. Witthaus, 340 Mo. 1004, 102 S. W. 2d 99. To determine the jurisdiction, if any, of the Public Service Commission over such vehicles of the type described, when used for hire as common carriers, as in the instant case, the statutory test is whether the 'principal operations' of the same are 'confined to the area within the corporate limits of cities of the state and suburban territory as herein defined.' If the facts show all the elements of such exemption to exist, then no part of Article 8, Chapter 35, R.S. Mo. 1939, applies to such carriers and the Public Service Commission has no power or jurisdiction over them. If the facts show any element of exemption lack-

ing, then such vehicles are within the purview of Section 5720(b) and 5725, which statutes and all other applicable provisions of said article affect such vehicles, and the jurisdiction of the Public Service Commission would obtain."

From the foregoing, it appears that the question of whether or not a particular operation is or is not common carriage is one of fact to be determined in accordance with the statutory regulations. If a particular vehicle is found to be a taxicab, as defined in the Public Service Commission Act, it is not subject to regulation by that body. If not so found, it is subject to their regulation, as was pointed out in the case last cited, supra.

Referring again to Section 8470.15, Mo. R.S.A., containing the exemption relative to the Motor Vehicle Safety Responsibility Act, it will be noted that all operations which are subject to regulation and supervision by the Public Service Commission have been exempted from the provisions of the act. This by reason of the fact that all such regulated operations include as a part thereof requirements for posting evidence of financial responsibility equivalent to or greater than those imposed under the Motor Vehicle Safety Responsibility Act. To require further evidence of financial responsibility under the latter act would amount to an unjust hardship upon those carriers previously having filed proof of financial responsibility with the Public Service Commission, in that a duplication would result.

However, you will also note that a further exemption obtains on behalf of those common carriers who are subject to the jurisdiction of and are regulated by ordinances of municipalities served by such carriers, and which have in fact satisfied applicable requirements concerning bonds, insurance or proof of financial responsibility. Under the provisions of Section 5721, Mo. R.S.A., the right of municipalities to regulate its public highways has been specifically recognized. We quote, in part, from that section:

" \* \* \* No provision of this article shall be so construed as to deprive any county or municipality within this state of the right of police control over the use of its public highways, \* \* \* "

Also, in construing the exemption afforded taxicabs under the Public Service Commission Act, the Kansas City Court of

Appeals said in State ex rel. v. Public Service Commission, 185 S. W. (2d) 347, 1. c. 357:

"The exemption of 'taxicabs' from the regulation and jurisdiction of the Public Service Commission under Section 5721 has other purposes than those personal to the operators of that type of service. No doubt one main purpose was to allow for the local regulation of such carriers by the municipality involved. \* \* \*"

It is a matter of common knowledge that many municipalities have ordinances, regulatory of the operations of taxicabs and other common carriers, which incorporate requirements respecting bonds, insurance or proof of financial responsibility. Again, this remains a question of fact to be determined in each particular instance.

The general purpose of the Motor Vehicle Safety Responsibility Act, in one phase, seems to be that persons operating motor vehicles shall be required, under certain circumstances, to furnish evidence of financial responsibility in one of the several ways provided therein, and that there has been exempted from the act those motor vehicles which are operated under the jurisdiction of regulatory bodies who have the authority to, and in fact have imposed as a condition precedent to such operations a requirement that such operators furnish equivalent or greater proof of financial responsibility than is required by the Motor Vehicle Safety Responsibility Act itself. Of course, such exemption is extended only to those who have actually complied with such regulatory requirements.

#### CONCLUSION

In the premises, we are of the opinion that motor vehicles the construction and operation of which are not such as to constitute them "taxicabs" within the meaning of the Public Service Commission Act, but which in fact are commonly known as taxicabs and the operations of which are such as to place them within the jurisdiction of the Public Service Commission, are exempt from the provisions of the Motor Vehicle Safety Responsibility Act.

We are further of the opinion that motor vehicles operated as taxicabs within the meaning of that term as defined in the Public Service Commission Act, but which are exempted therefrom,

Mr. Hinkle Statler

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but the operations of which are subject to regulation by municipal authorities, are also exempted from the provisions of the Motor Vehicle Safety Responsibility Act if such municipal regulations include proof of financial responsibility and such requirement is in fact complied with.

Respectfully submitted,

WILL F. BERRY, Jr.  
Assistant Attorney General

APPROVED:

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J. E. TAYLOR  
Attorney General

WFB:HR



MOTOR VEHICLES: (1) "Bookmobiles" owned by County Library Districts exempt from provisions of motor vehicle registration and licensing provisions; (2) type of license required of persons employed to operate "Bookmobiles."

August 27, 1947

FILED

85

Mr. Hinkle Statler, Supervisor  
Motor Vehicle Registration  
Division of Collection  
Department of Revenue  
Jefferson City, Missouri

Dear Sir:

Reference is made to your request of recent date for an official opinion of this department, reading as follows:

"Numerous inquiries are being received in this office with reference to the necessity of Bookmobiles, used by County Library Districts, to comply with the registration and licensing provisions of the Missouri Motor Vehicle Laws. We request an official opinion upon this question.

"We would also like to be advised as to the type of license that should be obtained by the operators of such motor vehicles."

I.

The motor vehicles referred to in your letter of inquiry are those owned and operated by County Library Districts for the purpose of distributing books to rural subscribers. They are generally of a van type body, equipped with suitable book shelving, mounted upon a light truck or passenger automobile chassis. Such vehicles belong to the County Library Districts of the various counties wherein such districts have been established under the provisions of Article 6, Chapter 110, R. S. Mo. 1939.

A brief discussion of the nature of such County Library Districts is deemed pertinent for reasons which will appear subsequently.

The provisions of Article 6, Chapter 110, R. S. Mo. 1939, referred to, in effect, provide for the establishment of County Library Districts upon petition and election by the inhabitants of such proposed districts. Such districts, when established, are under the control and supervision of a County Library Board of five members, consisting of the County Superintendent of Schools, who serves ex officio, and four other members appointed by the County Court. Library Districts, so established, are by statute described as corporate bodies, with power to sue and be sued, and with authority to acquire and hold both real and personal property.

With particular reference to the use of "Bookmobiles," Section 14775, R. S. Mo. 1939, specifically requires that the services of the library maintained in such districts be freely accessible to all residents thereof through branches, stations, travelling libraries and book wagons. From the foregoing, it is clear that such County Library Districts not only have the power to acquire and make use of "Bookmobiles," but, in accordance with the spirit of the statutory enactments, they should do so in proper cases in order to render the services of the library available to all of the inhabitants.

Turning now to the provisions of Section 8374, found as a part of Article 1, Chapter 45, R. S. Mo. 1939, relating to registration and licensing of motor vehicles, your attention is directed to the following portion thereof:

" \* \* \* and all other motor vehicles owned by municipalities, counties and other political subdivisions of the state shall be exempt from the provisions of this article requiring registration, proof of ownership and display of number plates: Provided, however, that there shall be displayed on each side of such motor vehicle, in letters not less than 3 inches in height with a stroke of not less than 3/8 of an inch wide, the name of such municipality, county or political subdivision, the department thereof, and a distinguishing number.

\* \* \*

It then becomes germane to a consideration of your inquiry to determine whether or not "Bookmobiles" owned and operated as described above are exempt under the provisions quoted. If so, it must be by reason of their ownership by a "political subdivision of the state."

The term "political subdivision of the state," in general, is defined as follows:

"A subdivision of a state to which has been delegated certain functions of local government." 49 C. J., page 1077.

We do not find a definition of this phrase in any appellate court decision of Missouri defining the term in its general sense. We are familiar with the many cases decided under the provisions of Section 12, Article VI, of the Constitution of 1875, giving appellate jurisdiction to the Supreme Court "in cases where a county or other political subdivision of the State \* \* \* is a party," and which hold that school districts, levee districts, drainage districts, etc., are not comprehended within the term as used in that constitutional provision.

However, we believe that the Supreme Court itself has indicated that such subsidiary governmental subdivisions are "political subdivisions of the state" in a general sense. That this is true appears in *Bushnell v. Drainage District*, 102 S. W. (2d) 871, 1. c. 874, wherein the court said, quoting approvingly from *Wilson v. Drainage & Levee District*, 139 S. W. 136, 1. c. 140:

" \* \* \* 'the words "other political subdivisions of the state," as used in section 12, art. 6, following as they do the word "county," mean such political subdivisions as may be created having powers similar to those of a county, and do not refer to townships, school districts, levee districts, drainage districts, and such like minor political subdivisions of the state.' See, also, *Chilton v. Drainage District No. 8 of Pemiscot County*, 332 Mo. 1173, 61 S. W. (2d) 744."

Therefore, we do not believe that these cases are authority for holding that townships, school districts, levee districts, etc., may not be "political subdivisions of the state" in the general sense, but rather, on the contrary, that they are "political subdivisions of the state."

That the General Assembly has considered school districts, at least, to be "political subdivisions of the state" within the exemption provision quoted from Section 8374, R. S. Mo. 1939, supra, appears by reason of the incorporation therein of further

provisions relating to the issuance of a particular type of plates to be used on motor vehicles for the transportation of school children.

Further, viewing the powers of the County Library Districts in the light of the general definition of the phrase "political subdivisions of the state," it seems to us that such districts are to be included within the meaning of the exemption statute quoted. We, therefore, reach the conclusion that they are exempt from the statutes relating to registration, proof of ownership and display of number plates.

## II.

With respect to the second question which you have proposed, your attention is directed to the following definitions, found as a part of Section 8367, R. S. Mo. 1939:

" \* \* \* 'Chauffeur.' An operator (a) who operates a motor vehicle in the transportation of persons or property, and who receives compensation for such service in wages, salary, commission or fare, or (b) who as owner or employee operates a motor vehicle carrying passengers or property for hire. \* \* \*  
'Registered operator.' An operator, other than a chauffeur, who regularly operates a motor vehicle of another person in the course of, or as an incident to his employment, but whose principal occupation is not the operating of such motor vehicle. \* \* \*"

From the foregoing, you will perceive that the type of license required by the drivers of such motor vehicles will depend upon the nature of the employment. If the driving of the "Bookmobile" is merely incident to employment as a Librarian or Assistant Librarian, such persons will be required to have a Registered Operator's license. If, on the other hand, such persons are primarily hired as drivers, then they necessarily must obtain Chauffeurs' licenses.

## CONCLUSION

In the premises, we are of the opinion that "Bookmobiles" owned and operated by County Library Boards on behalf of County

Mr. Hinkle Statler

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Library Districts are exempt from the provisions of the motor vehicle laws of Missouri relating to the registration, proof of ownership and display of number plates.

We are further of the opinion that persons employed by County Library Boards as Librarians or Assistant Librarians, and who drive "Bookmobiles" incident to the discharge of their duties as such Librarians or Assistant Librarians, are required to obtain Registered Operators' licenses.

We are further of the opinion that persons employed by County Library Boards and whose primary employment is for the driving of a "Bookmobile" are required to obtain Chauffeurs' licenses.

Respectfully submitted,



WILL F. BERRY, Jr.  
Assistant Attorney General

APPROVED:

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J. E. TAYLOR  
Attorney General

WFB:HR

MAGISTRATE COURTS: Distribution of costs and fines in criminal cases.

2/11  
January 28, 1947

FILED  
86

Honorable Taylor W. Strubinger  
Magistrate District No. 2  
32 A So. Central Avenue  
Clayton, Missouri

Dear Sir:

Your request for an official opinion directed to Mr. Drake Watson, Assistant Attorney General has been assigned to me for reply. Your request reads:

"Please advise if all Criminal Costs and fines are payable to the County Treasurer? House Bill No. 526, Section 3, states that the constable shall pay all fees received by him, by virtue of his office into the County Treasury monthly; under the old Justice of the Peace practice, the Justice collected \$2.70 on each Criminal case, plus cost for continuance and issuing subpoenas, this money was turned into the County Treasury with a copy of the report being filed with the County Clerk. Other moneys, such as fines, fees for serving papers, warrants, commitments and witnesses fees were turned into the treasurer by the Constable.

"I have been advised by the State Auditor's office that the Magistrate does not turn in any fees to the State in Criminal Cases, also that all fees that may accrue in the future on all pending Justice cases shall be turned into the County Treasury."

From reading your letter we apprehend the question to be: To whom are the costs and fines turned over which accrue in criminal cases in Magistrate Courts.

Your attention is directed to Senate Bill 193, Section 3856.36, Revised Statutes Annotated which reads:

"It shall be the duty of the magistrate before whom any conviction may be had under this article, if there be no appeal, to make out and certify, and, within ten days after the date of judgment deliver to the treasurer of the county and clerk of the county court each a statement of the case, the amount of the fine and return day of the execution, and the name of the officer charged with the collection thereof; and the county treasurer shall charge the officer with the amount of such fine, and unless the same be paid into the county treasury on or before the return day of the execution, the county court shall, at their next term, ten days' notice being given to the officer in default and his sureties, render an account stated against them for the amount due, and twenty per cent thereon, making, however, proper deductions for insolvencies; on which account stated suit may be maintained and when collected, the proceeds paid in the county treasury."

The above section provides for execution on the judgment after a conviction has been rendered in the magistrate court, and requires the officer charged with collecting the judgment to turn into the county treasury the amount of the fine on or before the return day of the execution. Consequently, we believe that as to fines, when they are collected, they should be turned into the county treasury.

In counties of the first class the constable is the officer designated to attend the magistrate courts and would be the officer charged with collecting the judgment and turning the amount of the fine into the county treasury as provided in Section 3856.36, supra. Section 6 of House Bill No. 526, Section 13381.6, R. S. A. provides:

"A constable shall devote his entire time to the duties of his office and shall serve and execute all warrants, writs of attachment, subpoenas and all other process, both civil and criminal, appertaining to the business of such magistrate district, and he shall act as conservator of the peace within his county. He or a deputy shall attend the magistrate court of his district when in session, preserve order therein, and

perform such other duties as may be directed by the magistrate or provided by law, and shall be authorized to execute and serve process outside of his district, and at any place within the county. Writs and process directed from one county to any county in the first class may run in the name of any constable in the county."

Now let us consider what disposition shall be made of the costs collected in criminal cases after conviction in the magistrate court in counties of the first class. Under an execution on a judgment the costs and fine would be collected at the same time by the constable, and as herein concluded the fine would be paid into the county treasury.

Section 3 of House Bill No. 526, Section 13381.3, Rev. Stats. Ann., provides:

"A constable shall within ten days after receiving his commission execute and deliver to the county court of such county a surety bond in the amount of \$5,000.00 to be approved by the court and paid for by the county, conditioned that he will faithfully execute all process to him directed and delivered and pay to the proper parties all moneys received by him by virtue of his office, and pay into the county treasury monthly all fees received by him by virtue of his office, and in every respect discharge all of the duties of a constable according to law.\* \* \*"  
(Emphasis ours.)

Under the above section we believe that the moneys collected by the constable in the nature of costs would be paid by him to the proper parties. For example, jurors fees would be paid to the jurors, prosecuting attorneys fees would be paid to the prosecuting attorney and magistrate and magistrate clerk fees would be paid to them respectively and all the fees that the constable would be entitled to by virtue of his office would be collected and turned into the county treasury.

As to the disposition of the magistrate and magistrate clerk fees collected by the constable and paid to those officers, we



direct your attention to Section 24, Article V of the Constitution of 1945, which, in part, provides:

"\* \* \*The fee of all courts, judges and magistrates shall be paid monthly into the state treasury or to the county paying their salaries."

In reading the above quoted portion of Section 24, we observe that no distinction is made between fees received in criminal cases and fees received in civil cases. In either type of case the fee or fees received by all courts, judges and magistrates are to be paid monthly into the state treasury or to the county if the salaries are paid by the county.

Section 21, Article V of the Constitution of 1945, provides:

"Magistrate Courts--Administration.--The general assembly shall provide for the administration of magistrate courts consistent with this Constitution."

Pursuant to the above constitutional provision the 63rd General Assembly enacted Senate Bill No. 207, which pertains to magistrates and magistrate courts, and Section 23 of said bill, in part, provides:

"\* \* \*Except as provided in Section 23a of this act, it shall be the duty of each clerk of the magistrate court, with the approval of the magistrate to charge upon behalf of the State every fee that accrues in his office and to receive the same, and at the end of each month, pay over to the director of revenue all monies collected by him as fees, taking two receipts therefor, one of which he shall immediately file with the director of revenue, and shall at the end of each quarter make out an itemized and accurate list of all fees in his office, in which list shall be itemized all fees collected by him and also all fees due his office which have not been paid, giving the name of the person or persons paying or owing the same, and turn the same over to the director of revenue, stating that he has been unable, after the exercise of diligence, to collect the part unpaid, said report to be verified by affidavit, and it shall be the duty of the director of revenue to cause the fees unpaid within one year from the date

accrued to be collected by law.

"All magistrate fees received by the director of revenue shall be deposited by him with the state treasurer in a special fund to be denominated 'magistrate fund', and all moneys in said fund shall be used exclusively for the payment of salaries of magistrates, their clerks, deputies and employees; provided, however, that such salaries may also be paid from the general revenue of the state whenever either the balance in the magistrate fund or the appropriation from such fund is insufficient to pay such salaries."

In the above quoted section reference is made to Section 23a of Senate Bill No. 207, which provides:

"In all cases where additional magistrates are selected to fill offices created by order of the circuit court as provided in Section 1 of this act, it shall be the duty of the clerk of each such magistrate court, with the approval of the magistrate to charge upon behalf of the county every fee that accrues in his office and to receive the same, and at the end of each month pay over to the county treasurer all moneys collected by him as fees taking from said treasurer two receipts therefor, one of which he shall immediately file with the county clerk, and at the end of each quarter such magistrate shall make out an itemized and accurate list of all fees in his office, in which list shall be itemized all fees collected by him and also all fees due his office which have not been paid, giving the name of the person or persons owing the same and turn the same over to the county treasurer stating that he has been unable after the exercise of due diligence to collect the part unpaid, said report to be verified by affidavit.

"All magistrate fees received by the county treasurer shall be deposited by him in a special fund to be denominated 'additional magistrate fund', and withdrawals may be made during the current fiscal year only for

the payment of salary of additional magistrate and clerks, deputy clerks and employees of such additional magistrate. The balance, if any, remaining in said fund at the end of the year may be transferred to the general revenue fund of the county."

In reading Sections 23 and 23a, supra, it becomes apparent that the General Assembly has enacted laws consistent with Section 24, Article V of the Constitution, supra, by providing that all fees accruing in the magistrate court shall be paid to the Director of Revenue, except fees accruing in magistrate courts, additionally created by order of the circuit court, when in such cases said fees are to be turned into the county treasurer. Therefore, we believe that all magistrate fees, whether they accrue in civil or criminal cases, are to be turned over to the Director of Revenue, unless the magistrate court has been created by order of the circuit court.

Senate Bill No. 333 provides for certain fees allowed clerks of the magistrate courts, and in part, reads:

"All such fees shall be charged on behalf of the State or county paying salary of such clerk and shall be paid and accounted for in the same manner as magistrate fees."

Section 13409, R. S. Mo. 1939, provides for fees in criminal proceedings allowed clerks of the several courts of this state possessing criminal jurisdiction, which would include magistrate courts. While no provision is made for the disposition of these fees allowed such clerks, we believe that as to the fees received under section 13409 by clerks of the magistrate courts they would also be accounted for in the same manner as magistrate fees. Such would be in consonance with the intention of the legislature as manifested in the above quoted portion of Senate Bill No. 333.

Like the magistrates, the clerks of the magistrate courts are compensated for their services by a fixed salary rather than by fees for services performed in connection with their office, and under the mandate of Section 24, Article V of the Constitution and the manifested intention of the legislature, we believe that all fees received by clerks of the magistrate courts should be turned into the Director of Revenue unless they be clerks of magistrate courts created by order of the circuit court, when in such cases their fees would be turned into the county treasury.

CONCLUSION

In view of the foregoing, it is the opinion of this department that the costs and fines which accrue in criminal cases in magistrate courts are disposed of as follows: The fines are turned over to the county treasury. The costs comprising the fees are distributed to the proper parties entitled to receive fees. That the fees received by the magistrate and clerk of the magistrate court are turned over to the Director of Revenue unless the magistrate court is one created by order of the circuit court, when in such case the magistrate and magistrate clerk fees would be turned over to the county treasury of the county paying the salary of such officers.

Respectfully submitted,

RICHARD F. THOMPSON  
Assistant Attorney General

APPROVED:

J. E. TAYLOR  
Attorney General

RFT:mw

CORONERS:  
DEATH CERTIFICATE:

Coroner may sign death certificate only in cases where death has occurred without medical attendance and registrar refers case to coroner for his investigation and certification because circumstances render it probable that death was caused by unlawful or suspicious means, or where relatives or friends of deceased request coroner to hold inquest for purpose of issuing death certificate.

November 26, 1947

Filed No. 86

Honorable H. K. Stumberg  
Prosecuting Attorney  
St. Charles County  
St. Charles, Missouri



Dear Sir:

This is in reply to your letter of recent date, requesting an official opinion of this department, which reads, in part, as follows:

"Over the past number of years it has always been the practice in this county and the practice in other counties of the State of Missouri for coroners to sign death certificates without holding an inquest where the circumstances of the case do not render the probability that the death is caused by unlawful or suspicious means, and there has been no recent medical attendance. In such cases the coroner would be called, and he himself would view the body, inquire into the nature of the death, and then sign the death certificate without calling a jury and holding an inquest.

\* \* \* \* \*

"Where an individual is found dead and there had been no recent medical attendance and the circumstances of the case do not render the probability that the death was caused by unlawful and suspicious means, may the coroner sign the death certificate without calling a jury and holding an inquest?"

The coroner is authorized to sign a death certificate only under the provisions of Section 9767, R. S. Mo. 1939, and Section

13253, R. S. Mo. 1939. Such sections provide that in case of any death occurring without medical attendance, the undertaker notifies the registrar, and the registrar informs the local health officer, except in cases where the local health officer is not a qualified physician, or where there is no local health officer. In case the local health officer is not a qualified physician, or there is no local health officer, the registrar is the officer authorized to make the certificate and return from the statement of relatives or other persons having adequate knowledge of the facts. The only provision for the making of a certificate by the coroner is when the circumstances of the case render it probable that the death was caused by unlawful or suspicious means. In such case the registrar is to refer the case to the coroner.

The St. Louis Court of Appeals, in the case of Crenshaw v. O'Connell, 150 S. W. (2d) 489, 1. c. 492, said:

"As to this, suffice it to say that under the statute having to do with the coroner's duties in respect to registration of deaths, Sec. 9767, R. S. Mo. 1939, Mo. St. Ann. sec. 9047, p. 4191, the coroner is authorized to make a certificate of death only when the case is referred to him by the local registrar as one without an attending physician and one where the circumstances of the case render it probable that the death was caused by unlawful or suspicious means. The purpose of such reference is, of course, to have an investigation by the coroner as the officer whose duty it is to hold an inquest on the body of any deceased person; and when such a case is properly referred to the coroner, he conducts his investigation, and then executes the certificate of death required for a burial permit, stating therein the disease causing death or the means of death, and otherwise making the same conform to the requirements of the statute. \* \* \*"

In the case of Patrick v. Employers Mut. Liability Ins. Co., 118 S. W. (2d) 116, the Kansas City Court of Appeals said, 1. c. 124:

"There is no provision in Article 2, Chapter 52 of the statute empowering the coroner to make a death certificate, except under

the provisions of section 9047, Mo. St. Ann. sec. 9047, p. 4191. Said section authorizes the coroner to make such certificate when the case is referred to him by the registrar as a case without an attending physician and one where the death may have been caused by unlawful or suspicious means. In such a case the coroner, whose duty it is to hold an inquest on the body of the deceased, may make the death certificate required for a burial permit. O'Donnell v. Wells, 323 Mo. 1170, 21 S. W. 2d 762, 765."

In the case of O'Donnell v. Wells, 21 S. W. (2d) 762, the Supreme Court said, l. c. 765:

"Defendant insists the medical certificate must be made and signed by the attending physician. Plaintiff thinks the coroner was authorized by section 5803, Rev. St. 1919, to make and sign said part of the certificate of death. Said section does authorize the coroner to make the medical certificate when the case is referred to him by the registrar as a case without an attending physician and a case where death may have been caused by unlawful and suspicious means. When the coroner is so authorized, he must make the certificate as directed in said section. This duty is incidental to the duties of a coroner under chapter 48 (sections 5916-5957), Rev. St. 1919, which provides for taking inquests of violent and casual deaths. This chapter directs the coroner to perform no duty in aid of the registration of births and deaths.

"Defendant's contention must be sustained. It is clear the lawmakers had in mind the best information obtainable, for they provided in section 5802, Rev. St. 1919, that the medical certificate of the death certificate must be made and signed by the attending physician. They not only commanded the attending physician to make and sign the medical certificate but provided he would be guilty of a misdemeanor if he failed or refused to do so. Section 5817, Rev. St. 1919.

In cases calling for an inquest it would be the duty of the attending physician to notify the coroner. It would then be the duty of the coroner to hold an inquest under chapter 48 (sections 5916-5957), Rev. St. 1919. But the holding of an inquest does not authorize the coroner to make and sign the medical certificate unless the case was referred to him by the registrar as provided in section 5803.  
\* \* \* (Emphasis ours.)

From the above quoted cases, it is apparent that under Section 9767 the coroner has no authority to make a death certificate except in cases where the registrar has notified the coroner that the circumstances of the case make it probable that death was caused by unlawful or suspicious means.

Section 13253, R. S. Mo. 1939, provides that where a person shall have died from a cause other than violence or casualty and a certificate of death is necessary for the burial of such body, the coroner shall, at the request of the relatives or friends of such person, hold a view or inquest on the body.

In the case of Crenshaw v. O'Connell, supra, the court said, l. c. 492:

"In the case at bar, not only was the deceased receiving treatment from a doctor for high blood pressure up to the very time of his death, but, in addition, the case was concededly not referred to defendant by the registrar for his investigation and certification. Neither was defendant requested by the relatives or friends of the deceased to hold a view or inquest on the body for the purpose of issuing a certificate of the cause of death, Sec. 13253, R. S. Mo. 1939, Mo. St. Ann. sec. 11634, p. 4285, and so for the want of any of the circumstances empowering the coroner to make a death certificate, the autopsy performed upon the body of the deceased is not to be justified upon any such ground."

#### CONCLUSION

It is the opinion of this department that the coroner has authority to issue a death certificate only in cases where the



Honorable H. K. Stumberg

-5-

registrar has referred such cases to the coroner because of the probability that death was caused by unlawful or suspicious means and where there was no medical attendance, in which case an inquest must be held by the coroner, or where the coroner is requested by relatives or friends of the deceased to hold an inquest for the purpose of issuing a death certificate.

Respectfully submitted,

C. B. BURNS, JR.  
Assistant Attorney General

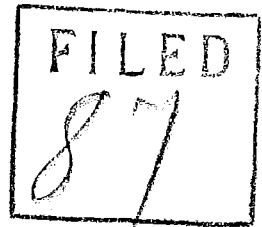
APPROVED:

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J. E. TAYLOR  
Attorney General

CIRCUIT CLERK: Circuit clerk in third-class county entitled to  
FEE: change of venue fee earned, in addition to salary  
provided in House Bill 773, but not entitled to  
retain fees in case originally filed in circuit  
court by consent of parties.

January 22, 1947



Mr. Earl R. Sutton  
Clerk of the Circuit Court  
St. Charles County  
St. Charles, Missouri

Dear Sir:

This will acknowledge receipt of your request for an  
opinion, which reads:

"For my information, would be pleased to  
have your opinion on venue cases as to the  
Circuit Clerk's retaining fees, such as  
case King vs. King reported in 170 S.W. 2nd  
on page 983.

"House Bill #775 provides for circuit clerks  
in 3rd class counties to retain in addition  
for his services, all fees earned by him in  
cases of change of venue from other counties.

"In the above case it was a venue by consent,  
plaintiff nor the defendant were residents  
of the county, but gave the court jurisdiction  
by consent. The question I would like to have  
your opinion on is can the clerk retain his  
fees earned in such cases."

You referred to House Bill 775, passed by the 63rd General  
Assembly, as authority for the circuit clerk in counties of the  
third class retaining change of venue fees earned.

We understand that, while your county is classified as a  
county of the third class, the offices of circuit clerk and  
recorder of deeds are separate and distinct. House Bill 775,  
supra, deals only with circuit clerks and recorders of deeds  
in counties wherein the two offices shall have been combined.  
We do find House Bill 773, passed by the 63rd General Assembly,  
contains a very similar provision relative to the clerks' re-  
taining change of venue fees and deals with only circuit clerks  
of counties of the third class. Section 1 of said House Bill  
reads:

"The circuit clerk in counties of the third class, wherein there shall be a separate circuit clerk and recorder, shall receive annually for his services the following: In counties having a population of less than 7,500 the sum of \$1,200; in counties having a population of 7,500 and less than 10,000 the sum of \$1,500; in counties having a population of 10,000 and less than 15,000 the sum of \$1,700; in counties having a population of 15,000 and less than 17,500 the sum of \$1,900; in counties having a population of 17,500 and less than 20,000 the sum of \$2,100; in counties having a population of 20,000 and less than 25,000 the sum of \$2,300; and in counties having a population of 25,000 or more the sum of \$2,500; provided that the circuit clerk shall be allowed to retain, in addition to the sums above allowed, all fees earned by him in cases of change of venue from other counties."

In the case cited in your request, King vs. King, 170 S.W. (2d) 983, a petition for divorce was filed in Pulaski County, Missouri; the petition was dismissed by the Circuit Court for the reason the plaintiff was not a resident of said county, however, on appeal, the Supreme Court held that the plaintiff was a resident of said county, but further held that made no difference for the reason that the jurisdiction was waived by the defendant appearing generally and pleading to the merits. In that case there was no change of venue, the petition was originally filed in the Circuit Court of Pulaski County and was not transferred therefrom to another circuit court in another county on a change of venue.

Article 11, Chapter 6, R.S. Mo. 1939, deals exclusively with change of venues in civil cases. Section 4015 to 4036, R.S. Mo. 1939, likewise deals with change of venue in criminal cases. Such provisions all clearly indicate that, before a change of venue can be granted, the petition or some pleading must be filed in the court so as to give said court jurisdiction to pass upon an application for a change of venue.

Change of venue has often been defined to mean a transfer of a cause from one court to another. In State v. Bruce, 55 S.W. (2d) 733, 1.c. 736-737, the court said:

"Although there was a change of judges to try the case in the Johnson circuit court, there was no 'change of venue' from one court to another. Section 911, R.S. No.

1929 (Mo. St. Ann. Sec. 911), provides that in the situation herein disclosed 'a change of venue shall not be awarded to another county.' And, strictly speaking, a 'change of venue' means a transfer of a cause from one court to another. Section 906, R.S. Mo. 1929 (Mo. St. Ann. Sec. 906). 'To "change the venue" is to transfer the cause for trial to another county or district.' Black's Law Dictionary, p. 1214. \* \* \* \* \*

Also, in Towle v. City of St. Joseph, 185 S.W. 1151, 1.c. 1152, the court defined a change of venue as follows:

"The point here claimed by defendant is that division No. 1 was without jurisdiction to try the case at the same term of the court. Section 1935 does not apply to the case at bar. The case is governed by the act of the General Assembly creating two divisions of the Buchanan circuit, approved April 13, 1889, found in Laws 1889, p. 74. Section 3 of that act says:

"In case of any transfer of a cause from one division to another, it shall be the duty of the clerk to place the same at the foot of the docket for that term of the division to which the same has been transferred."

"The transfer of the case from division 2 to division 1 was a change of venue. State ex rel. v. Woodson, 86 Mo. App. 253, loc. cit. 262. \* \* \* \* \*

Certainly, in King v. King, supra, there was no change of venue involved. In that case the court, wherein the petition was originally filed, retained jurisdiction of the cause and there was no transfer of said cause from one court to another.

#### CONCLUSION

Therefore, it is the opinion of this department that the provisions contained in House Bill 773, supra, fixing the

Mr. Earl R. Sutton

-4-

annual salary of the clerk of the circuit court in counties coming within the classification of a third-class county and providing that in addition thereto said clerk may retain, for his services, all fees earned by him in cases of change of venue from other counties, does not mean such cases as represented in King v. King, supra, where in fact no change of venue was requested, but the court had jurisdiction by consent and retained said jurisdiction.

Respectfully submitted,

AUBREY R. HAMMETT, Jr.  
Assistant Attorney General

APPROVED:

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J. E. TAYLOR  
Attorney General

ARR:LR

REPRESENTATIVE DISTRICTS: St. Louis Election Commissioners cannot  
ELECTION COMMISSIONERS: alter representative districts until  
after next census.

FILED

87

November 28, 1947

12/16  
Mr. Arthur M. Sullivan  
Board of Election Commissioners  
208 South Twelfth Boulevard  
St. Louis, Missouri

Dear Mr. Sullivan:

This is in reply to your letter of recent date requesting an opinion from this department for the Board of Election Commissioners of the City of St. Louis. Your letter reads as follows:

"The wards of the City of St. Louis were redistricted in 1943. In Wards 12 and 23, adjacent wards, the dividing line extends westwardly to the end of Michelberger Street, from which point west to the City limits an undeveloped territory existed. As no streets had been laid out at that time, a line was drawn through the middle of this territory, about the length of three blocks.

"During the past year a new subdivision has been opened and this dividing line now extends through the center of eight lots, thus presenting a problem as to the ward in which these voters reside.

"At present this Board has a bill before the Board of Aldermen of the City of St. Louis, changing these lines. These changes will affect the boundaries of the 3rd and 4th Representative Districts, and the Board would like to alter these District lines to conform with the new ward lines. The changes are minor and affect only about nine voters. We should like to know whether we have the authority to alter these Representative District Lines. May we call your attention to

Article III, Section 10, of the Constitution of the State of Missouri, and Section 12896 of the Session Acts of 1945."

The question presented concerns the authority of the Board of Election Commissioners to alter representative district boundary lines in the City of St. Louis. The applicable sections of the 1945 Constitution provide:

Sec. 3, Art. III. "When any county is entitled to more than one representative, the county court, and in the City of St. Louis the body authorized to establish election precincts, shall divide the county into districts of contiguous territory, as compact and nearly equal in population as may be, in each of which one representative shall be elected."

Sec. 10, Art. III. "The last decennial census of the United States shall be used in apportioning representatives and determining the population of senatorial and representative districts. Such districts may be altered from time to time as public convenience may require."

The body authorized to establish election precincts in the City of St. Louis is, of course, the Board of Election Commissioners, and, hence, is authorized to alter representative district boundary lines just as such authority is given the county courts in the various counties of the state. However, Section 10 of Article III is not an unlimited grant of power to said Board. The power to alter such lines is legislative in character and cannot be exercised at the will of said Board. This was recognized by the Supreme Court, en banc, in *State ex rel. v. Patterson*, 229 Mo. 364, where it was said at page 391:

"\* \* \* This power is legislative in character, and when such powers are conferred upon other bodies, in instances where they can be conferred, the presumption is that the power does not extend beyond the express terms of the grant. County courts are denied any rights except those expressly conferred. (Constitution, sec. 36, art. 3.)"

This section 9 of article 4 is merely directory in terms, and in our judgment reserves to the Legislature the right to provide for the alteration of legislative districts once established as per the terms of the Constitution. In other words the Constitution contemplates that these districts shall be established at decennial periods, but has reserved a power in the Legislature to provide by law for a change in the same. This, upon the theory that there is a difference between dividing a county into districts, and afterward changing the boundary lines of those districts. That this power is reserved to the Legislature is further emphasized by the fact that section 9 does not, within itself, undertake to prescribe the conditions under which the changes or alterations should be made. Nor does it undertake to prescribe the method of determining the requisites for such changes. These things were evidently left for legislative determination, and the Legislature has not acted. This section 9 only speaks of changes when 'public convenience may require.' It places no restrictions as to compact and contiguous territory. It contains no safeguards whatever. Upon its face it is not self-executing, but clearly indicates that there was to be legislative action. \* \* \*

(The applicable provisions of the 1945 Constitution are substantially the same as those under consideration in this case.)

We find judicial construction in the Patterson case, supra, of the phrase "from time to time as public convenience may require." The following statement was made at pages 381 and 382:

"Respondents Patterson and Harnden rely upon section 9 of article 4 of the Constitution, which thus reads: 'Senatorial and representative districts may be altered, from time to time, as public convenience may require. When any senatorial district shall be composed of two or more counties, they shall be contiguous; such districts



to be as compact as may be, and in the formation of the same no county shall be divided.'

"Under this section it is claimed that the county court can rearrange the legislative districts at any time. Indeed, if full latitude be given to their contention such districts might be remoulded at each session of the county court, a thing unreasonable within itself.

"To start with, this section gives, within itself, no power to the county court. The county court is not mentioned and if it was intended to give it power, such fact must be gathered from the context of the article and not from the section itself. Going to the section itself, it mentions both senatorial and representative districts. That the county courts have no power as to senatorial districts must be conceded. That the power here conferred as to senatorial districts had reference to a legislative power reserved by the Constitution to that branch of the government, can not well be disputed. For as to most of the senatorial districts the Legislature has the right to fix the boundaries. If then it appears that the Constitution was reserving to the Legislature the right to legislate as to senatorial districts, is it not reasonable to construe that such was the intent as to representative districts. Both are mentioned together. One clearly refers to a reservation of power in the Legislature, why not the other? But the section says that such districts may be altered 'from time to time.' How must this be read? That senatorial districts cannot be rearranged oftener than once in ten years is more than evident from the Constitution. That is not denied here. Why say that representative districts are to be changed oftener? Both are mentioned in the same connection. One concededly cannot be changed oftener than once in ten years. That being the situation, what does the expression 'from time to time' mean? Does it mean that a county court can upon its own whim, at each and every session,

change the representative districts, or does it mean that after each apportionment of representatives to the county, such court shall rearrange the districts? This apportionment is by decennial periods. The changes in senatorial districts are by decennial periods. When the Constitution coupled the two together and used the words 'from time to time,' did it not refer to decennial periods? Did it not refer to the things which could be done at decennial periods and not otherwise? And, further, when it coupled the two together, and reserved the power to alter and change, was it not a reservation to the Legislature and not to the county court? We think that such was the idea of the Constitution-framers.  
\* \* \*

Thus, Section 10 of Article III does not authorize frequent alteration of said boundary lines as a casual reading might indicate. The Court, in the *Atterson* case, *supra*, said at pages 394 and 395:

"From these sources came section 9 of article 4 of the Constitution of 1875, *supra*. In its origin therefore it clearly referred to the Legislature and not to any other body.

"So when we take the context of the present article 4, and the origin of section 9 therein, it appears to us clear that there is a reservation of power to the Legislature, and until the Legislature acts with reference to the alteration of the districts established under section 3, there can be no action by the courts. The Legislature perhaps can act by laws duly passed, and in so doing can delegate its constitutional powers over the subject-matter but up to this time it has not been done. Until such time as the Legislature may legally provide for the alteration of the legislative districts, there is no such power in the county courts."

Therefore, the Board of Election Commissioners of the City of St. Louis can alter representative district boundary lines.

only at specific times as may be designated by the Legislature. By reenacting Section 12896, Laws of 1945, page 1123, the Legislature authorized the Board of Election Commissioners of the City of St. Louis to alter the boundary lines of any representative district within their jurisdiction at certain specified times. It is provided that such districts may be altered one time after each national decennial census as public convenience may require. Said section provides as follows:

"Within ten days after the effective date of this Act, and thereafter within thirty days after the taking of each decennial census of the United States, the Secretary of State shall forthwith certify to the county courts of the several counties, named in Section 12895, Revised Statutes of Missouri, 1939, which are entitled by this apportionment to two or more representatives, and to the Board of Election Commissioners in the City of St. Louis, the number of representatives to be elected in the respective counties and in the City of St. Louis. Within twenty days after the effective date of this Act and thereafter within sixty days after being officially so informed by the Secretary of State, the county court of the several counties and the Board of Election Commissioners of St. Louis shall divide their respective counties and said city into representative districts, of compact and contiguous territory corresponding in number to the representatives to which such county or city is entitled, and in population as nearly equal as may be, in each one of which the qualified voters shall elect one representative, who shall be a resident of such district. After each decennial census such districts may be altered one time as public convenience requires. On its own motion, or on petition of five hundred or more qualified voters of the county or of said city, the county court of such counties or the Board of Election Commissioners in the City of St. Louis, shall hold a public hearing to determine the necessity for altering any such districts. The population of the county or of said city shall be divided by the number of

representative districts in the county or said city, and proof at such hearing that by the last decennial census of the United States taken since the last districting, was made the population of any one district varies from the quotient by more than one-fourth thereof, shall be prima facie evidence that public convenience requires that such a redistricting be made. If the county courts or Board of Election Commissioners of said city shall find that public convenience requires such redistricting to be made, they shall by an order entered of record, redistrict such county or city into representative districts in the manner prescribed by the Constitution for such districts. Within thirty days after the effective date of this act, and thereafter within thirty days after making any districting, the county court or Board of Election Commissioners in said city shall file the divisions or alteration and the names and descriptions of the districts with the county clerk of said counties or the circuit clerk in said city, and certify the same to the Secretary of State."

We assume that after the effective date of the above section the City of St. Louis was divided by the Board of Election Commissioners into representative districts. The question which now arises is whether said districts can be altered at the present time. It will be noted that "after each decennial census such districts may be altered from time to time as public convenience may require." In order to determine the meaning of the provision, we must refer back to the first part of the statute wherein it is provided that within ten days after the effective date of this act, "and thereafter within thirty days after the taking of each decennial census of the United States," the Secretary of State shall certify to the Board of Election Commissioners the number of representatives to be elected, and "within twenty days after the effective date of this Act and thereafter within sixty days after being officially so informed by the Secretary of State, \* \* \* the Board of Election Commissioners of St. Louis shall divide their \* \* \* city into representative districts." It is a well-recognized rule of statutory construction that the provisions of an act must be construed in harmony with each other so as to give force and effect to each. This necessarily requires that in determining the meaning of particular sections of legislative acts all other parts thereof

should be considered. State v. Padberg, 145 S.W. (2d) 150, l.c. 151, 152, and State v. Mitchell, 181 S.W. (2d) 496, l.c. 500.

Taking Section 12896, supra, as a whole, we believe that the Legislature intended to refer only to each decennial census which may be taken after the effective date of said section. In other words, that said representative districts can be altered only after the next national decennial census has been taken and then only when public convenience requires such action. Reference is not made to the 1940 national census, but only to those made after the effective date of Section 12896. The terms of said statute are clear and unambiguous and must be given effect as written.

Conclusion.

In view of the foregoing, it is our opinion that the Board of Election Commissioners of the City of St. Louis is not authorized to alter the boundary lines of representative districts in the City of St. Louis until a time after the next national decennial census is taken.

Respectfully submitted,

DAVID DONNELLY  
Assistant Attorney General

APPROVED:

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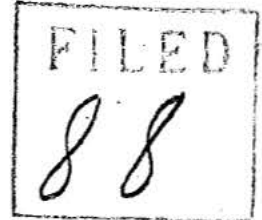
J. E. TAYLOR  
Attorney General

DD:ml



COUNTY BUDGET LAW: County courts may not transfer funds from  
ROADS AND BRIDGES: Class 3 of the Budget to any other class  
under the budget law.

November 14, 1947



Honorable B. C. Tomlinson  
Prosecuting Attorney  
St. Francois County  
Farmington, Missouri

Dear Sir:

This is in reply to your letter of recent date wherein you submit to this department a request for an opinion on the following question:

"Can a surplus of money in the Road and Bridge Fund of a county of the third class be transferred by order of the County Court to the County Revenue Fund in order to pay necessary expenses of the county?"

The County Budget Law, which was originally enacted in 1933, Laws of Missouri, 1933, page 340, was enacted for the purpose of setting up a system of accounting and bookkeeping for the various counties of the state. The court, in the case of State ex rel. vs. Smith, 182 S.W. (2d) 571, 574, in speaking of the purpose of the law, said:

" \* \* \* The primary purpose was to regulate the usual operation of the regular departments of Government whose needs could be foreseen and planned on a biennial basis. \* \* \* "

The same rule applies to counties as to departments of government. Section 10910 of the Budget Act was amended in 1945, Laws of Missouri, 1945, page 610. This section as amended reads as follows:

"This law may be cited and quoted as the county budget law. All counties of the third and fourth classes shall be governed by Sections 10910 to 10917, inclusive, of this article. Whenever the term revenue is used in this article it shall be understood and taken to mean the ordinary or general revenue to be used for the current expenses of the county as is provided by this article regardless of the source from which derived. The county courts of the

several counties of this state are hereby authorized, empowered and directed and it shall be their duty, at the regular February term of said court in every year, to prepare and enter of record and to file with the county treasurer and the state auditor a budget of estimated receipts and expenditures for the year beginning January 1, and ending December 31. The receipts shall show the cash balance on hand as of January first and not obligated, also all revenue collected and an estimate of all revenue to be collected, also all moneys received or estimated to be received during the current year. The clerk of the county court of the several counties of this state shall be the budget officer of such county and as such shall prepare all data, estimates and other information needed or required by the county court for the purpose of carrying out the provisions of this article but no failure on the part of the clerk of the county court shall in any way excuse the county court from the performance of any duty herein required to be performed by said court. The county court shall classify proposed expenditures according to the classification herein provided and priority of payment shall be adequately provided according to the said classification and such priority shall be sacredly preserved."

Section 10911, R. S. Mo. 1939, of the Budget Act was amended in 1941, Laws of Missouri, 1941, page 650. Section 3 of said Section 10911, which relates to funds for road and bridge purposes, reads as follows, Laws of Missouri, 1941, page 651:

"The county court shall next set aside and apportion the amount required, if any, for the unkeep, repair or construction of bridges and roads on other than state highways (and not in any special road district). The funds set aside and apportioned in this class shall be made from the anticipated revenue to be derived from the levies made under Sections 8526 and 8527 R. S. Mo. 1939. This shall constitute the third obligation of the county."

From this section it will be found that funds for road and bridge purposes were to be derived from revenues obtained under authority of Sections 8526 and 8527, R. S. Mo. 1939. These were the taxes derived under levies designated as general road and bridge levies and special road and bridge levies. Said Sections 8526 and 8527 were repealed by the 63rd General Assembly, Laws of Missouri, 1945, page 1478. Under Section 12 (a) of Article X of the Constitution of Missouri, 1945, provisions are made for raising of revenue for road and bridge purposes. The taxes derived under this authority are in lieu of the taxes authorized under Sections 8526 and 8527, R. S. Mo. 1939. Said Section 12 (a) provides in part as follows:

"In addition to the rates authorized in section 11 for county purposes, the county court in the several counties not under township organization, the township board of directors in the counties under township organization, and the proper administrative body in counties adopting an alternative form of government, may levy an additional tax, not exceeding thirty-five cents on each hundred dollars assessed valuation, all of such tax to be collected and turned in to the county treasury to be used for road and bridge purposes. \* \* \* "

In order to supplement the foregoing constitutional provision, the 63rd General Assembly, by H.C.S.H.B. No. 784, Laws of Missouri, 1945, page 1478, enacted the following law, Section 8527. This section reads as follows:

"In addition to other levies authorized by law, the county court in counties not adopting an alternative form of government and the proper administrative body in counties adopting an alternative form of government, in their discretion may levy an additional tax, not exceeding thirty-five cents on each one hundred dollars assessed valuation, all of such tax to be collected and turned into the county treasury, where it shall be known and designated as 'The Special Road and Bridge Fund' to be used for road and bridge purposes and for no other purpose whatever;



provided, however, that all that part or portion of said tax which shall arise from and be collected and paid upon any property lying and being within any special road district shall be paid into the county treasury and four-fifths of such part or portion of said tax so arising from and collected and paid upon any property lying and being within any such special road district shall be placed to the credit of such special road district from which it arose and shall be paid out to such special road district upon warrants of the county court, in favor of the commissioners or treasurer of the district as the case may be; Provided further, that the part of said special road and bridge tax arising from and paid upon property not situated in any special road district and the one-fifth part retained in the county treasury may, in the discretion of the county court, be used in improving or repairing any street in any incorporated city or village in the county, if said street shall form a part of a continuous highway of said county leading through such city or village."

From a reading of this section, it will be found that the moneys derived under this section are placed in the county treasury and designated as the special road and bridge fund. It also provides that this fund is to be used for road and bridge purposes and no other purpose whatever. This is the fund which now goes into and makes up the revenue for Class 3 demands under the Budget Act. Since the Constitution says that this fund is to be used for road and bridge purposes, and since the 1945 act specifically provides that this fund shall be used for no other purpose, then there would be no authority for the county court to transfer these funds out of Class 3 to any other class of demands of the county. The county court is only authorized to handle the accounts in the county budget as is prescribed by statute. The rule as to the powers and duties of county courts was stated by the court in the case of Morris et al. vs. Karr et al., 114 S.W. (2d) 962, 1.c. 964, as follows:

"In Sturgeon v. Hampton, 88 Mo. 203, at page 213, the rule was early announced which has been generally recognized in

this state as follows: 'The county courts are not the general agents of the counties or of the state. Their powers are limited and defined by law. These statutes constitute their warrant of attorney. Whenever they step outside of and beyond this statutory authority their acts are void.' The court goes on to say that it should go far to uphold the acts of the county court when they are merely irregular, but such acts are not irregularities and are void when made without any warrant or authority in law."

#### CONCLUSION

It is the opinion of this department that since road funds are raised for a specific purpose and expenditures thereof for any other purpose are prohibited, and since these funds are placed in Class 3 of the Budget Law, county courts would not have any authority to transfer any of these funds to the county revenue fund or any other class of demands under the County Budget Law.

Respectfully submitted,

TYRE W. BURTON  
Assistant Attorney General

APPROVED:

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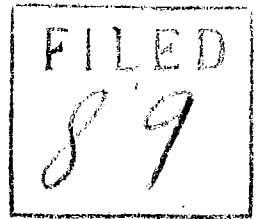
J. E. TAYLOR  
Attorney General

TWB:VEM

LEGISLATOR:  
MILEAGE:  
OATH:

It is unnecessary for Mr. David A. Peery to be sworn in as the Representative from Linn County. He is entitled to and should be paid the mileage provided for in Sec. 16, Art. III, of the Constitution.

January 27, 1947



Mr. C. J. Tindel, Chief Clerk  
Missouri House of Representatives  
Sixty-Fourth General Assembly  
Jefferson City, Missouri

Dear Sir:

This is in reply to your letter of recent date, requesting the official opinion of this department, and reading as follows:

"Mr. V. Earl Cox was elected November 5th, 1946 to the office of Representative of Linn County. He has not to this date qualified, but Mr. David A. Peery, former representative of the 63rd session is present and serving until his successor is qualified to take his seat. Please render your decision on the following questions:

"1. Shall Mr. David A. Peery be sworn in as the representative from Linn County?

"2. Shall Mr. David A. Peery be paid the mileage provided by Sec. 16, Art. III, Constitution of Missouri?"

We note that the following appears on page 7 of the Journal of the House, Sixty-Fourth General Assembly of the State of Missouri, First Day - Wednesday, January 8, 1947:

"The member from Linn, Honorable V. Earl Cox being sick and not appearing to qualify, Honorable D. A. Perry was reelected being without successor."

This action by the House of Representatives in reseating Mr. Peery is a determination by the said House of the fact that

Mr. Peery is now a member of the House of Representatives. This determination is correct, and Mr. Peery is entitled to be seated as a member of the House of Representatives by virtue of Article VII, Section 12, of the Constitution of 1945, which reads as follows:

"Except as provided in this Constitution, and subject to the right of resignation, all officers shall hold office for the term thereof, and until their successors are duly elected or appointed and qualified."

and by virtue of the fact that Mr. Cox has not qualified as a member of the House of Representatives, as required by Article III, Section 15, of the Constitution of 1945, which provides, in part, as follows:

"Every senator or representative elect, before entering upon the duties of his office, shall take and subscribe the following oath or affirmation: 'I do solemnly swear, or affirm, that I will support the Constitution of the United States and of the State of Missouri, and faithfully perform the duties of my office, and that I will not knowingly receive, directly or indirectly, any money or other valuable thing for the performance or non-performance of any act or duty pertaining to my office, other than the compensation allowed by law.' The oath shall be administered in the halls of the respective houses to the members thereof, by a judge of the supreme court or a circuit court, or after the organization by the presiding officer of either house, and shall be filed in the office of the secretary of state. \* \* \*"  
(Emphasis ours.)

The first question in your request for an opinion is whether it is necessary for Mr. David A. Peery to take the oath of office.

Section 15 of Article IV of the Constitution of 1875 provided as follows:

"Every Senator and Representative elect, before entering upon the duties of his office, shall take and subscribe the following oath or affirmation: 'I do solemnly swear, or affirm, that I will support the

Constitution of the United States and of the State of Missouri, and faithfully perform the duties of my office; and that I will not knowingly receive, directly or indirectly, any money or other valuable thing for the performance or non-performance of any act or duty pertaining to my office, other than the compensation allowed by law.' The oath shall be administered in the halls of their respective houses, to the members thereof, by some judge of the Supreme court, or the circuit court, or the county court of Cole county, or after the organization by the presiding officer of either house, and shall be filed in the office of the Secretary of State. \* \* \* "

The provisions of Article III, Section 15, of the Constitution of 1945, and Article IV, Section 15, of the Constitution of 1875, as to the form of oath to be administered, and the fact that such oath shall be taken by representatives elect, are the same. The oath that is taken is not as a representative in a particular general assembly, or a particular session of the general assembly, but is taken by a representative elect as a member of the house of representatives of this state.

Mr. Peery took the required oath as set out in Article III, Section 15, of the Constitution of 1945, and Article IV, Section 15, of the Constitution of 1875, as a representative elect in January, 1945, and holds office as a representative thereby. Since he is not a representative elect, but is holding over under the provisions of Article VII, Section 12, of the Constitution of 1945, it is not necessary that he be sworn in again.

We find that such conclusion is borne out by a legislative interpretation by the General Assembly of Missouri. On page 4 of the Journal of the Senate, Sixty-Fourth General Assembly of the State of Missouri, First Day - Wednesday, January 8, 1947, we find the following:

"The newly elected Senators advanced to the bar and subscribed to the oath of office, which was administered by Judge Laurance M. Hyde of the Supreme Court of Missouri."

Those senators who were elected in 1944 and took the oath in January, 1945, that is, "hold over senators," did not take the oath of office. The reason for this is that such members were

senators and are senators by virtue of their being sworn in in January, 1945, and because they were sworn in as senators, and not as senators of the 63rd General Assembly.

An examination of the House and Senate Journals of the 62nd General Assembly, Extra Session, 1944, discloses that the members of the respective houses were not sworn in as members of the Extra Session of the 62nd General Assembly, but were members thereof by virtue of their having been sworn in in January, 1943.

Since Mr. Peery is now a representative, there is no more reason for his being sworn in at the present session than there was for the members of the House of Representatives and Senate to be sworn in at the Extra Session of the 62nd General Assembly in 1944.

The second question you ask is: Shall Mr. Peery be paid the mileage provided by Section 16 of Article III of the Constitution?

Section 16 of Article III of the Constitution of 1945 provides as follows:

" \* \* \* Senators and representatives shall receive one dollar for every ten miles traveled in going to and returning from their place of meeting, once in each session, on the most usual route."

Section 1 of House Bill No. 566 of the 63rd General Assembly, effective July 1, 1946, provides as follows:

"Senators and representatives shall receive one dollar for every ten miles traveled, and an amount for travel for any fractional part of ten miles at the same rate, in going to their place of meeting in Jefferson City from their place of residence, and returning from their place of meeting in Jefferson City to their place of residence, once in each regular session and once in each special session, on the most usual route."

By virtue of the authority of Section 20 of Article III of the Constitution of 1945, the 64th General Assembly is now meeting in regular session, which session began on January 8, 1947. It will be noted that Section 16 of Article III of the Constitution of 1945 and Section 1 of House Bill No. 566 of the 63rd General Assembly provide that each senator and representative

Mr. C. J. Tindel - 5

is entitled to mileage once during each session of the general assembly. The only requirement as to the right to receive such mileage is that the person shall be a senator or representative. Section 16 of Article III of the Constitution and Section 1 of House Bill No. 566 are clear in providing that each representative shall be paid mileage for every regular or special session of the general assembly.

Since Mr. Peery is now a representative and has been seated as a member of the House during the present session, he is entitled to mileage for the present regular session of the 64th General Assembly.

#### CONCLUSION

It is, therefore, the opinion of this department that it is unnecessary for Mr. David A. Peery to be sworn in as the Representative from Linn County.

It is further the opinion of this department that Mr. David A. Peery is entitled to and should be paid the mileage provided by Section 16 of Article III of the Constitution of Missouri of 1945.

Respectfully submitted,

C. B. BURNS, Jr.  
Assistant Attorney General

APPROVED:

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J. E. TAYLOR  
Attorney General

CBB:HR

CIRCUIT CLERK AND RECORDER  
OF DEEDS:  
DRAINAGE DISTRICT:  
FEES:

Circuit Clerk and recorder of deeds,  
under House Bill No. 775, passed by  
the 63rd General Assembly, not entitled  
to retain fees or compensation for  
services rendered under Article 1, Chapter  
79, R.S. Mo. 1939.

January 30, 1947



2/6

Honorable D. D. Thomas, Jr.  
Prosecuting Attorney  
Carroll County  
Carrollton, Missouri

Dear Sir:

This will acknowledge receipt of your request for an  
official opinion, which reads:

"It has been ruled that the Circuit Clerk,  
in Counties like Carroll may retain the  
costs in drainage cases. I would like to  
have your opinion on whether or not the  
Clerk may retain the costs in a suit for  
default drainage taxes, instituted in the  
Circuit Court and prosecuted to judgment."

By reference to "costs" we are assuming for the purpose  
of this opinion that you mean costs or fees allowed the cir-  
cuit clerk for services rendered the drainage district under  
and by virtue of Article 1, Chapter 79, R.S. Mo. 1939.

One of the cardinal rules of statutory construction is  
to ascertain and give effect to the intention and purpose of  
the Legislature as expressed in the act. In Thompson v. City  
of Lamar, 17 S.W. (2d) 960, 1.c. 967, the court, in enunciating  
the foregoing rule, said:

"\* \* \* While it is our duty, in construing  
a statute, to endeavor to ascertain, and to  
carry out, if possible, the true intent and  
purpose of the Legislature in enacting such  
statute, yet we have no right to alter,  
amend, change, or add to, the statute, by  
supplying omitted words or phrases, under  
the guise of construction, especially where  
the statute is not ambiguous or uncertain  
in the words, language, and form in which  
it was enacted by the Legislature. 36 Cyc.  
1103. \* \* \* \* \*



Also, see State v. Tombs, 25 S.W. (2d) 101, 1.c. 109.

The circuit clerks in such counties as yours have been upon a salary basis for a long time. Section 13408, R.S. Mo. 1939, was a general and controlling salary statute for said circuit clerks prior to the enactment of House Bill No. 775, passed by the 63rd General Assembly. Apparently the reason for passing such legislation was to break down the various counties into classes so as to conform to the provision in the Constitution of 1945 relative to classifications of counties. (See Section 8, Article VI, Constitution of 1945.) We make this assertion because under said House Bill No. 775 the annual salary provided therein is practically in the same figures and words as will be found in Section 13408, R.S. Mo. 1939.

House Bill No. 775, passed by the 63rd General Assembly, deals exclusively with the annual salary, compensation, and certain specified fees for the circuit clerk and recorder of deeds in third-class counties, wherein the offices of circuit clerk and recorder of deeds are combined. We understand this is the case in Carroll County, Missouri. Under said House Bill No. 775 the Circuit Clerk and Recorder of Deeds in Carroll County is entitled to receive \$2300.00 annually and, in addition thereto, retain all fees earned by him in change of venues from other counties. Section 1 of said bill reads:

"The circuit clerk and recorder in counties of the third class, wherein the two offices shall have been combined, shall receive annually for his services the following: In counties having a population of less than 7,500 the sum of \$1400; in counties having a population of 7,500 and less than 10,000 the sum of \$1800; in counties having a population of 10,000 and less than 15,000 the sum of \$1900; in counties having a population of 15,000 and less than 17,500 the sum of \$2100; in counties having a population of 17,500 and less than 25,000 the sum of \$2300; and in counties having a population of 25,000 or more the sum of \$2500; provided that the circuit clerk and recorder shall be allowed to retain, in addition to the sums above allowed, all fees earned by him in cases of change of venue from other counties; provided, further, that persons now holding the office of circuit clerk and recorder shall not have their compensation increased by reason of this act for his present term."

Said officer is also entitled, under the said bill, to receive annually, in addition to the aforesaid salary, all fees earned in change of venues, and for services rendered as clerk of the juvenile division of the circuit court \$500.00. Section 2 of said bill reads:

"In addition to the compensation provided in Section 1 hereof, the circuit clerk and recorder of counties of the third class, wherein the two offices shall have been combined, shall receive annually for his services as clerk of the juvenile division of the circuit court the following: In counties with a population of less than 7,500 the sum of \$100; in counties having a population of 7,500 and less than 10,000 the sum of \$200; in counties having a population of 10,000 and less than 15,000 the sum of \$300; in counties having a population of 15,000 and less than 17,500 the sum of \$400; and in counties having a population of 17,500 or more the sum of \$500."

Under Section 3 of said act the circuit clerk and recorder of deeds is required to charge and collect every fee accruing to his office as recorder of deeds, to which he may be allowed under the law, and to make a monthly report of all fees and pay same over monthly to the county treasurer, except those fees earned by him in change of venues from other counties as provided in Section 1 of the act. Section 3, House Bill No. 775, supra, reads:

"It shall be the duty of the circuit clerk and recorder of counties of the third class, wherein the offices shall have been combined, to charge and collect for the county in all cases every fee accruing to his office as recorder of the county to which he may be entitled under the law, and shall at the end of each month, file with the county clerk a report of all fees charged and accruing to his office during such month, together with the names of persons paying such fees. It shall be the duty of the circuit clerk and recorder, upon the filing of said report, to forthwith pay over to the county treasurer, all moneys, except that collected for change of venue fees as provided in Section 1 of

this act, that shall have been collected by him during the month and required to be shown in such monthly report as hereinabove provided, taking duplicate receipt therefor, one of which shall be filed with the county clerk, and every such circuit clerk and recorder shall be liable on his official bond for all fees collected and not accounted for by him, and paid into the county treasury as herein provided."

Section 4 of said act requires the clerk to collect, report and remit fees accruing to his office as circuit clerk of the county in the same manner as provided in Section 3 of said act.

There are numerous statutory provisions requiring the clerk of the circuit court to perform certain specified duties under Article 1, Chapter 79, R.S. Mo. 1939, such as Sections 12324-25-34-35-38 and 46. However, we are unable to find any specific fee allowed the circuit clerk under said article as is provided for some other officers, but we do find Section 12363, R.S. Mo. 1939, which requires the board of supervisors of said drainage district, except where otherwise provided, to pay the fee, per diem and necessary expenses, of all court and county officers who, by virtue of said article, render service to the drainage district, and further provides that the ordinary fee statute does not apply to services rendered under said article by any county officer, but that said county officers shall receive reasonable compensation for services rendered the district, to be fixed by the court wherein the proceedings may be pending. Said Section 12363 reads:

"The board of supervisors, except where otherwise provided shall, by resolution, at time of hiring or appointing, provide for the compensation for work done and necessary expense incurred by any officer, engineer, attorney or other employee and shall also pay the fees, per diem and necessary expenses of all court and county officers who may by virtue of this article render service to said district. It is understood that the ordinary fee statute does not apply to services rendered under

this article by any county officer, but each such officer shall receive only a reasonable compensation for services actually rendered, the same to be fixed by the court in which the proceeding is pending, except where otherwise provided in this article; that said corporation or petitioners for corporations may prepare, write or print all copies of petitions, writs, orders and decrees or other papers, and furnish same to the clerk or other officer for his use, and in such event said officer shall be entitled to receive as compensation for issuing the said writs and copies of petitions, decrees, orders or other papers, only the reasonable value of the services actually rendered."

It is a well recognized principle of statutory construction that statutes relating to the same subject matter are to be considered together and, if possible, harmonized and effect given to all provisions. See *Whalen v. Buchanan County*, 111 S.W. (2d) 177, 342 Mo. 33. Also, see *State ex rel. Cairo Bridge Commission v. Mitchell*, 181 S.W. (2d) 496, 352 Mo. 1136. Another recognized rule is that statutes pertaining to salary and fees of public officers shall be strictly construed against said officers, and that a public officer is only entitled to receive compensation when he can point to the statute authorizing same. See *Nodaway County v. Kidder*, 129 S.W. (2d) 857, 1.c. 860.

Under Sections 3 and 4 of said House Bill No. 775, the circuit clerk and recorder of deeds must report and remit monthly fees allowed him under the law, except those earned in change of venues. Said House Bill does not specifically repeal Section 12363, R.S. Mo. 1939. Therefore, the reasonable conclusion is that said officer is entitled to reasonable compensation, fixed by the court wherein such proceedings may be pending, under Article 1, Chapter 79, R.S. Mo. 1939, however, such fees must be reported and remittance made to the county treasury. Keeping in mind the foregoing rules of construction, we are of the opinion that, under House Bill No. 775, passed by the 63rd General Assembly, the circuit clerk and recorder of deeds in your county is entitled to receive an annual salary amounting to \$2300.00 and, in addition thereto, \$500.00 annually allowed for services rendered as clerk of the juvenile division of the circuit court, and said officer may also retain, in

addition to the foregoing compensation, all fees earned by him in change of venues from other counties.

CONCLUSION

Therefore, it is the opinion of this department that the circuit clerk and recorder of deeds in third-class counties, wherein the two offices are combined, is entitled to receive the annual salary provided in House Bill No. 775, passed by the 63rd General Assembly, and, in addition thereto, the amount allowed in said bill for services rendered as clerk of the juvenile division of the circuit court, and, in addition to the foregoing compensation, said officer may retain fees earned by him in change of venues. However, all other fees or compensation allowed said officer shall be reported monthly and paid into the county treasurer, which will include all fees or compensation allowed by the court under Article 1, Chapter 79, R.S. Mo. 1939.

Respectfully submitted,

AUDREY R. HAMMETT, Jr.  
Assistant Attorney General

APPROVED:

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J. E. TAYLOR  
Attorney General

ARH:LR

*Copy to  
J. Smith*

COUNTY BOARD OF EQUALIZATION: Judges of county court in third  
COUNTY JUDGES: class counties entitled to fees for  
COUNTY SURVEYOR: holding court and as members of  
board of equalization when acting in  
both capacities on same day; county  
surveyor in counties of the third  
class entitled to fee as member of  
board of equalization, and compensation  
August 15, 1947 as county highway engineer,  
when acting in both capacities  
on same day.

Honorable D. D. Thomas, Jr.  
Prosecuting Attorney  
Carroll County  
Carrollton, Missouri

9/5

Attention: Mr. Jack Calvert Jones  
Asst. Prosecuting Attorney



Dear Sir:

This is in reply to your letter of August 6, 1947,  
requesting an official opinion from this department, which  
reads as follows:

"According to your opinion under date  
of July 16, 1946, addressed to W. D.  
Mayse, the Sheriff is entitled to re-  
ceive the fee of \$5.00 for serving as  
a member of the Board of Equalization  
and that the County Court Judges are  
entitled to the same fee, but the  
question has arisen as to whether or  
not the county court judges are en-  
titled to their fees as county court  
judges and as members of the board of  
equalization, when they act as both on  
the same day.

"The same question has arisen as to the  
compensation of the County Surveyor.  
Can he draw the compensation fixed by  
the County Court as his fee as County  
Engineer and the fee for serving as a  
member of the County Board of Equaliza-  
tion, when he acts as both on the same  
day?

"From the opinion above mentioned, it  
is evident that the County Clerk is not  
entitled to compensation for serving as

a member of the Board of Equalization, since he is entirely on a salary basis, but would like to have your opinion on this also."

The opinion referred to in your letter holds that judges of the county court in counties of the third class are entitled, under the provisions of Section 11008, Mo. R.S.A., to certain compensation for each day they act in the performance of their duties as members of the county board of equalization. Said section reads as follows:

"The judges of the county court, the county surveyor, the county assessor, the sheriff, the county clerk, and those sitting as members as may otherwise be provided, shall receive five dollars per day for each day they shall be present and act in the performance of their duties as members of the county board of equalization. Provided, that the above county officers who are now or may hereafter be compensated by salary shall not be entitled to the compensation provided in this section."

The first question presented is whether the judges of the county court are entitled to said compensation in addition to that allowed by Section 2494.3, Mo. R.S.A., when acting in both capacities on the same day. Section 2494.3 provides:

"In all counties of the third class in this state, the judges of the county court shall receive for their services the sum of ten dollars per day for each of the first five days in any month that they are necessarily engaged in holding court and shall receive five dollars per day for each additional day in any month that they may be necessarily engaged in holding court, and shall receive five cents per mile for each mile necessarily traveled in going to and returning from the place of holding county court. The per diem compensation herein

fixed shall be paid at the end of each month and the mileage compensation shall be paid at the end of each month on presentation of a bill, by each of the respective county judges setting forth the number of miles necessarily traveled; provided, however, that this increase in compensation shall not become effective during any county judge's present term of office."

The next section of the same act, Section 2494.4, provides for additional compensation when judges of the county court act as members of the county board of equalization. Said section is as follows:

"In addition to the compensation provided in Section 1 of this act, the judges of the county court in counties of the third class shall receive five dollars per day for each day they shall act as members of the county board of equalization."

It is a well-recognized rule of statutory construction that statutes relating to the same subject are to be read together and harmonized so as to give effect to each. The court, in the case of *State v. State Tax Commission*, 153 S.W. (2d) 43, said at page 45:

"It is the duty of courts in construing two or more statutes relating to the same subject, to read them together and to harmonize them, if possible, and to give force and effect to each." *Little River Drainage District v. Lassater*, 325 Mo. 493, 29 S.W. 2d 716, loc. cit. 718. And this applies not only to acts passed at the same session of the legislature, but also to acts passed at prior and subsequent sessions. *State ex rel. and to Use of George B. Peck Co. v. Brown, Secretary of State*, 340 Mo. 1189, 105 S.W. 2d 909."



See also Whalen v. Buchanan County, 111 S.W. (2d) 177, 1.c. 180.

There is nothing in the foregoing statutes which prohibits the proposition under consideration, and, in fact, the terms of Section 2494.4, supra, declare that the compensation allowed judges of the county court as members of the county board of equalization is additional to that provided in the preceding section. Even though said judges act in both capacities on the same day, they should be compensated for both functions. This is a natural result, and the Legislature must be presumed to fully understand the consequences of their acts.

In the absence of a statutory prohibition, the foregoing provisions must be harmonized and effect given to each, thereby allowing judges of the county to receive compensation for holding court and acting in the performance of their duties as members of the county board of equalization although both functions are performed on the same day.

We submit that the above reasoning with regard to the harmonizing of statutes applies with equal force to the office of county surveyor and ex officio county highway engineer in counties where the county court, under the provisions of Section 8660, Mo. R.S.A., appointed the county surveyor to the office of county highway engineer. Of course, the county surveyor is entitled to compensation as a member of the board of equalization, so the only question is whether the county surveyor may receive said compensation and also compensation as county highway engineer when acting in both capacities on the same day. It is clear that when these provisions were enacted the Legislature contemplated that he should receive compensation from both sources, even in this situation, and we must therefore harmonize said provisions and give effect to each.

Section 8660, Mo. R.S.A., specifically provides that said county highway engineer shall receive compensation fixed by the county court and also such fees as are allowed by law for his services as county surveyor. And the fee for acting as a member of the county board of equalization is such a fee as is allowed by Section 13425.1. It necessarily makes no difference whether or not the county surveyor acts in both capacities on the same day.

The county surveyor, in the situation at hand, is actually an ex officio county highway engineer, that is, he holds the second office by virtue of the first. It is an authority not expressly conferred on the county surveyor as an individual but rather annexed to his official position, therefore said offices are separate and distinct. Because of this fact any argument, to the effect that the county surveyor is not entitled to compensation as a member of the county board of equalization because he receives a salary (as county highway engineer) and is thereby within the prohibition set out in Section 11008, is unfounded.

With reference to the third question submitted, your attention is directed to our opinion rendered to Honorable David E. Impey, Prosecuting Attorney of Texas County, dated August 14, 1947, holding that the clerk of the county court in counties of the third class is entitled to receive \$5.00 per day for each day that he is present and acts in the performance of his duties as secretary of the county board of equalization. We are enclosing herewith a copy of said opinion.

#### Conclusion.

Therefore, it is the opinion of this department that judges of the county court of a county of the third class are entitled to receive compensation for holding court and acting in the performance of their duties as members of the county board of equalization although both functions are performed on the same day. It is further the opinion of this department that the county surveyor of a county of the third class who is ex officio county highway engineer is entitled to receive compensation for acting in the performance of his duties as a member of the county board of equalization as well as that compensation allowed him as county highway engineer even though the functions of both offices are performed on the same day.

Respectfully submitted,

DAVID DONNELLY  
Assistant Attorney General

APPROVED:

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J. E. TAYLOR  
Attorney General

DD:ml  
Enc.

SCHOOLS: County common school funds as used in Section 10400, House Bill # 494, means school moneys belonging to various school districts. County treasurer 4th class counties only entitled to salary provided for in Section 13800.4, House Bill No. 781.

February 17, 1947



3/27

Mr. E. S. Trantham  
Treasurer, Webster County  
Marshfield, Missouri

Dear Mr. Trantham:

Your request for an official opinion, the receipt of which was previously acknowledged, reads:

"At the request of the County Court of Webster County they would like an opinion on the meaning of House bill #494,

"In paying for the Treasurers bond does the County common school funds, refer to the Permanent school funds of the County? Also the principal or the interest fund.

"In paying the Treasurers compensation, out of the County treasury mean the County general revenue fund."

Your request presents two questions which involve the interpretation of House Bill No. 494, Section 10400.

Your first inquiry is in regard to the interpretation of the words "county common school funds," out of which the premium for the surety bond, given by the county treasurer, is paid by the county court.

Section 10400 of House Bill No. 494 which was enacted by the 63rd General Assembly provides as follows:

"The county treasurer in each county shall be the custodian of all moneys for school purposes belonging to the different districts, until paid out on warrants duly issued by order of the board of directors or to the treasurer of some town, city or consolidated school district, as authorized by this chapter, except in counties having adopted the township organization law, in which counties

the township trustee shall be the custodian of all school moneys belonging to the township, and be subject to corresponding duties as the county treasurer; and said treasurer shall pay all orders heretofore legally drawn on township clerks, and not paid by such township clerks, out of the proper funds belonging to the various districts; and on his election, before entering upon the duties of his office, he shall give a surety company bond, with sufficient security, in the probable amount of school moneys that shall come into his hands, payable to the State of Missouri, to be approved by the county court, and paid by the county court out of the county common school funds, conditioned for the faithful disbursement, according to law, of all such moneys as shall from time to time come into his hands; and on the forfeiture of such bond it shall be the duty of the county clerk to collect the same for the use of the schools in the various districts. If such county clerk shall neglect or refuse to prosecute, then any freeholder may cause prosecution to be instituted. It shall be the duty of the county court in no case to permit the county treasurer to have in his possession, at any one time, an amount of school moneys over the amount of the security available in the bond; and the county treasurer shall be allowed such compensation for his services as the county court may deem advisable, not to exceed one-half of one per cent of all school moneys disbursed by him, and to be paid out of the county treasury: "Provided that the county treasurer in any county of the third class or fourth class may furnish either a personal or surety bond and in case a surety bond is required by the county court in said county, said surety bond shall be paid for by said county." (Emphasis ours)

The above section repealed Section 10400, R. S. Mo. 1939, relating to the same subject matter. One of the changes made in the new section was the provision relating to the giving of a bond by the county treasurer. As indicated in the underscored portion of Section 10400, supra, the county treasurer is now required to give a surety bond in the probable amount of school moneys that

shall come into his hands, said bond to be approved and paid by the county court out of the county common school fund. In the old section 10400 the county treasurer was required to give a bond in double the probable amount of school moneys coming into his hands, said bond to be approved by the county court. There was nothing in the old section relating to the method of payment of the bond. Therefore, by passing House Bill No. 494 the Legislature has enacted new matter relating to the giving of a bond by the county treasurer for the purpose of making secure certain school moneys coming into his hands.

Webster County falls within the category of counties of the fourth class, and that portion of Section 10400 of House Bill No. 494, relating to the furnishing of a bond by the county treasurer in fourth class counties provides:

"\* \* \*Provided that the county treasurer in any county of the third class or fourth class may furnish either a personal or surety bond and in case a surety bond is required by the county court in said county, said surety bond shall be paid for by said county."

Under the above quoted portion of the statute the county treasurer in a fourth class county may furnish either a personal bond or a surety bond, however, if a surety bond is given and is approved by the county court the premium for such bond shall be paid by the county court out of the county common school funds. It has been so held by this department in an opinion submitted December 5, 1946, to Honorable Edwin W. Mills, prosecuting attorney of St. Clair County a county of the fourth class.

Now let us consider the meaning of the words "county common school funds" as they appear in Section 10400 of House Bill No. 494. In construing their meaning we must do so with the purpose in mind to promote the object of the entire statute in which they appear as intended by the Legislature. For it is a primary rule of statutory construction to ascertain the intent of the lawmakers from the language used and to put upon the language its plain and rational meaning in order to promote its object. *Donnelly Garment Co. v. Keitel* (Mo. Sup.) 193 S. W.(2d) 577.

In the first part of Section 10400 of House Bill 494 it is provided that the county treasurer in each county shall be the custodian of all moneys for school purposes belonging to the different districts, until paid out on warrants issued by the order of the Board of Directors (in the case of common school districts), or distributed to the treasurers of town, city or consolidated school districts. Later in the statute it is provided that the treasurer

shall give a bond conditioned for the faithful disbursement of such moneys.

We believe that the school moneys referred to in the statute, which are to be protected by the bond, are only the moneys coming into the hands of the county treasurer that are to be distributed to the various school districts of the county, either by warrant in the case of the common school districts, or by being paid directly to the treasurer of town, city or consolidated school districts. The requirement of the bond to be furnished by the county treasurer is to protect the various school districts from any loss of moneys belonging to them as a result of unfaithful performance of duty by the county treasurer. We therefore believe that in declaring that the bond shall be paid for out of the "county common school funds" the Legislature has intended that it be paid out of the school moneys protected by the giving of the bond, i.e., the moneys coming into the hands of the county treasurer belonging to, and to be distributed to, the various school districts. A superficial interpretation of the words "county common school funds" might indicate that the bond was to be paid for only out of the funds belonging to the common school districts of the county, but such an arrangement would be unreasonable and inequitable and not in harmony with the true legislative intent.

Therefore, in answer to your first question we believe that the "county common school funds" refer to those funds coming into the hands of the county treasurer which belong to, and are to be distributed to, various school districts of the county. The premium for the surety bond should be paid for from amounts withheld from the moneys belonging to each school district in the proportion that the amount belonging to each school district is to the entirety of such moneys coming into the hands of the county treasurer belonging to all of the school districts.

Your second question pertains to the compensation of county treasurers for disbursing school monies as provided in section 10400 of House Bill No. 494, which, in part, reads:

"\*\*\*\*and the county treasurer shall be allowed such compensation for his services as the county court may deem advisable, not to exceed one-half of one per cent of all school moneys disbursed by him, and to be paid out of the county treasury:\* \* \*"

We inclose a copy of an opinion submitted to Mr. B. E. Ragland, Chief Clerk of the State Auditor's Office, dated March 5, 1947, in which this office held that the county treasurer in counties of the third class is only entitled to his salary as provided for in Section 13800.3 of House Bill No. 780 of the Laws of 1945, and is not entitled to any compensation for disbursing school monies as provided in

Section 10400 of House Bill No. 494.

Your attention is directed to Section 13800.4 of House Bill No. 781, passed by the 63rd General Assembly, which was approved March 7, 1946, and became effective July 1, 1946. This section provides:

"Sec. 13800.4 Counties of fourth class--salary of county treasurer

"The county treasurers in counties of the fourth class of this State shall receive for their services annually, to be paid out of the county treasury in equal monthly installments at the end of each month by a warrant drawn by the county court upon the county treasury, the following sums: In counties having 10,000 inhabitants or less, the sum of \$1,200; in counties having more than 10,000 inhabitants and not more than 12,500, the sum of \$1,500; in counties having more than 12,500 inhabitants and not more than 15,000, the sum of \$1,800; and in counties having more than 15,000 inhabitants, the sum of \$2,200; provided, salaries set out and prescribed in this section shall be in lieu of any other or additional salaries, fees, commissions or emoluments of whatsoever kind for county treasurers in all counties of this state to which this section, by its terms, applies, the provisions of any other statute of this state to the contrary notwithstanding."

House Bill No. 781 in its application to counties of the fourth class is the same as House Bill No. 780 in its application to counties of the third class.

Taking the inclosed opinion and substituting House Bill No. 781 in place of House Bill No. 780, the same conclusion would be reached regarding the compensation of the county treasurer in counties of the fourth class as was concluded in that opinion regarding the compensation of the county treasurer in counties of the third class. Therefore the county treasurer in fourth class counties would only be entitled to his salary as provided for in Section 13800.4 of House Bill No. 781 of the Laws of 1945.

#### CONCLUSION

It is, therefore, the opinion of this department that the words

"county common school funds" as used in Section 10400 of House Bill No. 494, mean those funds coming into the hands of the county treasurer which belong to, and are to be distributed to, the various school districts of the county. The premium for the surety bond furnished by the county treasurer should be paid for by amounts withheld from the moneys belonging to each school district in the proportion that the amount belonging to each school district is to the entirety of such moneys coming into the hands of the county treasurer belonging to all of the school districts.

Further, it is the opinion of this department that the county treasurer in counties of the fourth class is only entitled to his salary as provided for in Section 13800.4 of House Bill No. 781 of the Laws of 1945, and is not entitled to any compensation for disbursing school moneys as provided in Section 10400 of House Bill No. 494, Laws of 1945.

Very truly yours,

RICHARD F. THOMPSON  
Assistant Attorney General

APPROVED:

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J. E. TAYLOR  
Attorney General

RJS:mw  
Enc.



INSURANCE: Approval of incorporation of Protective Mutual Casualty Company

March 24, 1947

FILED  
90

3/24

Honorable A. R. Troxell  
Counsel  
Division of Insurance of Missouri  
Jefferson City, Missouri

Dear Mr. Troxell:

Herewith, we are enclosing the original and triplicate copies of the opinion you requested in the matter of the incorporation of the Protective Mutual Casualty Insurance Company.

We are likewise enclosing two copies of the draft of the Articles of Incorporation of said company. We also return the original proof of publication of the Articles of Incorporation. This proof of publication, we believe, should be retained by your office, along with one copy of the original signed and acknowledged Articles of Incorporation. We would, however, like to have a copy of the proof of publication for our files. But, you should keep among your records, the original.

Trusting that this will meet with your approval, and that it will be sufficient for your records, we are,

Very sincerely,

GEORGE W. CROWLEY,  
Assistant Attorney General

GWC:lr  
enc:

SOIL CONSERVATION DISTRICTS: The soil district of any county, in the absence of any statutory provision, is immune from any tort liability for the negligence of its employees while engaged in the soil conservation program as provided for in the Soil Conservation Districts Law.

May 23, 1947

4/3  
**FILED**  
90

Dean E. A. Trowbridge, Chairman  
Missouri State Soil Districts Commission  
128 Mumford Hall  
Columbia, Missouri

Attention: Mr. John W. Ferguson  
Extension Soil Conservationist

Dear Sir:

This is in reply to your letter of May 17, 1947, in which you requested an opinion relative to the liability of established soil districts in this state. Said letter reads in part as follows:

"I hope our discussion the other day, together with these enclosed forms, will enable you to prepare an opinion relative to the exact legal status of established soil districts in this state. We would like to know definitely whether the Enabling Act under which we operate actually establishes soil districts as definite political subdivisions of the state, and we would appreciate an opinion regarding their liability and rights with respect to the operation of conservation equipment and the employing of necessary personnel."

A letter to you from the Franklin County Soil District, under date of April 30, 1947, which you enclosed to us, reads in part as follows:

"The Soil Conservation Service has received three T-D 18 track type tractors for use in this district. The Soil District of Franklin County will receive at least one, or possibly more, of these machines for use in the county."

"The Supervisors of the Soil District of Franklin County have requested that I obtain information from you regarding types of insurance they will need for both the machine and operator. They are thinking specifically about liability and property damage on the machines, and insurance that would cover personal injury for the operator."

The State Soil Districts Commission was created by an act of the Legislature of the State of Missouri, approved July 23, 1943, by the 62nd General Assembly, and known as the Soil Conservation Districts Law, Senate Bill No. 80, found on page 839 of the 1943 Missouri Laws. By the act this Commission is made a political subdivision of the state--a state agency. Section 4 of said act provides for the establishment of soil conservation districts in any certain county or specific township or townships. Section 6 specifies that any soil district organized under the provisions of this act shall be a body corporate. Said section says that "\* \* \* Any soil district so organized shall be officially known and titled The Soil District of . . . . . County, and shall be so designated by the county court by order of record, and in that name shall be capable of suing and being sued and of contracting and being contracted with."

Therefore, this soil district being what we may refer to as a quasi-corporation, a political subdivision and agency of the state, and analogous to a school district as regards liability, we feel that the wording of the court in the case of Cochran v. Wilson, 287 Mo. 210, is quite applicable where at l.c. 218 they said:

"\* \* \* The reasons prompting legislative action in the creation of school districts has been judicially defined many times, nowhere perhaps more fully or clearly than in Freel v. School of Crawfordsville, 142 Ind. 27, in which recovery was sought by a laborer in a suit against a school district for injuries while working on a school building. A demurrer to the petition was sustained and there was judgment for the defendant. This was affirmed on an appeal to the Supreme Court.

In discussing the quasi-corporate capacity of the district as a ground of nonliability, at page 28, the court said, in effect:

"They are involuntary corporations, organized, not for the purpose of profit or gain, but solely for the public benefit, and have only such limited powers as were deemed necessary for that purpose. -Such corporations are but the agents of the State for the sole purpose of administering the state system of public education. \* \* \* In performing the duties required of them, they exercise merely a public function and agency for the public good, for which they receive no private or corporate benefit. School corporations, therefore, are covered by the same law in respect to their liability to individuals for the negligence of their officers or agents, as are counties and townships. It is well established that where subdivisions of the State are organized solely for a public purpose by a general law, no action lies against them for an injury received by a person on account of the negligence of the officers of such subdivision, unless a right of action is expressly given by statute. Such subdivisions, then, as counties, townships and school corporations, are instrumentalities of government and exercise authority given by the State and are no more liable for the acts or omissions of their officers than the State."

Likewise, we feel that the wording of the Cochran case, supra, at page 220, is applicable where the court said:

"In Moxley v. Pike County, 276 Mo. 449, l.c. 453, this court ruled that a county was not liable for an injury caused by a defective highway. The reasons for the court's ruling are stated somewhat elaborately and may not inappropriately be quoted in this connection.

"When, for convenience in the administration of its laws, the State, through the Legislature,

calls to its aid those territorial organizations sometimes called, with more or less accuracy, quasi-corporations, such as counties, townships and school districts, the question has frequently arisen whether these agencies share, with the State itself, immunity from common-law liability for the negligence of their officers in the exercise of their territorial duties. The answer, from the courts of this State, has generally been a negative one. From *Reardon v. St. Louis County*, 36 Mo. 555, down to *Lamar v. Bolivar Special Road District*, 201 S.W. 890, are many cases which will be found collected in the case last cited which have settled the general principle so firmly that it is not questioned by this appellant. On the other hand, it has been equally well settled that municipal corporations, which include cities, towns and villages, are, in the control, management and maintenance of their streets, alleys and public places, subject to such liability. The cases recognizing this doctrine are so numerous and so constantly before our appellate courts and their doctrine so well recognized as to render citations not only unnecessary but unjustifiable. This general doctrine is also recognized and admitted by the parties to this appeal."

The case of *Zoll v. St. Louis County*, 124 S.W. (2d) 1168, involved an action against the county to recover consequential damages resulting from changing the grade of a public highway. The court in denying recovery reviewed the many similar cases in this state where suits have not been permitted to be brought against an agency of the state. At l.c. 1172, the court said:

"Such a cause as here has never been permitted to be maintained in this state. The long established policy of the state, as reflected in the cases we have reviewed, and there are others, clearly is against the maintenance of such suits. Cases involving municipal corporations are not authority for the maintenance of the present cause, and this because when improving streets, etc., the municipality is acting in a private

and proprietary capacity and for its own private benefit. See Moxley v. Pike County, supra, 208 S.W. loc. cit. 247; Zummo v. Kansas City, 285 Mo. 222, 225 S.W. 934, loc. cit. 935; Cochran v. Wilson et al., 287 Mo. 210, 229 S.W. 1050, loc. cit. 1053."

As we understand the factual situation in the case of the county soil districts, the individual farmers of the district may enter into an agreement with the board of supervisors to have this program of soil conservation performed on their land. In other words, this county soil district probably would receive money from the individual farmers they serve to help defray some of the maintenance expense of the county soil conservation program. Such a procedure, we feel, would not deprive the district of the characteristics of a governmental function acting in the capacity of agent of the state. Moxley v. Pike County, 276 Mo. 449, is a case we feel by analogy is quite appropriate to our case of the soil district of a county. The Zoll case, supra, in speaking of the Moxley case, said at l.c. 1171:

"Moxley v. Pike County, 276 Mo. 449, 208 S.W. 246, was an action for damages resulting from personal injury. Plaintiff's automobile, driven by himself at night on a public road, and occupied by himself and wife, ran over the bank and into the bed of a stream from which the bridge had been removed, and the place left unguarded. Originally this road was a private road and toll was charged, but later taken over by the county and collection of toll continued. It was contended that since this road, at its origin, was a private road and that toll was charged, and that toll continued to be charged after the road was taken over, the county was liable. In ruling the case, the court said, 208 S.W. loc. cit. 248: '\* \* \* Pike county, in taking over the control and management of the road in question by authority of the act of 1899, and maintaining toll gates thereon, and collecting tolls from travelers to provide a fund for its maintenance, was acting in the capacity of agent of the state, and that its negligence

in the performance of the duties arising from such official relation is not imputable to the county, which is not, therefore, liable in this suit.'"

Therefore, we feel that the statement made by the court in *Todd v. Curators of University of Missouri*, 147 S.W. (2d) 1063, would in general be the rule as applied to soil conservation districts where the court said at l.c. 1064:

"In the absence of express statutory provision, a public corporation or quasi corporation, performing governmental functions, is not liable in a suit for negligence. \* \* \* \* \*

The remaining question to be dealt with is the provision in the act to the effect that the district of any certain county, being a body corporate, "shall be capable of suing and being sued." *Todd v. Curators of University of Missouri*, supra, was a case involving an action against the Curators of the University of Missouri for alleged negligence in failing to furnish plaintiff a safe place to work when he was repairing certain campus buildings. The court held the defendant, as a public corporation, was immune from such actions. At l.c. 1064, the court said:

"A statutory provision that such a public corporation 'may sue and be sued' does not authorize a suit against it for negligence. '\* \* \* But the waiver by the state for itself or its officers or agents of immunity from an action is one thing. Waiver of immunity from liability for the torts of the officers or agents of the state is quite another thing.' *Bush v. Highway Commission*, 329 Mo. 843, loc. cit. 849, 46 S.W. 2d 854, loc. cit. 856. See also *Hill-Behan Lumber Co. v. State Highway Commission*, Mo. Sup., 148 S.W. 2d 499, not yet reported (in State Reports), and cases cited supra."

The case of *Hill-Behan Lumber Co. v. State Highway Commission*, 148 S.W. (2d) 499, involved an action by plaintiff against the State Highway Commission of Missouri for consequential damages to

plaintiff's property. The Supreme Court directed the trial court to dismiss plaintiff's petition. Section 8102, R.S. Mo. 1929, providing for the State Highway Commission, among other provisions, said that the State Highway Commission "may sue and be sued." The court, at l.c. 500, said:

"Plaintiff, however, says that Section 8102 R.S. 1929, Mo. St. Ann., Sec. 8102, p. 6889, provides that the State Highway Commission 'may sue and be sued', and that therefore, there is statutory authority for the present suit. So can counties sue and be sued in many instances, but absent an authorizing statute, a county cannot be sued for changing the grade of a public highway as was ruled in the Zoll case, supra, and there is no authority to support the contention that Section 8102 authorizes such suit as here. By an authorizing statute, we do not mean such statute as Section 8102, but a statute specifically providing for the payment of damages when caused to abutting owners by the change of grade of a public highway."

#### CONCLUSION

In view of the above, it is the opinion of this department that the soil district of any county of this state, being an agent of the state in carrying out its governmental functions, in the absence of any statutory provisions, is immune from any tort liability for the negligence of its employees while engaged in the soil conservation program as provided for in the Soil Conservation Districts Law.

Respectfully submitted,

Wm. C. COCKRILL  
Assistant Attorney General

APPROVED:

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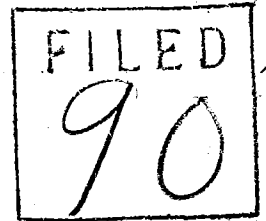
J. E. TAYLOR  
Attorney General

WCC:LR



TRAINING SCHOOLS: Circuit court may modify its order of commit-  
CIRCUIT COURTS: ment to state training schools.  
JUVENILES:

August 6, 1947



Board of Training Schools  
State of Missouri  
Jefferson City, Missouri

Attention: Mr. Louis J. Sharp, Director

Gentlemen:

This will acknowledge receipt of your request for an official opinion which reads:

"From time to time the Board of Training Schools is faced with the problem of circuit and juvenile court judges wishing to make changes in court orders of commitment to the three training schools.

"These changes usually take one of these two forms:

1. The court desires to release the juvenile to the custody of some other agency or person, whether or not there is to be continuation of supervision or court jurisdiction, and enters a court order modifying the original judgment to provide for this change of custody and release from the training schools.

2. The court desires to reduce the period of commitment to provide for the termination of a commitment and thereby release the juvenile without further control.

"The Board of Training Schools would like to have an opinion on the following:

1. What responsibility the Board and the Superintendents have in recognizing such court orders as outlined in 1 and 2 above, after the juvenile has been accepted in a training school.

2. Whether or not a decision in a particular case would be conditioned on whether

or not the amending court order was filed during the same term of court or a subsequent term of court."

In construing your request, it is important that we examine Sections 9704 and 9715, R. S. Mo. 1939, which read:

"Sec. 9704. When any child coming under the provisions of this article shall be adjudged to be neglected or delinquent or in need of the care or discipline and protection, the court may make an order committing the child, under such conditions as it may prescribe, to the care of some reputable person of good moral character, or to the care of some association willing to receive it, embracing in its objects the purpose of caring for neglected children, or to any institution incorporated under the laws of this state that may care for children, or to any institution or agency which now is or hereafter may be established by the state or county for the care of children; or the court may place the child in the care and control of a probation officer, and may allow such child to remain in its home subject to the visitation and control of the probation officer, to be returned to the court for further proceedings whenever such action may appear to the court to be necessary; or the court may authorize the child to be placed in a suitable family home, subject to the friendly supervision of a probation officer and the further order of the court; or it may authorize the child to be cared for in some suitable family home in such manner as may be ordered by the court or may arrange for same through voluntary contributions or otherwise until suitable provision may be made for the child in a home without such payment. In case of a delinquent child the court may commit such child, if a boy, to a training school for boys, or to the Missouri reformatory, or, if a girl, to the state industrial home for girls, or, if a colored girl, to the state industrial home for negro girls.

The court shall not commit any child under the age of seventeen years to any jail or police station where such child may come in contact in any way with adults convicted or under arrest. All orders of the court touching the care or other disposition of any child shall be subject to such modifications from time to time as the court may consider to be for the best welfare of said child. In making commitments to associations or individuals the court shall place children as far as practicable with associations or persons having the same religious faith as the parents of such child. After any child shall have come under the care or control of the juvenile court as herein provided, any person who shall thereafter knowingly contribute to the delinquency or neglect of such child, shall knowingly disobey, violate or interfere with any lawful order of said court, with relation to said child, shall be guilty of contempt of court, shall be proceeded against as now provided by law and punished by imprisonment in the county jail for a term not exceeding six months or by a fine not exceeding five hundred dollars or by both such fine and imprisonment."

"Sec. 9715. Nothing in this article shall be construed to repeal any portion of the law relating to the state industrial home for girls or the Missouri reformatory; and in all commitments to either of said institutions the law in reference to said institutions shall govern the same."

The two foregoing statutory provisions are both contained in the same Article 10, Chapter 56, R. S. Mo. 1939. Neither of the foregoing provisions have been specifically repealed by the Legislature and since repeals by implication are not favored, we are of the opinion that if said provisions do not directly conflict in any manner with the Constitution or laws hereinafter referred to, with respect to having charge and control of said training schools, then said provisions shall remain in full force and effect.

We shall first relate a little history regarding the various training schools in this state. Said training schools

were formerly under the jurisdiction of the commission of the department of penal institutions (see Section 8894, R. S. Mo., 1939). Said commission was authorized to appoint a superintendent who was to be the chief executive officer of said institutions under the control of the commission of the department of penal institutions (see Sections 8994 and 8995, R. S. Mo., 1939). The foregoing provisions formerly gave the department of penal institutions the full control and management of Missouri Training Schools for Boys. Under Sections 9010 and 9012, R. S. Mo., 1939, the Legislature gave the commission of the department of penal institutions supervision and government of the State Industrial Home for Girls at Chillicothe. Under Section 9022, R. S. Mo., 1939, the same department was vested with similar authority over the Industrial Home for Negro Girls.

While the foregoing laws provided for the return of certain children placed in said institutions, to the court or magistrate sending them to said institutions, upon finding them to be incorrigible and providing how said court or magistrate shall then sentence them, furthermore such laws contained provisions that before any sentence made by certain courts could be executed, the commitment must have the endorsement thereon the approval of the circuit or probate court (see Sections 9017 and 9029, R. S. Mo., 1939), there is nothing in the foregoing statutes giving the commission of the department of penal institutions jurisdiction of said training schools that directly conflicts with Section 9704, R. S. Mo., 1939.

Subsequent thereto, the Constitutional Convention in 1944 proposed Section 38, Article IV of the Constitution of Missouri 1945, and the voters of this state at a special election held on the 27th day of February, 1945, adopted said constitutional amendment which on and after the 30th day of March, 1945, became the supreme law of the State of Missouri. The foregoing constitutional provision places all training schools in charge of a board of trustees to be appointed by the governor with the advice and consent of the Senate and reads:

"All state training schools and industrial homes for boys and girls shall be classified as educational institutions and shall be in charge of a board of six trustees, three from each of the two major political parties, appointed by the governor by and with the advice and consent of the senate. All employees of the board shall be selected and removed as provided for employees in the state eleemosynary institutions."

Thereafter, the 63rd General Assembly enacted a law to conform with the foregoing constitutional provision (see Sections 20 to 34, inclusive, pages 730-734, Laws of Missouri 1945). Section 20 of the Laws of Missouri 1945, page 730, vests in the state board of training schools full charge and control of all training schools which is, if possible, even broader than the foregoing constitutional provision. "Charge" has been defined by Webster's New International Dictionary, Second Edition, as follows:

"9. A person or thing committed or entrusted to the care, custody or management of another;

"in charge \* \* \* having the charge or care of something, esp., temporarily; as, the officer or minister in charge."

Various decisions have defined the word "charge" as synonymous with "custody" (see *Randazzo vs. United States*, 300 F. 794, 1.c. 797). Other insurance liability decisions in various states define the words "in charge of" as used in such policies to mean not mere possession but the right to exercise dominion or control of something (see *Sky et al., vs. Keystone Casualty Company*, 29 Atl. (2d) 230, 1.c. 232-233; also *Cohen & Powell vs. Great American Indemnity Company*, 16 Atl. (2d) 354, 1.c. 355; and *Homin vs. Cleveland and Whitehill*, 24 N.E. (2d) 136, 1.c. 138). As can be seen by the foregoing definitions, said board of training schools under the foregoing statutes and constitutional provisions have almost unlimited authority relative to administrative management, course of study, recreation, rehabilitation and conduct of children committed to said institutions. However, nothing in said act of 1945 or Section 38, Article IV of the Constitution of Missouri 1945, in any manner conflicts with that part of Section 9704, R. S. Mo. 1939, which authorizes the circuit court that commits boys or girls to said training schools to modify the order of said court when in the court's opinion it is for the best welfare of the child. To prohibit this might be detrimental to a child in that some circuit courts might not be anxious to commit children to said institutions unless they at least have some authority or supervision thereafter to modify their orders when and if conditions and circumstances in their opinion warrant a modification of said order.

One of the cardinal rules of statutory construction is that two or more statutes, relating to the same subject, should be read together and harmonized, if possible, so as

to give full force and effect to each, and this rule applies not only to acts passed at the same session of the Legislature but also to those passed at prior and subsequent sessions (see State ex rel. Central Surety Insurance Corporation vs. State Tax Commission, 153 S.W. (2d) 43, 348 Mo. 171; also White River Drainage District vs. Lancaster, 29 S.W. (2d) 716, 325 Mo. 493).

In view of the foregoing, it is the opinion of this department that Section 9704, R. S. Mo. 1939, authorizing the circuit court to modify its order at any time when the court feels it is for the best welfare of the child committed by said court to said training school, does not conflict with the provisions of Section 9715, R. S. Mo. 1939, or with any law in effect at the time of said enactment or subsequent thereto, nor does it conflict with Section 38, Article IV of the Constitution of Missouri 1945, and therefore, same is still in full force and effect as of this date.

Answering your second query, it is the further opinion of this department that Section 9704, R. S. Mo. 1939, being more in the nature of a special statute authorizing the circuit court to amend its order at a subsequent date, possibly extending far beyond that term of the circuit court, that it would take precedence over any decision or statute holding that a circuit court may not change a judgment subsequent to the closing of the term of court at which said judgment was rendered. It is true that the appellate courts of this state have held that after the expiration of a term at which a judgment and sentence were pronounced, the criminal court is without jurisdiction to set them aside. In State vs. Lonon, 56 S.W. (2d) 378, l.c. 380, the court in so holding said:

"The only reason, assigned in appellant's motion, questioning the jurisdiction of the circuit court to try the defendant, was that the case had been dismissed against him and the court was without power to reinstate the case. Courts of general jurisdiction have inherent authority, during the term, to vacate any judgment or order that may have been made at that term. This was the rule at common law and prevails in most jurisdictions. (See cases cited.) \* \* \*

See also Dusenberg vs. Rudolph, 30 S.W. (2d) 94, l.c. 96 (9), 325 Mo. 881, and Carrollo vs. United States, 141 F. (2d) 997. However, the order of the circuit court in this instance rendered under Section 9704, R. S. Mo. 1939, which is a special

statute, has the effect of being the exception to the foregoing rule and permits the circuit court to set aside orders rendered at a previous term of court. In *State vs. Richman*, 148 S.W. (2d) 796, 1.c. 799, the court in so holding said:

"In *State v. Harris*, 337 Mo. 1052, 1058, 87 S.W. 2d 1026, 1029, we said that if statutes are necessarily inconsistent that which deals with the common subject matter in a minute and particular way will prevail over one of a more general nature; and, citing authorities, we quoted the rule as stated in *State ex rel. County of Buchanan v. Fulks*, 296 Mo. 614, 626, 247 S.W. 129, 132, thus: "Where there is one statute dealing with a subject in general and comprehensive terms and another dealing with a part of the same subject in a more minute and definite way, the two should be read together and harmonized, if possible, with a view to giving effect to a consistent legislative policy; but to the extent of any necessary repugnancy between them the special will prevail over the general statute. Where the special statute is later, it will be regarded as an exception to, or qualification of, the prior general one; and where the general act is later, the special will be construed as remaining an exception to its terms, unless it is repealed in express words or by necessary implication." "

See also *State ex rel. R. Newton McDowell, Inc., vs. Smith*, 67 S.W. (2d) 50, 334 Mo. 653; also *State of Missouri vs. Ross*, 57 S. Ct. 60, 299 U.S. 72, 81 L. Ed. 46.

In view of Section 9704, *supra*, being a special statute, it will therefore prevail over any general provision regarding the time when circuit courts may modify judgments and under said section, the circuit court may modify its order committing said delinquent children to the state training schools in this state whenever said court is of the opinion that it is for the best welfare of said child.

CONCLUSION

Therefore, it is the opinion of this department that that part of Section 9704, R. S. Mo. 1939, authorizing the circuit court to modify its order when, in the opinion of the court, it is for the best welfare of the child committed to said training school, is still in full force and effect; and it is the further opinion of this department that decisions of the Supreme Court, holding that a circuit court may not change a judgment after the expiration of a term of court at which said judgment was rendered, do not apply in the case of a circuit judge committing a delinquent child to the Missouri State Training Schools.

Respectfully submitted,

AUBREY R. HAMMETT, Jr.  
Assistant Attorney General

APPROVED:

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J. E. TAYLOR  
Attorney General

ARH:VLM



STATE MERIT SYSTEM ACT:

CANDIDACY OF EMPLOYEES FOR  
PUBLIC OFFICE:

LEAVE OF ABSENCE:

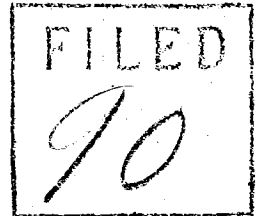
*Candidates:*

November 21, 1947

Individual not candidate within meaning  
of State Merit System Act, Session Acts  
1945, page 1157, until filing under  
Section 11550, R.S. Mo. 1939.

No mandatory direction in Merit System  
Act requiring superior to grant leave  
of absence to prospective candidate.

Mr. Ralph J. Turner, Director  
Personnel Division  
State Department of Business and Administration  
630 Jefferson Street  
Jefferson City, Missouri



Dear Sir:

We have your recent letter in which you request an opinion of this department. Your letter is as follows:

"A question has arisen as to the construction to be given to Section 43(e) of House Bill 162 enacted by the 63rd General Assembly regarding the question of an employee under the Act being a candidate for nomination or election to any public office. Specifically, there are two questions which are as follows:

- "1. When does an individual become a candidate for public office and, under the Act, when would he be required to resign or request a leave of absence.
- "2. Is it mandatory that the appointing authority be required to grant such leave of absence if requested by an individual under this section:

"(e) No employee selected under the provisions of this act shall be a member of any national, state, or local committee of a political party, or an officer of a partisan political club, or shall take any part in the management or affairs of any political party or in any political campaign; except to exercise his right as a citizen to express his opinion and to cast his vote. No employee in a position subject to this act shall be a candidate

for nomination or election to any public office except after resigning, or obtaining a regularly granted leave of absence, from such position.'

"In order to resolve the question we would appreciate receiving from you an opinion as to when an individual becomes a candidate for public office and when would such individual, employed under the Act, be required to resign or request a leave of absence. Also, is it mandatory that the appointing authority be required to grant such leave of absence if requested by an individual under this section.

"A copy of the correspondence relating to this situation is being enclosed for your information."

You also attach certain correspondence pertaining to the particular circumstances which have prompted your inquiry, together with a photostatic copy of a letter evidently intended for use by the prospective candidate in seeking the office to which he aspires. From your aforesaid letter, and from the enclosures therewith, we deduce the following facts: (1) The prospective candidate is an employee in the Division of Employment Security, and is, therefore, subject to the provisions of the State Merit System Act, Laws of Missouri 1945, Session Acts, page 1157, being House Bill No. 162, enacted by the 63rd General Assembly. (2) The prospective candidate has frankly expressed to his superiors his intention to become a candidate for Congress, but has stated that he does not intend to seek the office to which he aspires until he shall file his declaration pursuant to the provisions of Section 11550, R.S. Mo. 1939, and has also expressed his intention to request a suitable leave of absence before filing his declaration, evidently having in mind the above quoted provision of the State Merit System Act above referred to. (3) Notwithstanding the prospective candidate's expressed intention not to seek the office actively before filing his declaration, the aforesaid letter does set forth certain facts about him, express certain of his convictions, make certain promises, and invite support. This correspondence does not reveal whether or not there has been such circulation or delivery of the letter to voters as might be construed to be a seeking of support for public office.

With the above enumerated facts in mind, we shall first give consideration to the first question in your above mentioned letter.

We believe it should be quite clear from a mere construction of the language employed by the statute that the resignation or the obtaining of a leave of absence must occur before the individual becomes a candidate. As to when an individual becomes a candidate, we suggest that the meaning of the word "candidate" is so broad, so vague and indefinite that it is not susceptible of a uniform construction wherever and whenever used, but must, when used in a specific statute, be construed in the light of the purpose of the particular act in which it is used. That the general meaning of the term is vague and indefinite is affirmed by the very broad definition in C. J., Vol. 9, page 1272, which is in the following words:

"One who seeks or aspires to some office or privilege, or who offers himself for the same; a person offering himself to the suffrage of the electors; one put forward for election, whether with or against his own will; one put forward by others for an office; one who is selected by others for an office or place; a person considered worthy or likely to attain some dignity, or to come to some place or end."

It may be readily seen from the language of the foregoing definition that, according to it, persons might be said to be candidates who do not even aspire to public office. The provision of the State Merit System Act prohibiting employees subject thereto from becoming candidates certainly could not apply to one who does not even aspire to public office but happens to be supported therefor by others.

We are unable to find a statutory definition of the term "candidate," and we are likewise unable to find a judicial construction of the term by an appellate court of this state. A Minnesota case, however, after adverting to the fact that the term is a very indefinite one, holds that the Minnesota statute which provides for filing for nomination in the primary amounts to a definition of a candidate as one who has so filed pursuant to that statute, and holds that an aspirant for public office is not a candidate until he has filed thereunder. The following is

quoted from the opinion of the Supreme Court of Minnesota in that case, State ex rel. Brady vs. Bates, 102 Minn. 104, 1.c. 107, 112 N.W. 1026:

"\* \* \* It is apparent, in the nature of things, as it is a familiar experience, that, in the absence of statutory prescription on the subject, the time when a man becomes a candidate is extremely vague and indefinite.

"\* \* \* The law clearly defines who is a candidate under its terms, and how and the time at which an aspirant becomes a candidate. Section 184 provides that at least twenty days before a primary election any person eligible becomes a candidate by, and at the time of, filing his affidavit with a specified official, setting forth, inter alia, the office for which he desires to become a candidate. Upon the filing of this affidavit, and the payment of the required fee, 'the auditor shall place such name upon the primary election ballot\* \* \*"

Section 184 of the Minnesota Revised Statutes, 1905, being the Minnesota statute referred to by the court in the last above quoted opinion, does not differ substantially from Section 11550, R. S. Mo. 1939, being the Missouri Statute providing for filing for nomination for public office.

Under the doctrine of the above quoted case, it would be logical for us to hold that not until an aspirant files under the last above cited statute does he attain the status of a candidate. We consider this Minnesota case to be very persuasive. However, even if this case last cited were to be disregarded, nevertheless, in view of the very broad meaning of the term "candidate," we are driven to the conclusion that the word has a restricted meaning as used in the State Merit System Act, and in order to arrive at a proper construction as to the meaning of the term within said act, reference must be had to the general purposes of the act itself.

With reference to the purpose of the Merit System Act we consider it sufficient to say that the general objective of said act is the promotion of an efficient administration of the departments subject thereto. Section 2(a), State Merit System Act, supra.

In furtherance of this general objective, an incidental objective is the accomplishment of the selection and retention of the personnel of the departments subject to the provisions thereof on the basis of a nonpolitical and nonpartisan consideration of the qualifications for the particular positions to be filled and to keep that personnel free from partisan incentives.

We are of the opinion that this incidental objective of the act led not only to the prohibition against activities in partisan political organizations by individual employees, but also to the prohibition against an employee being a candidate for nomination or election to any public office. In fact both of said prohibitions are embodied in the same section of the act. Section 43(e), State Merit System Act, supra. We are of the opinion that the aforesaid incidental objective of said act led to the incorporation of the following language in Section 5 thereof, which section enumerates the qualifications of members of the Board:

"\* \* \* In order to be eligible for appointment and tenure as a member of the Board, no appointee shall during his term of office, or for at least one year prior thereto, be a member of any local, state, or national committee of a political party or an officer or member of a committee in any partisan political club or organization, or shall hold, or be a candidate for, any elective office."

These provisions of said sections of the aforesaid act clearly show that the prevailing intention of the Legislature in this act is to safeguard the employees and the departments subject to the act from such partisan political influences as might be promoted by membership of an individual on the committee of a political party or by his holding office in a partisan political club or by his taking part in the management of the affairs of any political party, or by his taking part in a political campaign, or by his becoming a candidate for nomination or election to any public office.

With these considerations in mind, we are of the opinion that when the Legislature in the aforesaid State Merit System Act prohibited employees subject thereto from becoming candidates for nomination or election to any public office, except after resigning or obtaining a leave of absence, it intended to prevent such employees from becoming engaged in partisan political activities during the period of their actual employment.

In the light of these conclusions, it seems to us that the meaning of the word "candidate," as used in the State Merit System

Act, supra, is restricted to the status attained by the aspirant when, by filing and declaring his candidacy for a party nomination pursuant to the provisions of Section 11550, R.S. Mo. 1939, he publicly appeals for partisan political support, for the reason that it is not until that time, that he places himself under the party standard and publicly adopts the party label, and because the last mentioned section prescribes the only practicable and lawful method whereby he may be chosen as the nominee of a political party for any public office.

The prohibitions of the State Merit System Act against political activity are indeed so specific that, according to sound principles of statutory construction, no political activity of an employee not specifically mentioned in the act should be deemed to be prohibited thereby. Therefore, the mere fact that an employee aspires to the nomination to a public office and reveals that fact to his superiors, or even invites the support of voters in the event of the occurrence of the uncertain future contingency of his filing for same, does not constitute him a violator of any of the prohibitions of this act directed against partisan political activities. These prohibitions are clearly defined and are limited to: (1) being a member of any national, state or local committee of any political party, (2) being an officer of a partisan political club, (3) taking part in the management of the affairs of any political party, (4) taking part in any political campaign, or (5) becoming a candidate for nomination or election to any public office.

This brings us to your question as to whether the superior is obliged, under the provisions of the act, to grant a leave of absence to an employee who requests same in order that he may become a candidate for nomination or election. In response to this question, we are definitely of the opinion that the granting of such a leave of absence upon request therefor, or the refusal to grant same, is clearly discretionary. The avowed purpose of the State Merit System Act set forth in Section 2(a) thereof is that it is "designed to secure efficient administration." It is quite obvious that the superior must keep this avowed objective of the act in mind and should refuse to grant leave of absence, if in his judgment the granting of same would have a tendency to detract from efficient administration.

#### CONCLUSION

We are, therefore, of the opinion that an individual does not become a candidate for office within the meaning of the State

Mr. Ralph J. Turner

-7-

Merit System Act until such time as he files his declaration in accordance with the terms and provisions of Section 11550, supra.

We are of the further opinion that, upon so filing, he definitely becomes engaged in partisan political activity by declaring publicly his candidacy for the nomination of a political party and is then definitely within the scope of the prohibition of the act, unless he has first obtained a leave of absence, and that he is, therefore, then a candidate within the meaning of the State Merit System Act.

We are further of the opinion that, under the State Merit System Act, the granting or refusing of a leave of absence to an employee who is a prospective candidate is discretionary rather than mandatory.

Respectfully submitted,

SAMUEL R. WATSON  
Assistant Attorney General

APPROVED:

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J. E. TAYLOR  
Attorney General

SMW:LR

SCHOOL FUNDS: ) May not be invested in time deposits even  
COUNTY SCHOOL FUNDS: ) though bank pledges United States government  
bonds to guarantee deposits.

FILED

92

April 9, 1947

Honorable Curt M. Vogel  
Prosecuting Attorney  
Perry County  
Perryville, Missouri

Dear Sir:

This is in reply to your letter of February 24, 1947, requesting an opinion from this department, which reads in part as follows:

"The Constitution of 1945, Section 7 of Article IX, and Section 10376 of the Statute reads in part, quote,

"... and the proceeds thereof and the money on hand now belonging to said school funds of the several counties and the city of St. Louis, shall be reinvested (1) in registered bonds of the United States, (2) or in bonds of the state or in approved bonds of any city or school district thereof, (3) or in bonds or other securities the payment of which are fully guaranteed by the United States and sacredly preserved as a county school fund."

"The third method of investing these funds, marked for convenience "3" has raised this question for the County Court: Is it permissible, under this clause, for the county to invest school funds in time deposits in banks, if these time deposits are guaranteed by the bank by depositing under an escrow agreement sufficient United States Government bonds as a pledge against such a time deposit?

"We have encountered difficulties in trying to invest this school fund money which,



roughly, amounts to \$55,000, and we are trying to work out a suitable plan of investment without tying up the money for too long a period."

Your attention is directed to the following sections which provide that the capital of the county and township school funds shall be liquidated and reinvested in certain securities and preserved as a county school fund.

Section 7, Article IX of the 1945 Constitution of Missouri, is, in part, as follows:

"All real estate, loans and investments now belonging to the various county and township school funds, except those invested as hereinafter provided, shall be liquidated without extension of time, and the proceeds thereof and the money on hand now belonging to said school funds of the several counties and the city of St. Louis, shall be reinvested in registered bonds of the United States, or in bonds of the state or in approved bonds of any city or school district thereof, or in bonds or other securities the payment of which are fully guaranteed by the United States, and secretly preserved as a county school fund. \* \* \*"

Section 10376, Mo. R.S.A., which implements the above constitutional provision as to the county school fund, reads in part as follows:

"It is hereby made the duty of the several county courts of this state to collect diligently and, when authorized by law, to invest securely the proceeds of all moneys, stocks, bonds and other property belonging to or accruing to the county school fund. On and after the effective date of this act, all real estate loans and investments now belonging to the county school funds, except those invested as hereinafter provided, shall be liquidated without extension of time upon the maturity thereof, and the proceeds thereof and the money then on hand belonging to said school

fund of the county shall be reinvested in registered bonds of the United States, or in bonds of the state, or in approved bonds of any city or school district thereof, or in bonds or other securities the payment of which is fully guaranteed by the United States Government, and shall be preserved as a county school fund; \* \* \*

Section 10383, Mo. R.S.A., also implementing the above constitutional provision, contains substantially the same provisions, but with respect to the township school fund, and is in part as follows:

"On and after the effective date of this act, all real estate loans and investments now belonging to the capital of the school fund of any township, except those invested as hereinafter provided, shall be liquidated without extension of time upon the maturity thereof, and the proceeds thereof and the money then on hand belonging to said capital of township funds, shall be reinvested in registered bonds of the United States, or in bonds of the State, or in approved bonds of any city or school district thereof, or in bonds or other securities the payment of which is fully guaranteed by the United States government; \* \* \*"

From an examination of the above provisions it will be found that after liquidation the county school fund may only be invested in certain authorized securities and that the power of the county court to invest this fund is limited by the above provisions. The question now before us is whether or not a time deposit guaranteed by the bank by depositing under an escrow agreement sufficient United States government bonds as a pledge to guarantee said time deposit, is an authorized security so as to come within the above constitutional and statutory provisions.

While we admit that time deposits may be classified as securities, we do not believe such a plan of investment satisfies the requirement that the security must be fully guaranteed by the United States. The above provisions are unambiguous and the words should be taken in their plain and ordinary meaning, as was held in *State ex rel. v. Wilder*, 206 Mo. 541, 1. c. 549:

"\* \* \* It is fundamental and one of the cardinal rules in the construction of statutes that the true intent and meaning of the lawmaking authority, as expressed in the language employed, should, if possible, be ascertained and declared. On the other hand, it is equally well settled that words and phrases shall be taken in their plain or ordinary and usual sense, and that it is incumbent upon the courts to construe a statute as written, without regard to the results of the construction, or the wisdom of the law as thus constructed. There is no ambiguity in the terms used in section 9701, and they are susceptible of but one construction and that is, that by the proviso it was not intended to embrace circuits in cities of this State containing over 300,000 inhabitants or circuits consisting of one county only; therefore those circuits were left without the pale of the provisions which authorize the payment of expenses of the judges of those circuits, and there is no law in existence now which would authorize the payment of such expenses."

The phrase "in bonds or other securities the payment of which is fully guaranteed by the United States," clearly means that such securities must actually be recognized and guaranteed by the United States. Such is not the case with respect to the proposed plan of investment because the United States would have no control over or knowledge of such an arrangement. To hold otherwise would amount to a strained construction of this provision, which undoubtedly refers only to such securities as bonds of the Reconstruction Finance Corporation, the Federal Home Loan Banks, the Home Owners Loan Corporation, the Federal Farm Mortgage Corporation and those issued under the Federal Housing Act.

The Constitution and statutes by setting up a plan of investment for the county school funds excluded the use of any other plan. These provisions must be construed strictly. The rule is set out in *Chilton v. Drainage Dist. No. 8 of Pemiscot County*, 63 S. W. (2d) 421, at pages 422-423:

"\* \* \* It is a well-recognized rule of construction as to statutes that ordinarily,

where a statute limits a thing to be done in a particular form, it includes in itself a negative, namely, that such thing shall not be done in any other manner. State ex rel. Barlow v. Holtcamp, 322 Mo. 258, 14 S. W. (2d) 646; State ex inf. Conkling v. Sweaney, 270 Mo. 685, 195 S. W. 714."

And also in the case of Lancaster v. County of Atchison, 180 S. W. (2d) 706, at 709:

"\* \* \* Thus, by the express words of the statute, the County is told from what funds the costs of maintaining, repairing and operating the toll bridge are to be paid.

"That fund is from the tolls collected for using the bridge. In this instance, the County was directed in express words from what fund the operation and maintenance expenses are to be paid; therefore, they cannot be paid from any other. Where the statute (Section 8548) 'limits the doing of a particular thing in a prescribed manner, it necessarily includes in the power granted the negative that it cannot be otherwise done.' Keane v. Strodtman, 323 Mo. 161, 18 S.W. 2d 896, 898. See, also, Dougherty v. Excelsior Springs, 110 Mo. App. 623, 85 S. W. 112; Taylor v. Dimmitt, 326 Mo. 330, 78 S. W. 2d 841, 98 A. L. R. 995. In other words, there can never be an implied power given a county or other public corporation when there is an express power."

It necessarily follows then that the county court, which is charged with the management of the county school fund, is not authorized to invest said fund in the manner proposed as it is limited in its authority by the Constitution and statutes. This is set out in Lancaster v. County of Atchison, supra, l. c. 708:

"The county courts are not the general agents of the counties or of the state. Their powers are limited and defined by law. These statutes constitute their warrant of attorney. Whenever they step outside of and beyond this statutory authority their acts are void.' Sturgeon v. Hampton, 88 Mo. 203, loc. cit. 213. Quoted with approval in the case of Morris et al. v. Karr et al., 342 Mo. 179, 114 S. W. 2d 962, loc. cit. 964."

And further, if there is any reasonable doubt as to the authority of the county court to act in a certain manner for the county, that doubt will be resolved against the county and the authority denied (Lancaster v. County of Atchison, supra). In the present case it is quite clear that there is no statutory or constitutional authority which would allow the county school fund to be invested in the manner which has been proposed.

We are enclosing herewith a copy of our opinion rendered to the Honorable Emory L. Melton, Prosecuting Attorney of Barry County, under date of February 7, 1947, relative to the liquidation of the county school fund invested in United States government bonds. This opinion may be of interest to you since you indicate in your letter that the county desires to invest said fund so that it will not be tied up for too long a period.

#### Conclusion

It is, therefore, the opinion of this department that the county school fund may not be invested under the provisions of Section 7, Article IX of the 1945 Constitution and Sections 10376 and 10383 of the Missouri Revised Statutes Annotated, by placing said fund on time deposit in a bank which deposits under an escrow agreement sufficient United States government bonds as a pledge to guarantee said deposit.

Respectfully submitted,

APPROVED:

DAVID DONNELLY  
Assistant Attorney General

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J. E. TAYLOR  
Attorney General

DD:EG  
Enc.

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93

2/2

Attention: Mr. Joseph N. Brown  
Assistant Prosecuting Attorney

We hereby acknowledge receipt of your letter of February 1, 1947, requesting an opinion from this department, which reads as follows:

"Said section of the Constitution provides in part as follows:

"section 10366 provides in part as follows.

"Money received from any other source whatsoever shall be placed (by the board) to the credit of the fund or funds designated by the board."

The question submitted here apparently arose upon a reading of the following portion of Section 10366, Mo. R. S. A. (Laws, 1943, p. 895):

"The treasurer shall open an account for each fund specified in this section, and all moneys received from the state, county and township funds, and all moneys derived from taxation for teachers' wages, and all tuition fees, shall be placed to the credit of the 'Teachers' Fund,' \* \* \*"

Section 10376.2, Mo. R. S. A., setting up the method and procedure by which the proposal to liquidate county and township school funds is to be presented to the voters, provides in part that:

"\* \* \* If the proposal to distribute annually the capital of the liquidated county and township school funds shall receive a majority of the votes cast, the body having control of such county and township school funds shall proceed to thereafter distribute annually such liquidated funds to the school districts. \* \* \*"

From this provision it is evident that the capital of township and county school funds when liquidated should be handled, generally speaking, in the same manner as all other school funds under Section 10366. At first it might be argued that said funds should be credited to the Teachers' Fund under that portion of Section 10366 set out above. However, on closer inspection of that statute it will be noticed that all moneys from the state, county and township funds shall be placed to the credit of the Teachers' Fund. It is then apparent from the wording of this provision that all moneys received from, or, in other words, all interest accrued from, said funds should be credited to the Teachers' Fund. But there is no indication that the capital of said funds should be handled in this manner. This position is further strengthened by the fact that neither at the time Section 10366 was enacted nor at the time of the amendment of 1943 was there any provision authorizing the capital of said funds to be liquidated and distributed according to Section 10366 or any other section of the statutes. Therefore it is clear that the capital of said funds when liquidated should not be governed by the above quoted portion of said Section 10366.

The provision which we believe controlling here is a portion of Section 10366 found immediately after the previously quoted portion of that section. It is as follows:

"\* \* \* except \* \* \* Money received from any other source whatsoever shall be placed to the credit of the fund or funds designated by the board. \* \* \*"

This provision serves to take care of all moneys not previously provided for, and, since the funds in question here, after apportioned to the various school districts and placed in the custody of the treasurer, fall within that classification, they should be handled or distributed in the manner in which the school board of the particular district considers proper under the provisions of Section 10366.

#### Conclusion

Therefore, it is the opinion of this department that the capital of township and county school funds, which is liquidated as provided by law and apportioned to the various school districts, should be handled and distributed in the manner which the board of the particular school district considers proper under the provisions of Section 10366, Mo. R. S. A. (Laws of 1943, page 893).

Respectfully submitted,

DAVID DONNELLY  
Assistant Attorney General

APPROVED:

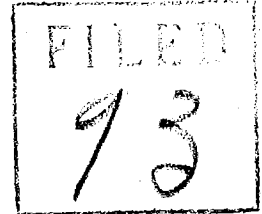
J. E. TAYLOR  
Attorney General

DD:EG



CRIMINAL LAW: Physical or mental examination of defendant by doctors procured by State; examination may not be made unless with the consent of defendant.

February 18, 1947



9/7

Col. Hugh H. Waggoner  
Superintendent, Missouri  
State Highway Patrol  
Jefferson City, Missouri

Dear Sir:

We are in receipt of your recent request for an opinion, based on the following facts:

"It is requested that your department give us an opinion on the following:

"a. Need a person held for the commission of a crime and thought to be insane, be informed of his constitutional rights before any physical or mental examinations are made to determine sanity?

"b. If the subject is examined without being informed of his rights, does that fact affect the admissibility of the testimony of the doctor or doctors who made the examination?

"c. Assuming that it is necessary to inform the subject of his constitutional rights, what would be necessary to comply with this requirement?

"d. Should the subject be informed of his rights and grant permission for the test to be made and if the results show that he is insane, would the testimony of the doctors be admissible or would it be excluded by reason of his insanity and inability, as an insane person, to

give permission for the examinations?

"e. Is there any possibility of the medical examiners being sued by the subject for any examination they might have subjected him to in the case where he was informed of his rights, or in the case where he was not informed of his rights?"

The main question involved in your request is: could a physical or mental examination of a person charged with or suspected of a crime, at the instance of the State, violate such person's constitutional rights not to be compelled to furnish evidence against himself?

It is stated in 22 C.J.3., Criminal Law, Section 681, page 997, as follows:

"The admission in evidence of the findings of experts on a physical or mental examination of the accused does not ordinarily violate his privilege against self-incrimination where the examination is had without any compulsion, and even, according to some authorities, but not others, where compulsion is resorted to.

"Evidence resulting from a medical examination of accused for the purposes of the prosecution rather than for treatment, after an accusation has been made against him, is admissible where, in the absence of any compulsion, accused submits or consents to the examination. However, while some authorities hold that such evidence is admissible even where the examination is compulsory and imposed on accused against his will, others hold that its admission under such circumstances constitutes a violation of the constitutional guaranty against compulsory self-incrimination. Some authorities have gone even farther and hold that such evidence is inadmissible unless accused consents to the examination in some positive manner, mere silence and failure to object or

resist under the circumstances being  
insufficient to constitute a waiver of  
the privilege. . . . .

(Underscoring ours.)

The underlined portion of the above section states the rule followed by the courts of Missouri.

In the case of State v. Newcomb, 280 Mo. 54, 1.c. 65 and 66, the court said:

"We are now brought to the most important question in this record. The defendant, while in custody and charged with this offense and when he was without counsel, was ordered by the justice of the peace, at the demand of the prosecuting attorney, to submit to a physical examination of his privates by a physician. He was taken into a room of the courthouse and in the presence of the sheriff was examined by Dr. Crowe, both of whom testified in this cause as to the result of the examination and as to what they saw during that examination and what they said to him.

"Counsel for defendant insist this was flagrant error and was a conspicuous violation of the constitutional right of the defendant to be exempt from testifying against himself. (Constitution of Missouri, sec. 23, art. 2.)

"Some effort was made to show that defendant voluntarily consented to this violation of his person, but we think it is apparent that he simply submitted because he thought he was compelled to do so. When it is considered that he was at the time in custody for this very crime; that the prosecuting attorney demanded an order from the justice for his examination; that the sheriff took him into a private room for the purpose of the examination, it is not strange that the defendant thought he was compelled to submit. It is idle to talk of his having voluntarily consented to

this violation of his person. As we read the record, he had no option in the matter.

\* \* \* \*

" \* \* \* \* We think the circuit court should have excluded all this testimony of Dr. Crowe and the sheriff as to this examination. We had occasion to examine the law on this subject in State v. Young, 119 Mo. 495, and the authorities are collated there. The facts of this case bring it clearly within the reasoning of that case and upon the authority of that decision and those cited and approved therein, this testimony was incompetent and inadmissible and violative of defendant's constitutional right not to be compelled to testify against himself. (See, also, State v. Height, 117 Iowa 650.)"

Also, in the case of State v. Horton, 247 Mo. 657, 1.c. 663, the Court said:

"Defendant insists that the physicians who examined him while he was in custody should not have been allowed to testify to the fact that he was suffering from a venereal disease. To meet this insistence the State contends that the examination complained of was made with defendant's consent. We have read the record carefully and find that the 'consent' consisted of the failure of defendant to object to the physical examination.

"When a man is under arrest, without counsel, and, speaking metaphorically, is standing in the shadow of a policeman's club, it requires something much more substantial than silence to justify an invasion of his constitutional right not to be compelled to furnish evidence against himself.

"If the evidence of the physicians had been objected to on the ground that the physical examination which they made under the orders of a police captain amounted to

compelling him to testify against himself, as prohibited by section 23, article 2, of the Constitution of Missouri, then the admission of their evidence would undoubtedly have constituted reversible error.  
\* \* \* \*

Again, in the case of State v. Matsinger, 180 S.W. 856, 1.c. 857 and 858, the Court said:

"After the state had established that about one or two weeks after the assault was alleged to have been committed the prosecutrix was found to be suffering from a venereal disease, it introduced the evidence of two physicians, which tended to show that at the instance of the prosecuting attorney they went to the county jail, where defendant was confined, and there made a physical examination of his privates. This examination disclosed, so they testified, that defendant was afflicted with the same venereal disease from which the prosecutrix was suffering. The evidence was admitted over the strenuous and repeated objections and exceptions of defendant, and after a preliminary examination of the physicians was made by the court on the subject of whether the physical examination was voluntarily consented to. From this preliminary examination the court concluded that the evidence was competent, but upon a re-examination of the physicians as to the conditions under which the examination took place, and after the evidence was in, the court withdrew same, both by oral and written instructions. It is our opinion that the court was entirely correct in withdrawing this evidence, as the record does not disclose that the consent which the law requires in such cases was given. The consent of the accused was not asked, he being merely informed that the physicians were there to make the examination. His only consent consisted of his failure to object, and as said by Judge Brown in State v. Horton, 247 Mo. loc. cit. 663, 153 S.W. 1053:

"When a man is under arrest, without counsel, and, speaking metaphorically, is standing in the shadow of a policeman's club, it requires something much more substantial than silence to justify an invasion of his constitutional right not to be compelled to furnish evidence against himself."

"When we remember that at that time defendant was confined in jail, and that one of the examining physicians was the jail physician, and that he was not apprised of his rights to resist the examination, and when the entire disclosures in this connection are considered, it is apparent that he merely submitted to this examination without consenting thereto. The record in this connection also discloses that the defendant had been advised by an attorney, with whom he was negotiating for his trial defense, that it was his intention to send a physician to the jail that morning with the view of making a physical examination, the attorney desiring to be informed as to this fact before agreeing to represent him. The defendant, not knowing that these physicians had not been sent by his own attorney, submitted the more readily. The record further discloses that the physician sent by the attorney arrived immediately after the examination began and took part therein. This evidence was clearly inadmissible, and should not have been received.

\* \* \*

"In view of the fact that this verdict rests entirely upon the uncorroborated testimony of the nine year old prosecutrix, and that her statements in some respects seem almost implausible, we are forced to the conclusion that the admission of this incompetent evidence was highly prejudicial, and that no instruction attempting to withdraw it could eradicate the poison and prejudice injected thereby; for, as said in State v. Webb, 254 Mo. loc. cit. 435, 162 S.W. 628:

"The state had sunk its fangs deep in the life blood of the defendant - too deep for the poison to be withdrawn."

"Because of this error the court should have granted a new trial."

The question (c) as to what would be necessary to inform the defendant of his rights, etc., we conclude from the authorities cited that it is not only necessary to inform the defendant of his rights to resist such examination but he must give his consent and voluntarily submit to the examination, mere silence and lack of resistance is not sufficient to render the evidence gained by the examination admissible in evidence. We think the defendant should be apprised of the purpose of the examination, what is to be determined, the fact that the findings may be used in evidence against him and that he has a right to refuse permission for the examination, and that the refusal of said permission is not a fact that can be admitted in evidence against him. Being so advised, he must affirmatively consent to the examination. We do not find any requirement that the advising him of his rights and his consent shall be in writing, but, in view of the strong language used by the court in the cases cited, we believe it would be much safer and more conclusive if the matter was in writing and signed by the defendant; otherwise the proof should be very strong of an oral advisement and the defendant's consent.

If question d means could the State, after procuring the doctors to examine defendant and who found him insane, exclude their testimony, the answer would be no because it is the duty and the oath of law enforcement officers to uphold the Constitution and the laws of the State. This includes all prosecuting officials, prosecuting attorneys, peace officers, etc., and to withhold evidence touching either the guilt or innocence of the defendant would be a violation of their oath. It follows, as a matter of course, that the defendant would never object to such evidence.

We do not believe that a medical examiner should make the examination unless the defendant was advised of his rights and gave his consent. If this procedure was followed the examiner could not be held liable in a civil action for examining the defendant, unless, of course, he performed the tests and examination in such a manner as could be held to be negligence and injured the defendant.

Question 6 mentions or inquires about the possibility of a medical examiner being sued. There is a difference between being sued and being liable. There is no way to prevent a suit being filed against a person, even though such person was free from any liability and a recovery could not be had against him. It would, however, be necessary for him to defend the suit.

Conclusion.

It is therefore the opinion of this department that a person suspected or charged with a crime must be advised of his constitutional rights to refuse to permit a medical examination of his person and must affirmatively consent to same before the facts, findings and results or conclusions of said examination would be admissible in evidence against him.

Respectfully submitted,

W. ERADY DUNCAN

Assistant Attorney General

APPROVED:

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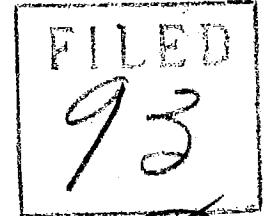
J. W. TAYLOR  
Attorney General

WED:ml



MAGISTRATES; Clerk of the magistrate court may not issue a commitment or a warrant, but may legally sign transcripts in criminal proceedings.

February 18, 1947



Honorable Stanley Wallach  
Prosecuting Attorney  
St. Louis County  
Clayton, Missouri

Attention: Mr. L. L. Bornschein,  
Assistant Prosecuting Attorney

Dear Sir:

We hereby acknowledge receipt of your letters of recent date requesting an opinion of this department in relation to the questions of whether or not the clerk of the magistrate court may (1) issue a warrant; (2) issue a commitment; or (3) legally sign a transcript.

In answer to your first question as to the power of the clerk to issue a warrant, we direct your attention to Section 3791 of Senate Bill 215 of the 63rd General Assembly, providing in part:

"The following magistrates shall have power and jurisdiction to cause to be kept all laws made for the preservation of the public peace, to issue process for the apprehension of persons charged with criminal offenses, and hold them to bail; require persons to give security to keep the peace, and to execute the powers and duties herein conferred in relation thereto: The judges of the supreme court throughout the state; judges of the courts of record, except probate judges, within their respective jurisdiction; \* \* \* \* \*

Since Section 19 of Senate Bill 207 of the 63rd General Assembly provides that magistrate courts shall be courts of record, they would come within the provisions of the above section. Pursuant to the above power the 63rd General Assembly, in Section 3 of Senate Bill 193, placed the following duty on the magistrates:

"\* \* \* provided, that complaints subscribed and sworn to by any person competent to testify against the accused may be filed with any magistrate, and if the magistrate be satisfied that the accused is about to escape, or has no known place of permanent residence or property in the county likely to restrain him from leaving for the offense charged, he shall immediately issue his warrant and have the accused arrested and held until the prosecuting attorney shall have time to file an information."

And Section 5 of Senate Bill 193 provides in part:

"\* \* \* and upon the filing of the information by the prosecuting attorney, as herein provided, with the magistrate, or upon the filing of an information by the prosecuting attorney upon his own information and belief, without complaint of a private individual having previously been filed, it shall be the duty of the magistrate to forthwith issue a warrant for the arrest of the defendant, directed to the sheriff, or, if no such officer is at hand, then to some competent person who shall be specially deputed by the magistrate to execute the same, by written indorsement to that effect on such warrant."

Although the above two sections provide that the magistrates shall issue the warrant, Section 44 of Senate Bill 193 reads as follows:

"All acts of an administrative nature herein required of the magistrate may be performed by the clerk of the magistrate court."

In the case of *Mauritz et al. v. Schwind et al.*, 101 S. W. (2d) 1085, the court adopted the following definition of "administrative," at 1. c. 1090:

"Administrative is defined as follows:  
'Commonly the word has been defined as ministerial; pertaining to administration, particularly, having the character of executive or ministerial action; and,

when particularly applied to official duties connected with government, executive, a ministerial duty; one in which nothing is left to discretion.' 2 C.J.S. p. 56.

"A court is a body in the government to which the public administration of justice is delegated. The one common and essential feature in all courts is, a judge or judges having some sort of judicial functions, power, or authority.' Rupert v. Alturas County Com'rs, 2 Idaho (Nasb.) 19, 2 P. 718, 720." (Underscoring ours.)

We do not believe the issuance of a warrant is an administrative function. In the case of Zeraga v. United States, 32 F. (2d) 963, the court stated at l. c. 964:

"It is perhaps not inappropriate to suggest that the issuance of a warrant of arrest is a judicial act which can be exercised only by an officer authorized by law. \* \* \*"

Therefore, since the issuance of a warrant is a judicial function and since the General Assembly has not given the clerk the power to issue a warrant in criminal proceedings before a magistrate court, we are of the opinion that only the magistrate may issue said warrant.

In answer to your second question as to whether or not the clerk may issue a commitment, we direct your attention to section 13 of Senate Bill 193, which provides:

"If the defendant shall fail or refuse to enter into recognizance, the magistrate shall commit him to the common jail of the county, or to the calaboose or other prison of the city where the trial is pending, there to remain until the day fixed for the trial of the charge alleged against him."

And Section 25 of Senate Bill 193, which provides:

"Whenever the defendant shall be tried and found guilty, either by the magistrate or a jury, or shall enter a plea of guilty, and a fine shall be assessed, the magistrate shall enter judgment against the defendant for such fine, and if the punishment shall be imprisonment in the county jail, or shall be both a fine and imprisonment, the magistrate shall enter judgment according to the finding of the court or verdict of the jury, and immediately commit the defendant to the county jail for the time designated in the judgment, and the defendant shall be adjudged to pay the costs, and may be committed to the county jail until the judgment for both fine and costs shall be paid, or until he shall be discharged therefrom under the provisions of the next succeeding section."

In the case of State ex rel. Million v. Allen, 187 Mo. 560, the court stated at l. c. 564:

"A commitment means a judicial order, and until such an order is made the person arrested is the sheriff's prisoner by virtue of the capias. \* \* \*"

It is noted that we have the same situation here as we had in your question in relation to warrants. Therefore, since the issuance of a commitment is also a judicial function the clerk of the magistrate court would not have the power to issue a commitment.

In answer to your third question as to whether or not the clerk of the magistrate court may legally sign a transcript, we direct your attention to Section 32 of Senate Bill 193, which provides:

"The clerk of the court shall file the transcript and papers in his office and enter the cause on the court docket; and if the appeal be regularly taken, the cause shall be heard on the merits at the first

term of the court, after the same shall have been filed in the clerk's office, or if said appeal be taken and filed in term, it shall be returnable to and triable at such term, unless for good cause shown the case be continued; and unless otherwise ordered by the court, the costs in both courts shall abide the event of the trial in the circuit or appellate court."

It is clear from the above section that the clerk would sign the transcript in criminal proceedings and that he has the duty of filing same on appeal.

Conclusion

Therefore, it is the opinion of this department (1) that a warrant and a commitment may not be issued by the clerk of the magistrate court, and (2) that the clerk may legally sign the transcript in criminal proceedings filed in the appellate court, and that it is his duty to file said transcript.

Respectfully submitted,

PEARSHING WILSON  
Assistant Attorney General

APPROVED:

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J. E. TAYLOR  
Attorney General

PW:EG

MOTOR VEHICLES: Leaving the scene of an accident is a felony for which an operator's license may be revoked.

FILED

April 25, 1947

Col. Hugh H. Waggoner, Superintendent  
Missouri State Highway Patrol  
Jefferson City, Missouri

Dear Sir:

This department is in receipt of your request for an opinion, which is as follows:

"We have received a letter from Sergeant A. S. White of our department, who is located at Flat River, Missouri. The contents of the letter which are self-explanatory, are as follows:

"1. Request some information on the following law: Section 8460 of the Driver's License Law, is as follows:  
"The Commissioner shall forthwith revoke the license of an operator, registered operator, or chauffeur upon receiving a record of such operator's, registered operator's, or chauffeur's conviction of any of the following offenses, when such conviction has become final:

1. Manslaughter (or negligent homicide) resulting from the operation of a motor vehicle;
2. Driving a motor vehicle while under the influence of intoxicating liquor or a narcotic drug;
3. Any felony in the commission of which a motor vehicle is used.

"2. On April 8, 1947, Frank W. Edgar, 319 Long Street, Bonne Terre, Missouri,

Col. Hugh H. Waggoner, Superintendent

was convicted in the St. Francois County Circuit Court, of feloniously leaving the scene of an accident and a report of the conviction sent to the Commissioner, who suspended Edgar's license for a period of six months.

"13. It has always been my impression that this was one of the violations which came within Part 3 of Section 8460, which reads, "Any felony in the commission of which a motor vehicle is used." At the time of the trial, N. D. Houser, Circuit Judge, Farmington, Missouri, also interpreted this paragraph as such and so advised Edgar and his attorney, ordering the driver's license of Edgar to be surrendered to the clerk of the court to be forwarded to the Commissioner for revocation."

Section 8401, R.S. Mo. 1939, Subsection (f), provides as follows:

"Leaving scene of accident: No person operating or driving a vehicle on the highway knowing that an injury has been caused to a person or damage has been caused to property, due to the culpability of said operator or driver, or to accident, shall leave the place of said injury, damage or accident without stopping and giving his name, residence, including city and street number, motor vehicle number and chauffeur's or registered operator's number, if any, to the injured party or to a police officer, or if no police officer is in the vicinity, then to the nearest police station or judicial officer."

An examination of this section clearly shows that in order for an act to constitute a criminal violation the violator would necessarily have to be operating or using a motor vehicle.

Section 8460, R.S. Mo. 1939, provides as follows:

Col. Hugh H. Waggoner, Superintendent

"The commissioner shall forthwith revoke the license of any operator, registered operator or chauffeur upon receiving a record of such operator's, registered operator's or chauffeur's conviction of any of the following offenses, when such conviction has become final:

1. Manslaughter (or negligent homicide) resulting from the operation of a motor vehicle;
2. Driving a motor vehicle while under the influence of intoxicating liquor or a narcotic drug;
3. Any felony in the commission of which a motor vehicle is used."

Subsection 3 of Section 8460, supra, provides for the revocation of an operator's license when he has been convicted of a felony in which a motor vehicle was used. Since it is necessary to use a vehicle in the commission of the felony of leaving the scene of an accident, it would therefore be a crime covered by said section.

Conclusion.

It is, therefore, the opinion of this department that a conviction for leaving the scene of an accident is a felony for which an operator's license shall be revoked.

Respectfully submitted,

W. BRADY DUNCAN  
Assistant Attorney General

APPROVED:

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J. E. TAYLOR  
Attorney General

WBD:ml



SHERIFF:

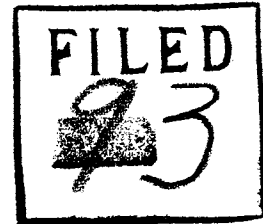
COUNTY COURT:

Sheriff of Greene County, Missouri, not entitled to be reimbursed by the County for attorney fees in the defense of his action in the performance of official duties.

May 21, 1947

OPINION NO. 93

Honorable Wayne T. Walker  
Prosecuting Attorney  
Greene County  
Springfield, Missouri



Dear Sir:

This will acknowledge receipt of your request for an opinion, which reads:

"At the request of our County Court we desire to have your opinion as to whether or not the County Court has the power to order the payment of an attorney's fee for the sheriff of the county under the following conditions.

"During the absence of the sheriff himself from the county, a prisoner was lodged in the Greene County jail by the highway patrol officers. This prisoner was held for the authorities in the City of Kansas City. He was later taken by the highway patrol officers to that city where he was charged with a felony. A few days later, the prisoner filed suit against the Sheriff of Greene County, the highway patrolmen and the Sheriff of Jackson County. The suit was filed in Jackson County, Missouri and the sheriff was compelled to employ an attorney in that city to defend the suit. The Court sustained a demurrer to the prisoner's petition and of course the law suit was dismissed by the Court. The Sheriff incurred an attorney's fee of One Hundred Fifty (\$150) Dollars which he feels should be paid for by the County. The nature of the suit was for unlawful imprisonment.

"We should be very glad to have your opinion as to whether or not the County Court has authority to pay the attorney fee under the aforesaid circumstances."

It is well established in this state that county courts are not general agents of the county, but are courts of limited jurisdiction, and outside of the management of fiscal affairs of the county, they possess only such authority as may be prescribed by statute. In *Lancaster v. County of Atchison*, 180 S.W. (2d) 706, 1.c. 708, 352 Mo. 1039, the court said:

"The county courts are not the general agents of the counties or of the state. Their powers are limited and defined by law. These statutes constitute their warrant of attorney. Whenever they step outside of and beyond this statutory authority their acts are void.' *Sturgeon v. Hampton*, 88 Mo. 203, loc. cit. 213. Quoted with approval in the case of *Morris et al. v. Karr et al.*, 342 Mo. 179, 114 SW. 2d 962, loc. cit. 964."

See also *State ex rel. Chadwick Consolidated School District v. Jackson*, 84 S.W.(2d) 988, 229 Mo. App. 842, and *State ex rel. Moser v. Montgomery*, 186 S.W. (2d) 553.

Also, the courts in this state have unanimously held that public officers are only entitled to such fees and compensation for performing official duties as may be provided by statute. In *Nodaway County v. Kidder*, 129 S.W. (2d) 857, 1.c. 860, 344 Mo. 795, the court, in so holding, said:

"The general rule is that the rendition of services by a public officer is deemed to be gratuitous, unless a compensation therefor is provided by statute. \* \* \* \* \*

"It is well established that a public officer claiming compensation for official duties performed must point out the statute authorizing such payment. *State ex rel. Buder v. Hackmann*, 305 Mo. 342, 265 S.W. 532, 534; *State ex rel. Linn County v. Adams*, 172 Mo. 1, 7, 72 S.W. 655; *Williams v. Chariton County*, 85 Mo. 645."

Also, see Ward v. Christian County, 111 S.W. (2d) 182, 341 Mo. 1115.

Furthermore, there is a specific constitutional inhibition against county courts appropriating public funds to any individual or for private purposes. Section 23, Article VI, Constitution of Missouri, 1945, reads:

"No county, city or other political corporation or subdivision of the state shall own or subscribe for stock in any corporation or association, or lend its credit or grant public money or thing of value to or in aid of any corporation, association or individual, except as provided in this Constitution."

Section 25, Article VI, Constitution of Missouri, 1945, reads:

"No county, city or other political corporation or subdivision of the state shall be authorized to lend its credit or grant public money or property to any private individual, association or corporation, except that the general assembly may authorize any municipality to provide for the pensioning of the salaried members of its organized police force or fire department and the widows and minor children of the deceased members, and may authorize any city of more than 100,000 inhabitants to provide for the pensioning of other employees, and may also authorize payments from any public funds into a fund or funds for paying benefits upon retirement, disability or death to persons employed and paid out of any public fund for educational services, and to their beneficiaries or estates."

In 57 C.J., page 1127, Section 1191, we find the general principle that a sheriff is not as a matter of right, entitled to be reimbursed for legal services. Said provision reads in part:

"As a general rule a sheriff is not entitled, as a matter of right, to an allowance of attorney's fees incurred or paid by him for

Hon. Wayne T. Walker

-4-

legal advice or services in connection  
with the discharge of his functions;  
\* \* \* \* \*

We have been unable to find any statutory authority for the Sheriff of Greene County, Missouri, hiring an attorney to defend him under the facts and circumstances related in your request or for the County Court ordering such expenditure be paid by the County.

#### CONCLUSION

Therefore, it is the opinion of this department, in view of the foregoing authorities, and finding no statute allowing the Sheriff of Greene County, Missouri, attorney fees for defending him for his action in the performance of his official duties, he is not entitled to be reimbursed by the County Court for such services.

Respectfully submitted,

AUBREY R. HAMMETT, JR.  
Assistant Attorney General

APPROVED:

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J. E. TAYLOR  
Attorney General

ARR:LR:BJ

SHERIFFS IN THIRD CLASS COUNTIES:

Deputy sheriffs may be hired on part time basis, when such appointment and the compensation of such deputies is approved by the Circuit Court.

February 27, 1947

FILED

Mr. H. L. C. Weier  
Prosecuting Attorney  
Jefferson County  
Festus, Missouri

Dear Sir:

We are in receipt of your recent request for an official opinion, based on the following state of facts:

"The Jefferson County Court has requested that I obtain an opinion from you concerning the payment of deputy sheriffs in counties of the 3rd class under House Bill No. 899.

"The Circuit Judge certified the necessity of having 3 deputy sheriffs on a part time basis to be paid \$50 per month for their services as deputy sheriffs. There were also several other deputies who were appointed to work for \$1.00 per hour when called upon by the sheriff. The County Court desires to know whether deputy sheriffs may be employed on a part time basis and legally paid by the county for their services."

Section 13547.302, Mo. R.S.A., Section 2, House Bill No. 899, covers the subject of your request, and states as follows:

"The sheriff in counties of the third class shall be entitled to such number of deputies and assistants, to be appointed by such official, with the approval of the judge of the circuit court, as such judge shall deem necessary for the prompt and proper discharge of his duties relative to the enforcement of the criminal law of this state. The

judge of the circuit court, in his order permitting the sheriff to appoint deputies or assistants, shall fix the compensation of such deputies or assistants. The circuit judge shall annually, and oftener if necessary, review his order fixing the number and compensation of the deputies and assistants and in setting such number and compensation shall have due regard for the financial condition of the county. Each such order shall be entered on record and a certified copy thereof shall be filed in the office of the county clerk. The sheriff may at any time discharge any deputy or assistant and may regulate the time of his or her employment."

(Underscoring ours.)

This section specifically provides for sufficient deputies to assist the sheriff as the need for same arises. The circuit judge, in his discretion, fixes the compensation and number of deputies, and when such an order is made by the Court, the county is liable for the compensation of such deputies.

#### Conclusion.

It is therefore the opinion of this department that deputy sheriffs may be employed on a part time basis, upon approval of the Circuit Court, and the county would be liable for their compensation as same is fixed by the Circuit Court.

Respectfully submitted,

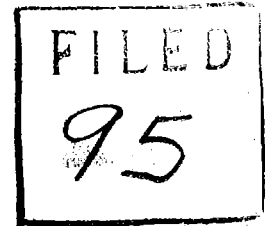
W. BRADY DUNCAN  
Assistant Attorney General

APPROVED:

J. R. TAYLOR  
Attorney General

COUNTY BUDGET: County Court of Stoddard County should issue warrants  
COUNTY COURT: for that part of the salaries of county officers of  
such county for which warrants have not been issued  
for the year 1946. Upon refusal of County Court to  
do so, mandamus is proper remedy to compel such action.  
Such warrants should be paid before warrants issued on  
class 5 fund of the budget.

February 27, 1947



Honorable Joe C. Welborn  
Prosecuting Attorney  
Stoddard County  
Bloomfield, Missouri

Dear Sir:

This is in reply to your letter of recent date, requesting  
an official opinion of this department, and reading as follows:

"Stoddard County is a third class County under township organization. In 1946 the expenses of the County exceeded the revenue which had been collected at the end of the year. The County Court, instead of issuing warrants for the full salaries of the officers, issued only warrants up to forty per cent of the salaries. This forty per cent has been paid and the Collector is now about to pay class five warrants. Some of the officers have applied to the County Court for warrants for the remainder of their salaries. I have advised the County Court that they should issue these warrants, but the County Clerk refuses to issue such warrants, because he says that there is no money in the Collector's hands out of which such warrants could be paid, and he would be liable on his bond.

"Applying the principles announced in Gill vs. Buchanan County, 346 Mo. 599, 142 S.W.2d 665, I believe the County Court should issue these warrants. The Supreme Court has rules in the Gill vs. Buchanan case that the County is liable for an officer's salary whether it is set up in the budget and also regardless whether or not there are funds on hand for the payment of salaries.

"Therefore, the County is certainly liable to these officers for their salaries and I do not see how the County Clerk could be liable on his bond for issuing the same.

"All of the Class four obligations of the County have been met - with the exception of this sixty per cent of the salaries for which warrants have not been issued. There is money in the Treasury, and there is money still coming into the Treasury. I do not see how the class five warrants can be paid with the class four obligations remaining unpaid, nor do I see how the County Clerk can defeat the people with the class four obligations by refusing to issue the warrants and let the money go to class five obligations.

"Section 13824, R.S.Mo. 1939, provides: that it is the duty of the County Court to order payment of money found due by the County.

"The County Court has directed me to request an official opinion from you on the question of whether or not the County Court may issue warrants for these class four obligations."

Stoddard County, which is a county of the third class, is governed by the provisions of the Budget Act of Missouri, found in Revised Statutes Annotated, Sections 10910 to 10917, inclusive.

The case of Gill v. Buchanan County, 346 Mo. 599, 142 S.W. (2d) 665, holds specifically that a county court must include in its budget for each year the salaries of county officers, which salaries are set by the Legislature of this state, and if such salaries are not included in the budget by the county court, such salaries will be considered to be put in the budget by the Legislature of this state. The court, in the Gill case, said (346 Mo. 1.c. 606):

"\* \* \* The action of the Legislature in fixing salaries of county officers is in effect a direction to the county court to include the necessary amounts in the budget. Such statutes are not in conflict with the County Budget Law but must be read and considered with it in construing it. They amount to a mandate to the county court to budget such amounts. Surely no



mere failure to recognize in the budget this annual obligation of the county to pay such salaries could set aside this legislative mandate and prevent the creation of this obligation imposed by proper authority. Certainly such obligations imposed by the Legislature were intended to have priority over other items as to which the county court had discretion to determine whether or not obligations concerning them should be incurred. They must be considered to be in the budget every year because the Legislature has put them in and only the Legislature can take them out or take out any part of these amounts. This court has held that the purpose of the County Budget Law was 'to compel . . . county courts to comply with the constitutional provision, Section 12, Article 10' by providing 'ways and means for a county to record the obligations incurred and thereby enable it to keep the expenditures within the income.' (Traub v. Buchanan County, 341 Mo. 727, 108 S.W.(2d) 340). To properly accomplish that purpose, mandatory obligations imposed by the Legislature and other essential charges should be first budgeted, and then any balance may be appropriated for other purposes as to which there is discretionary power. Failure to budget funds for the full amount of salaries due officers of the county, under the applicable law, which the county court must obey, cannot bar the right to be paid the balance. Instead, it must be the discretionary obligations incurred for other purposes which are invalid, rather than the mandatory obligation imposed by the same authority which imposed the budget requirements. We, therefore, hold that a county court' failure to budget the proper amounts necessary to pay in full all county officers' salaries fixed by the Legislature, does not affect the county's obligation to pay them. (Emphasis ours.)

If the County Court of Stoddard County did comply with the clear mandate of the Budget Law and did include in the class 4 fund of the budget for such county the salaries of the county officers, we fail to see upon what ground a refusal to issue warrants to such officers for payment of their salaries could be based. If the County Court did not comply with the Budget Law and did fail to include in class 4 of the budget the salaries of

county officers as fixed by the statutes of this state, such failure to obey the law by the County Court in making out the budget does not affect the obligation of the county to pay these valid obligations imposed by the Legislature, since by the legislative acts the salaries are made a part of the budget.

That part of Section 10911, Mo. R.S.A., relating to the class 5 fund of the budget, and providing, "No payment shall be allowed from the funds in this class for any personal service, (whether salary, fees, wages or any other emoluments of any kind whatever) estimated for in preceding classes," means that salaries other than those salaries of county officers provided for by the statutes of this state, if not estimated for in classes 1, 2, 3 or 4 of the budget, cannot be paid out of the funds in class 5.

As pointed out previously, the inclusion in the budget of salaries of county officers set by statute is mandatory, and an attempt of the County Court to leave out of the budget such statutory salaries is of no effect, because such salaries are included by the act of the Legislature. Therefore, since the salaries must be in the budget, those officers entitled to such salaries are entitled to have issued to them warrants for the amounts of their salaries.

It may be that Stoddard County does not have, or will not have, sufficient funds to pay all the obligations it contracted in 1946, but, as the Supreme Court points out in the Gill case, quoted supra, it is the discretionary obligations which must be held to be invalid, and not the mandatory obligations imposed by the statutes of this state, such as the county officers' salaries.

From your letter, we understand that there is money in the treasury of the county, but that the Treasurer is about to pay warrants issued on funds of class 5 of the budget. The warrants for the payment of the county officers' salaries must be paid before warrants issued on the funds of class 5 of the Budget Act are paid, as Section 10910, Mo. R.S.A., under which statute the budget for 1946 was made, and Section 10910 of House Bill No. 834 of the 6<sup>th</sup> General Assembly, effective July 1, 1946, both provide: "The county court shall classify proposed expenditures according to the classification herein provided and priority of payment shall be adequately provided according to the said classification and such priority shall be sacredly preserved."

If the County Court refuses to issue the warrants for the payment of the salaries of the county officers, the proper action

Honorable Joe C. Welborn -5

to be taken by the county officers is an action for mandamus. State ex rel. Spratley v. Maries County, 98 S.W. (2d) 623, 339 Mo. 577; Perkins v. Burks, 78 S.W.(2d) 845, 336 Mo. 248.

CONCLUSION

It is the opinion of this department that the County Court of Stoddard County should issue warrants for that part of the salaries of the county officers of such county for which warrants have not been issued for the year 1946. If the County Court refuses to issue such warrants, mandamus is the proper remedy to compel such action. Such warrants should be paid before warrants issued on the class 5 fund of the budget of Stoddard County.

Respectfully submitted,

C. B. BURNS, Jr.  
Assistant Attorney General

APPROVED:

J. E. TAYLOR  
Attorney General

COUNTY CLERK: Duties of the county court in respect to determining salary of county clerk under House Bill  
COUNTY COURT: No. 867 of the 63rd General Assembly

March 14, 1947



Honorable Joe C. Welborn  
Prosecuting Attorney  
Stoddard County  
Bloomfield, Missouri

Dear Sir:

This is in reply to your letter of recent date wherein you submit the following statement of facts and request for an official opinion from this department:

"Stoddard County is a Third Class County, and is subject to the provisions of Laws of 1945, H. B. 867. Sections 1 and 2 of H. B. 867 provide that on or before January 1, 1947, the County Court shall determine the proper group to which a county belongs for the purpose of fixing the salary of the County Clerk; and that the Court shall also determine the salary of the Clerk. The County Clerk of this County took office on January 1, 1947 but failed to have the County Court determine the group to which this County belongs. Nor has he since then taken steps to have H. B. 867 complied with, but rather he now seeks to fix his own salary, by his own computations. The County Court has refused to issue warrants for his salary, because the County has not yet been grouped according to the terms of H. B. 867. Since H. B. 867 is a completely new law and has not been given a construction by the Supreme Court and since the terms of the statute are clear, I do not feel that the provisions of H. B. 867 which the County Clerk has failed to have the Court follow, are directory only, and have advised the County Court to await a ruling from the Supreme Court, or action by the legislature, before taking further

action relative to paying the County Clerk.

"Since the salaries of the deputies of the County Clerk are based on the salary of the Clerk by H. B. 867, the Court has not issued warrants to the deputies for the same reasons that it has not ordered warrants for the Clerk.

"The County Court has directed me to request an official opinion from your department as to the proper procedure to be followed by it in view of the above circumstances."

According to Committee Substitute for House Bill No. 476, approved December 5, 1945, and passed by the 63rd General Assembly, Stoddard County comes within Class 3 of the division of counties provided for under the Constitution. For the purpose of providing for salaries of clerks of county courts in counties of the third class, the 63rd General Assembly enacted House Bill No. 867. Section 1 of this Act provides as follows:

"For purposes of establishing the salary of the clerk of the county court in counties of the third class of this state, said counties are hereby divided into four groups as follows: All counties with a per capita assessed valuation of less than \$700 shall be in Group A; all counties with a per capita assessed valuation of \$700 and less than \$1,000 shall be in Group B; all counties with a per capita assessed valuation of \$1,000 and less than \$1,300 shall be in Group C; and all counties with a per capita assessed valuation of \$1,300 and over shall be in Group D. The per capita assessed valuation of any county shall be determined by dividing the population of the county as shown by the 1940 federal decennial census into the 1944 total assessed valuation of the county as shown in the 'Journal of the Board of Equalization of the State of Missouri for the Year Ending December 31, 1944.' The county court in each county

of the third class shall on or before January 1, 1947, determine the proper group to which a county belongs under the provisions of this section. The compensation of the county clerk as provided in this act shall become effective on January 1, 1947; provided, that county clerks now in office shall not have their compensation increased or decreased by reason of this act but shall continue to receive compensation at the same rate as at present until the end of their respective terms."

From an examination of the Memorandum No. 3, issued by the Committee on Legislative Research, dated April 1, 1946, we find that Stoddard County has a population of 33,009, and that it has a valuation, as shown in the Journal of the Board of Equalization of the State of Missouri for the year ending December 31, 1944, of \$15,129,429.00.

For the purpose of determining what class a county clerk in third class counties will be in, the Legislature has provided that the per capita assessed valuation of a county shall be determined by dividing the population of the county as shown by the 1940 federal census into the 1944 total assessed valuation of the county as shown in the Journal of the Board of Equalization of the State of Missouri for the year ending December 31, 1944. When the court has made that calculation, then Section 2 of said House Bill No. 867 provides for the method of determining the salaries of county clerks in the various groups established by Section 1 of the Act. It will be a simple mathematical problem for the county court to determine what group the clerk is in, in order to fix his salary. Section 2 of said House Bill No. 867 sets out the plan for fixing the salaries of the clerks in the various groups. It reads as follows:

"On or before January 1, 1947, the county court of each county in Group A shall determine the annual salary of the county clerk as follows: Of the total population of the county, according to the 1940 federal decennial census, the county court shall allow 20 cents for each of the first 5,000 persons, plus 15 cents for each of

the next 10,000 persons, plus 5 cents for each of the next 5,000 persons, plus 4 cents for each of the next 14,000 persons, plus 3 cents for each of the next 1,000 persons, plus 1 cent for each person over 35,000 in the county.

"On or before January 1, 1947, the county court in each county in Group B shall determine the annual salary of the county clerk as follows: Of the total population of the county, according to the 1940 federal decennial census, the county court shall allow 20 cents for each of the first 5,000 persons, plus 15 cents for each of the next 9,000 persons, plus 10 cents for each of the next 3,000 persons, plus 5 cents for each of the next 6,000 persons, plus 3 cents for each person over 23,000 in the county.

"On or before January 1, 1947, the county court of each county in Group C shall determine the annual salary of the county clerk as follows: Of the total population of the county, according to the 1940 federal decennial census, the county court shall allow 20 cents for each of the first 10,000 persons, plus 10 cents for each of the next 10,000 persons, plus 5 cents for each of the next 5,000 persons, plus 3 cents for each person over 25,000 in the county.

"On or before January 1, 1947, the county court of each county in Group D shall determine the annual salary of the county clerk as follows: Of the total population of the county, according to the 1940 federal decennial census, the county court shall allow 30 cents for each of the first 4,000 persons, plus 20 cents for each of the next 3,000 persons, plus 15 cents for each of the next 5,000 persons, plus 10 cents for each of the next 10,000 persons, plus 5 cents for each of the next 4,000 persons, plus 3 cents for each person over 26,000 in the county."

Under Section 3 of the Act the salaries of the county clerks, as determined by the county courts, on or before January 1, 1947, and in accordance with provisions of Sections 1 and 2 of the Act, shall be the annual salaries of the respective county clerks until January 1, 1955.

In your letter you state, "The County Clerk of this County took office on January 1, 1947 but failed to have the County Court determine the group to which this County belongs." From a reading of House Bill No. 867, it appears that the duty of determining the salary to which the county clerk is entitled is imposed upon the county court. Section 7 of Article VI of the Constitution of 1945, provides as follows:

"In each county not framing and adopting its own charter or adopting an alternative form of county government, there shall be elected a county court of three members which shall manage all county business as prescribed by law, and keep an accurate record of its proceedings. The voters of any county may reduce the number of members to one or two as provided by law."

By these provisions of the Constitution, the people have imposed upon the county courts the duty of managing all county business as prescribed by law. House Bill No. 867 contains the duties imposed upon the county court by the General Assembly for determining the salaries of county clerks.

The question of whether or not this duty of determining the salary is mandatory or directory might be raised. In the case of State ex rel. Ellis vs. Brown, 33 S. W. (2d) 104, at l.c. 107, the court set out the rule applicable to mandatory and directory statutes.

"A mandatory provision is one the omission to follow which renders the proceeding to which it relates illegal and void, while a directory provision is one the observance of which is not necessary to the validity of the proceeding. Directory provisions are not intended by the legislature to be disregarded, but where the consequences of not obeying them in every particular are not prescribed the courts must judicially determine them. There is no universal rule by which directory provisions in a statute



may, in all circumstances, be distinguished from those which are mandatory. In the determination of this question, as of every other question of statutory construction, the prime object is to ascertain the legislative intention as disclosed by all the terms and provisions of the act in relation to the subject of legislation and the general object intended to be accomplished. Generally speaking, those provisions which do not relate to the essence of the thing to be done and as to which compliance is a matter of convenience rather than substance are directory, while the provisions which relate to the essence of the thing to be done, that is, to matters of substance, are mandatory."

In this case, the court had before it for consideration the duties of election officials with respect to making a public record of the qualifications of electors. On the question of the making of this record being of the essence of the thing to be done, the court said at l.c. 107:

"\*\*Such record, when made, tends to prevent repeating, colonization, and other fraudulent abuses of the franchise. The making of the record and the truthfulness of its recitals are the essence of the thing the statute requires to be done and not the time in which it is to be done, except that it be within the period between the election and the beginning of the sixth week preceding it. \* \*" (Emphasis ours.)

Under said House Bill No. 867, the thing to be done by the county court is the determination of the group in which the county clerk of its county will be placed and the determination of the salary which such officer will be entitled to. This duty, we think, is mandatory upon the court. In the case of Warrington et al. vs. Bobb et al., 56 S. W. (2d) 835, at l. c. 837, the court made the following statement with respect to the rule applicable to provisions of a statute which are the essence of the thing to be done:

"\* \* Provisions relating to the essence of the thing to be done, that is, matters of substance, are mandatory, while, generally, statutory provisions not relating

to the essence of the thing to be done, and as to which compliance is not a matter of substance, are directory. \* \*"

Following these authorities, it is the mandatory duty of the county court to ascertain and determine the salary of the county clerk under said House Bill No. 867.

From your request, it appears that the county court of Stoddard County did not perform these duties on or before January 1, 1947. We note from the Act that the court is directed to perform these duties on or before January 1, 1947. Then the question which arises is, "The County court having failed to perform this duty on or before January 1, 1945, shall it now perform that duty?" The answer to this question will depend upon whether or not the provisions of the Act fixing the time when the court shall perform this duty are directory or mandatory. We think this question has been answered by the Supreme Court in the case of Mead vs. Jasper County, 18 S. W. (2d) 464, 465. In that case, the court had before it for consideration the question of whether or not an order of the county court fixing the amount to be paid for board of prisoners was a valid order. Under the law it was the duty of the county court to fix this rate at the November term of court. Instead of performing this duty at that time, the court made the order in the following January. In stating the rule applicable, the court said at l.c. 465:

"The rule of construction of statutes of this character is well stated in a very early decision of this court, St. Louis County Court v. Sparks, 10 Mo. 117, 45 Am. Dec. 355, thus: 'It is a rule of construction, that a statute specifying a time within which a public officer is to perform an official act regarding the rights and duties of others, is directory merely, unless the nature of the act to be performed, or the phraseology of the statute is such, that the designation of time must be considered as a limitation of the power of the officer'--citing cases."

The court, in that case applied the foregoing rule and held that the statute fixing the time for the court to make the order fixing the amount which would be paid for board of prisoners was directory and that the order made at a time after that provided for by the statute was a valid order.

Applying that rule here, since the county court of Stoddard County did not on or before January 1, 1947, calculate and determine the salary of the county clerk, then the order which it is required to make relative to the clerk's salary would be a valid order even though it is made after January 1, 1947.

Since the salary of the deputies in the county clerk's office will be determined on the basis of the salary paid the county clerk, then the same rules of law announced in this opinion would be applicable to the law in determining the compensation of such deputies.

#### CONCLUSION

It is therefore the opinion of this department that it is the mandatory duty of the county court, under House Bill No. 867 of the 63rd General Assembly, to determine the salary of the clerk of the county court and his deputies.

It is further the opinion of this department that if the county court has not made this determination on or before January 1, 1947, that the determination after that date of those salaries will be valid.

Respectfully submitted,

TYRE W. BURTON  
Assistant Attorney General

APPROVED:

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J. E. TAYLOR  
Attorney General

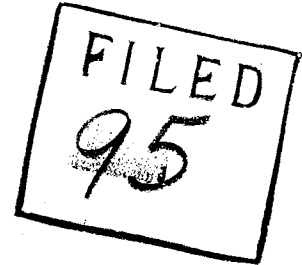
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**MAGISTRATES:**

**COUNTY TREASURER:**

One person may be employed by clerk in both the probate and county treasurer's office. County courts have the right to provide for additional clerk hire for the magistrate if the court finds that such a need exists.

April 10, 1947



Honorable H. L. C. Weier  
Prosecuting Attorney  
Jefferson County  
Festus, Missouri

Dear Sir:

We hereby acknowledge receipt of your several letters of recent date in which you have presented the following questions to this department for an official opinion:

- (1) May the same person be employed as clerk of the probate court and as part-time clerk of the county treasurer?
- (2) Has the county court the right to provide compensation for a clerk in the county treasurer's office?
- (3) May the county pay additional clerks in the magistrate's office?

We note that Jefferson County has an assessed valuation of \$29,552,478, and is therefore a third class county.

We will answer questions one and two together in that they are immediately related. We would like to point out at the outset that there is no statutory authority for the hiring of a clerk in the county treasurer's office in counties of the third class. There is such statutory authority in counties of the first and second classes. Therefore, under the doctrine laid down by the Supreme Court in the case of Rinehart v. Howell County, 153 S. W. (2d) 381, we believe that the county treasurer in counties of the third class may be reimbursed by the county court for reasonable sums paid for necessary clerk hire. In this case the court said at 1. c. 383:

"Appellant's statutory citations constitute legislative recognition of the propriety of expenditures for stenographic services in the discharge of the present-day duties of prosecuting attorneys in the communities affected--an approved advance in proper instances for the administration of the laws by county officials and the business affairs of the county and for the general welfare of the public. Such enactments, in view of the constitutional grant to county courts, should be construed as relieving the county courts in the specified communities from determining the necessity therefor and, by way of a negative pregnant, as recognizing the right of county courts to provide stenographic services to prosecuting attorneys in other counties when and if indispensable to the transaction of the business of the county, and not as favoring the citizens of the larger communities to the absolute exclusion of the citizens of the smaller communities in the prosecuting attorney's protection of the interests of the state, the county and the public. \*\*"

This may only be done if the county court finds this expense is bona fide and reasonable and if it further finds that the clerk hire is absolutely necessary for the proper conduct of the office of county treasurer. Conversely, if the county court believes that the county treasurer can perform his duties without any additional help, it would be justified in refusing to provide compensation for said clerk.

If the county court finds that it is necessary to hire a clerk in the county treasurer's office, then the same person may hold that job and be employed as clerk of the probate court. After diligent search we have found no statutory or constitutional prohibition of this practice.

In answer to your third question we direct your attention to Section 21 of Senate Bill 207 of the 63rd General Assembly, which provides in part as follows:

"\* \* \* The total salaries of clerk, deputies and other employees paid by the state shall in no event exceed the annual amount fixed in this act for clerk and deputy clerk hire of such courts, provided, that in any county where need exists, the county court is hereby authorized, at the cost of the county, to provide such additional clerks, deputy clerks or other employees as may be required. \* \* \*"

It is clear from the above provision that the county court may authorize the employment of additional clerks at the cost of the county in the magistrate's office if they believe that such a need exists.

#### Conclusion

Therefore, it is the opinion of this department that the county court may pay for clerk hire in the county treasurer's office if they find that such clerk hire is necessary for the proper conduct and administration of the affairs of said office, and that such clerk may also be employed as a clerk in the probate court.

It is further our opinion that the county court is authorized at the cost of the county to provide additional clerks, deputy clerks or employees for the magistrate court if they find the need exists.

Respectfully submitted,

PERSHING WILSON  
Assistant Attorney General

APPROVED:

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J. E. TAYLOR  
Attorney General

FW:EG

DEVISION OF WELFARE: Under sections 9759.31 and 9759.32, Mo. R.S.A.,  
OLD AGE PENSIONS: the Division of Welfare is a single state  
agency designated to administer the state  
social security act and federal social security  
act pertaining to the payment of old age as-  
sistance and aid to dependent children.

May 20, 1947

65  
FILED  
95

Division of Welfare  
Dept. of Public Health and Welfare  
Jefferson City, Missouri

Attention: Mr. Proctor N. Carter, Director  
Division of Welfare

Gentlemen:

This will acknowledge receipt of your request for an official opinion. Restating your request for sake of brevity, you inquire whether the Division of Welfare or the State Department of Public Health and Welfare is a single state agency under sections 31 and 32 of Senate Bill 349, passed by the 63rd General Assembly, designated to administer the state social security plan and Federal laws pertaining to the payment of old age assistance and aid to dependent children.

The primary rule of statutory construction is to ascertain, if possible, the intent of the Legislature in passing such a law from the words used and give it that effect. See *City of St. Louis v. Pope*, 126 S.W. (2d) 1201, 344 Mo. 479.

Prior to the enactment of Senate Bill 349, supra, the State Social Security Commission was a single state agency under the state plan for administering state and federal aid to applicants for old age assistance and aid to dependent children.

Section 9759.31, Mo. R.S.A., transfers all authorities and duties formerly vested in the State Social Security Commission to the Department of Public Health and Welfare, however, it further provides such authority and duty shall hereinafter be assigned to the Division of Welfare. Also, that the state agency, as the term may be used in any federal act and not otherwise specifically provided for by state law, shall mean the Department of Public Health and Welfare. Said section reads:

"All powers and duties heretofore under  
control and administration of the state

social security commission and the offices thereof shall hereafter be under the control and administration of the state department of public health and welfare and shall be assigned to the division of welfare within the department, together with all other powers and duties which may herein or hereafter be so assigned. In all laws of Missouri, wherever the term state social security commission or state commission used in such connection shall occur, the term department of public health and welfare shall be substituted and understood; and wherever the term commissioner in such connection shall occur, it shall be understood to mean the director of the division of welfare; the term person shall include corporation, partnership or association; state agency as that term may be used in any federal act and not otherwise specifically provided for by state law shall mean the department of public health and welfare; the singular shall include the plural and the masculine shall include the feminine."

Section 9759.32, Mo. R.S.A., specifically provides that the Division of Welfare shall be vested with and exercise all powers and duties necessary to carry out all purposes of said act, and furthermore, that said Division of Welfare shall be the state agency to administer state plans and laws involving old age assistance and aid to dependent children. Said section reads:

"The division of welfare as an integral part of the department of public health and welfare shall be vested with and shall exercise all the powers and duties necessary to enable it to carry out fully and effectively the purposes enumerated in this act or in amendatory acts, and shall be the state agency to administer state plans and laws involving pensions or assistance to persons over sixty-five years of age, who are incapacitated from



earning a livelihood or are without means of adequate support; aid to dependent children; aid or relief in cases of public calamity; aid for direct relief; child welfare services; pensions and services as heretofore administered by Missouri Commission for the Blind; any other duties relating to social security which may herein or hereafter be imposed upon the department of public health and welfare. The division of welfare shall also have control and administration over the confederate home near Higginsville, and the inmates thereof, in the same manner and to the same extent as has heretofore been lawfully exercised by the board of managers of the state eleemosynary institutions. The board of trustees of the federal soldiers' home as established in Article II of Chapter 124, Revised Statutes of Missouri, 1939, as amended, shall continue to operate and maintain the federal soldiers' home at St. James as now by law provided, but said board of trustees and said home shall be a part of the division of welfare and appropriations for said home shall hereafter be made through the department of public health and welfare, and reports of said board of trustees shall hereafter be made to said department, any other act to the contrary notwithstanding."

Furthermore, Section 9759.33, Mo. R.S.A., provides that the Department of Public Health and Welfare through and on behalf of the Division of Welfare shall cooperate with the United States government pertaining to any duties wherein the department and division are acting as a state agency. And concludes by stating that all powers and duties of the department shall, so far as applicable, apply to the administration of any other law or state law wherein duties are imposed upon the department or division, or the department or division is acting as a state agency.

The foregoing provisions, to say the least, are ambiguous, and there is plenty of room for construction. The Federal Social Security Act, Title 42, Section 302 (a), subdivision (3) thereof, specifically requires a state plan for the administration

of old age assistance, and reads:

"(a) A State plan for old-age assistance must \* \* \* \* (3) either provide for the establishment or designation of a single State agency to administer the plan, or provide for the establishment or designation of a single State agency to supervise the administration of the plan;"

The Department of Public Health and Welfare is specifically made the state agency as that phrase is used in the Federal Statutes when not otherwise provided by law. (See Section 9759.31, Mo. R.S.A., supra.) However, it is otherwise provided by law. (See Section 9759.32, Mo. R.S.A.) The foregoing provision makes the Division of Welfare under said Department of Public Health and Welfare the single state agency to administer the state social security act, and, therefore, is the single state agency required to be established under the federal social security act. Furthermore, Section 9759.33, Mo. R.S.A., supra, requires the Department of Public Health and Welfare through the Division of Welfare to cooperate with the federal government in many ways.

#### CONCLUSION

From the foregoing provisions, it is the opinion of this department that the Legislature has created the Department of Public Health and Welfare and places under its supervision many divisions, among them is found the Division of Welfare. It is apparent that the Division of Welfare under the foregoing statutes is the single state agency required to administer all laws pertaining to the payment of old age assistance and aid to dependent children.

Respectfully submitted,

AUBREY R. HAMMETT, Jr.  
Assistant Attorney General

APPROVED:

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J. E. TAYLOR  
Attorney General

ARH:LR

MAGISTRATES: Salaries of clerks of magistrate courts may be increased by county court, said increase to be paid by the county.

August 8, 1947

FILED

95

8/13

Honorable H. L. C. Weier  
Prosecuting Attorney  
Jefferson County  
Festus, Missouri

Dear Sir:

This will acknowledge your request for an official opinion which reads:

"Under Laws 1945, S. B. No. 207, Sec. 22, the Clerk of the Magistrate Court in this county, which has a population of more than 30,000 but not more than 40,000 inhabitants, receives a compensation of \$1800.00 paid by the State of Missouri. A member of our County Court has requested that I obtain your opinion whether the County Court has the authority to supplement this salary by payment of an additional amount to the Clerk of the Magistrate Court out of county funds.

"Sec. 21 of the same law provides that additional clerks, deputy clerks and other employees may be provided by the county court at county expense, but does not specifically state that an additional amount may be paid to the Clerk by the county, in order to supplement the amount paid by the State.

"I would appreciate it if you would send me an opinion with regard to this matter."

The question presented in your request asks if the salary of the clerk of the magistrate court which is paid by the state can be supplemented or increased by the county court, said increase to be paid by the county.

Reference is made in your request to Section 21, Laws Missouri 1945, page 775, which, in part, reads:

"In all counties each magistrate

shall by an order duly made and entered of record appoint and fix the salary of a clerk of his court and may appoint such deputies and employees as may be necessary for the proper dispatch of the business of his court and fix their salaries at such sum as in his discretion may seem proper. The total salaries of clerk, deputies and other employees paid by the state shall in no event exceed the annual amount fixed in this act for clerk and deputy clerk hire of such courts, provided, that in any county where need exists, the county court is hereby authorized, at the cost of the county, to provide such additional clerks, deputy clerks or other employees as may be required.  
\* \* \* \*(Underscoring ours.)

In an opinion submitted December 11, 1946, to the county court of Andrew county this office held that the salaries of clerks, deputy clerks and other employees of the magistrate court are fixed by the magistrate and that said salaries of all the clerks, deputy clerks and employees who are paid by the state, cannot exceed the limitation provided in Section 22, Laws Missouri 1945, page 775.

Under Section 21, supra, the county court could only pay salaries of clerks, deputy clerks and other employees out of county funds who were additionally provided for because of an existing need. In such a case where the county court did provide for additional personnel their entire salaries were paid by the county. There was no statutory authority authorizing the county court to supplement or increase the salaries of clerks, deputy clerks and employees, who were originally appointed and paid by the state, and to pay said increase out of county funds.

However, there has been recent legislation enacted which has a bearing on this question. The 64th General Assembly enacted Senate Bill 94 which repealed several sections of Senate Bill 207 enacted by the 63rd General Assembly. Among those was Section 21, supra, and a new section known as Section 21 was enacted which, in part, provides:

"In all counties each magistrate shall by an order duly made and entered of record appoint and fix the salary of a clerk of his court and may appoint such deputies and employees as may be necessary for the

proper dispatch of the business of his court and fix their salaries at such sum as in his discretion may seem proper. The total salaries of clerk, deputies and other employees paid by the state shall in no event exceed the annual amount fixed in this act for clerk and deputy clerk hire of such courts, provided, that in any county where need exists, the county court is hereby authorized, at the cost of the county, to provide such additional clerks, deputy clerks or other employees as may be required and to provide funds for the payment of salaries or parts of salaries of clerks, deputy clerks and other employees, in addition to the amounts payable by the state under this act.  
\* \* \* (Underscoring curs.)

The underscored portion of the above quoted statute is new matter and provides the principal change over the old Section 21 appearing at page 775, Laws Missouri 1945.

We believe that the added language appearing in Section 21 of Senate Bill 94 extends the authority of the county court relative to paying salaries of clerks, deputy clerks and other employees of the magistrate court. It says that the county court may provide funds to pay "salaries or parts of salaries of clerks, deputy clerks and other employees, in addition to the amounts payable by the state under this act." In other words, if, under Section 22, Laws Missouri 1945, page 775, the clerk of the magistrate court in Jefferson County which has more than 30,000 but less than 40,000 inhabitants, receives an annual salary from the state of \$1800.00, we believe that under Section 21 of Senate Bill 94 the county court could provide for the payment of a sum of money additional to the amount payable by the state, said additional sum to be paid by the county. To do this would be increasing the salary of the magistrate court beyond what is payable by the state, and paying said increase out of county funds.

Senate Bill 94 was approved by the Governor July 7, 1947, but it was enacted without an emergency clause and therefore becomes effective 90 days after the June 12th recess of the 64th General Assembly, which would be September 10, 1947.

#### CONCLUSION

It is, therefore, our opinion that under Section 21 of Senate

Hon. H. L. C. Weier

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Bill 94, which becomes effective September 10, 1947, the salaries of the clerks of the magistrate courts can be increased by the county court beyond what is payable by the state, said increase to be paid by the county court out of county funds.

Respectfully submitted,

RICHARD F. THOMPSON  
Assistant Attorney General

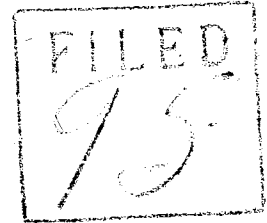
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APPROVED:

J. E. TAYLOR  
Attorney General

COUNTY COURT: When only two district judges are present at county court meeting and they are unable to agree on any matter submitted to them, the clerk is to designate one district judge as presiding judge and his decision is the decision of the court. When the presiding judge and one district judge are present and they disagree, the decision of the presiding judge is the decision of the court.

September 17, 1947



Honorable H. L. C. Weiler  
Prosecuting Attorney  
Jefferson County  
Festus, Missouri

Dear Sir:

This is in reply to your letter of recent date, requesting an official opinion of this department, and reading, in part, as follows:

"Section 2493 Revised Statutes of Missouri 1939 provides that 'When but two judges are sitting and they shall disagree in any matter submitted to them the decision of the presiding judge at the time being, to be designated by the clerk of such court, shall stand as the judgment of the court.' In this particular instance it appears that the clerk did not designate the presiding judge since Judge Becker, who was sitting at the time, was the duly elected presiding judge of this county. The minutes do show that the decision of Judge Becker being the presiding judge, became the decision or judgment of the court. It is my interpretation of the law that where only two judges are sitting and one is the presiding judge, then if there is a disagreement the decision of the presiding judge is the decision of the court, but if two district judges are sitting in the absence of the presiding judge, then the clerk of the county court must designate which of the two district judges is to be the presiding judge and carry the decision of the court. Mr. Sweet is in disagreement with this opinion and has requested that I obtain your opinion in this matter.

"I would appreciate it if you would inform me as to your construction of Section 2493 with regard to this matter."

Section 2475, R. S. Mo. 1939, provides as follows:

"At the general election in the year eighteen hundred and eighty, and every two years thereafter, the qualified voters of each of said districts shall elect a county court judge, who shall hold his office for a term of two years and until his successor is duly elected and qualified; and at the general election in the year eighteen hundred and eighty-two and every four years thereafter, the presiding judge of said court shall be elected by the qualified voters of the county at large, who shall hold his office for the term of four years and until his successor is duly elected and qualified. Each judge elected under the provisions of this article shall enter upon the duties of his office on the first day of January next after his election."

It is a well established rule of statutory construction that in arriving at the intent of the Legislature in enacting a statute cognate statutes are to be considered in determining such legislative intent. In the case of Darlington Lumber Co. v. Railroad, 216 Mo. 658, 1, c. 672, the Supreme Court of Missouri said:

"Nor should we give the statute such construction as would make it unreasonable and absurd, for it is to be presumed that such was not the legislative intent. And after all the legislative intent and purpose is the thing to be sought, when there is doubt as to the meaning of the language used. This doubt may arise from the statute itself or from cognate statutes, which must be considered therewith.

\* \* \*

" \* \* \* The inartificial manner in which many of our statutes are framed, the inaptness of expressions frequently used, and the want of perspicuity and precision not infrequently met with, often require the court to look less



at the letter or words of the statute than at the context, the subject-matter, the consequences and effects, and the reason and spirit of the law, in endeavoring to arrive at the will of the law-giver."

Since Section 2475, quoted supra, provides that a presiding judge shall be elected by the qualified voters of the county, it is our view that such presiding judge is to be the presiding judge of the county court at all times when he is present at the meetings of such court, and therefore that the provision of Section 2493, R. S. Mo. 1939, providing "and when but two judges are sitting and they shall disagree in any matter submitted to them, the decision of the presiding judge at the time being, to be designated by the clerk of such court, shall stand as the judgment of the court," refers only to those meetings of the county court at which only the two district judges are present, and does not refer to a meeting of the county court when the presiding judge and one district judge are present. When only two district judges are present and they disagree, one of the district judges is to be designated as presiding judge by the clerk of the court, and the decision of such judge is to stand as the judgment of the court. When only the presiding judge and one district judge are present, no designation of the presiding judge by the clerk is necessary since the decision of the presiding judge of the court will stand as the judgment of the court.

Another rule of statutory construction is that the actual construction given a statute for a long period by those charged with its administration, while not conclusive, is entitled to great weight in construing such a statute. In the case of *State ex rel. Chick v. Davis*, 273 Mo. 660, the Supreme Court of Missouri said, 1. c. 667:

" \* \* \* Though the statute be not clear, its ambiguity opens the way for the rule that the actual construction given it for a long period by those charged with its administration, the supervising courts and the Legislature acquiescing therein, is regarded as strong evidence of its true meaning."

Since the county courts of this state have long given Section 2493 the construction that the clerk is to designate a presiding judge only in cases where only the district judges are present, we believe it is clear that such construction should be followed in this case.

Honorable H. L. C. Weier

-4-

CONCLUSION

It is the opinion of this department that when only the presiding judge and one district judge are present at a meeting of the county court, the decision of the presiding judge shall stand as the judgment of the court.

It is further the opinion of this department that when only the two district judges of the county court are present and they disagree in any matter submitted to them, it is the duty of the county clerk to designate one of such district judges as the presiding judge, and the decision of the presiding judge so selected by the clerk shall stand as the judgment of the court.

Respectfully submitted,

C. B. BURNS, Jr.  
Assistant Attorney General

APPROVED:

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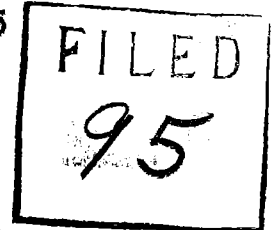
J. E. TAYLOR  
Attorney General

CBB:HR

COUNTY JUDGES: No restriction in third class counties on number of times mileage may be charged for going to and returning from court.

September 24, 1947

FILED 95



Honorable Wm. H. Wessel  
Prosecuting Attorney  
Gasconade County  
Hermann, Missouri

Dear Mr. Wessel:

This is in reply to your letter of September 19, 1947, requesting an opinion from this department, which reads as follows:

"Can County Judges in a Third Class County receive mileage to and from their home to the Courthouse? Two of the Judges go back and forth every night. Can they receive mileage for this every day, under the provision 'necessary' traveling, or can they receive such mileage only once, that is, when they come to the Courthouse for the beginning of a session and then only again when they go home from the session? Or could they receive it every week, when Court is in session for longer than one week?"

The statute now in effect relating to the compensation and mileage allowance of judges of the county court of third class counties is Section 2494.3, Mo. R.S.A., which provides as follows:

"In all counties of the third class in this state, the judges of the county court shall receive for their services the sum of ten dollars per day for each of the first five days in any month that they are necessarily engaged in holding court and shall receive five dollars per day for each additional day in any month

that they may be necessarily engaged in holding court, and shall receive five cents per mile for each mile necessarily traveled in going to and returning from the place of holding county court. The per diem compensation herein fixed shall be paid at the end of each month and the mileage compensation shall be paid at the end of each month on presentation of a bill, by each of the respective county judges setting forth the number of miles necessarily traveled; provided, however, that this increase in compensation shall not become effective during any county judge's present term of office." (Underlining ours.)

It will be noted that prior statutes on this subject contained certain restrictions with regard to the number of times such mileage could be charged. Section 2494, R.S. 1939, allowed five cents per mile in counties of 75,000 inhabitants or less, but provided that in counties of 20,000 inhabitants or less such mileage should be charged only once for each regular term and not over eight times per year for special or adjourned terms. Section 13402, R.S. Mo. 1939, allowed five cents per mile, but further provided that such mileage should be charged only once for each term of court.

However, when Section 2494.3 was enacted, no restriction was included which would limit the number of times such mileage may be charged by judges of the county court. Said section only requires that such charge be made for travel in going to and returning from the place of holding court. The statute is plain and unambiguous in its terms and must be given effect as written. *St. Louis Amusement Co. v. St. Louis County*, 147 S.W. (2d) 667, 1.c. 669; *State v. Phillips Petroleum Co.*, 160 S.W. (2d) 764, 1.c. 769.

Of course, it is evident that by providing said allowance for each mile "necessarily traveled" the Legislature intended that amount to be available for only necessary travel in going to and returning from the place of holding court by the most usually traveled and shortest practicable route. *Hitch v. United States*, 66 Fed. 937; *United States v. Nix*, 189 U.S. 199.

#### Conclusion.

It is, therefore, the opinion of this department that Section 2494.3, Mo. R.S.A., imposes no restriction with regard

Honorable Wm. H. Wessel

-3-

to the number of times judges of the county court in counties of the third class may charge mileage for necessary travel in going to and returning from the place of holding county court.

Respectfully submitted,

DAVID DONNELLY  
Assistant Attorney General

APPROVED:

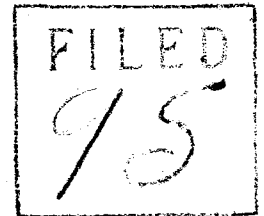
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J. E. TAYLOR  
Attorney General

DD:ml

DIVISION OF WELFARE: Federal funds unclaimed by recipients for old  
APPROPRIATIONS: age assistance and aid to dependent children  
FEDERAL FUNDS: shall not be returned to the general revenue  
fund of the State of Missouri.

September 29, 1947



10-8  
Division of Welfare  
State of Missouri  
Jefferson City, Missouri

Attention: Mr. Proctor N. Carter, Director

Gentlemen:

This will acknowledge receipt of your request for an opinion. For sake of brevity we are restating your request. You inquire if federal participation to recipients of old age assistance and aid to dependent children, that may not be presented for payment by said claimants within one year, shall be transferred to the general revenue fund of the State of Missouri as provided under Section 13, page 1981, Laws of Missouri, 1945.

Claimants under both programs in this state, old age assistance and aid to dependent children, receive monthly grants in the form of checks. Both the state and federal government participate in these monthly payments and payments of both federal and state government to each recipient are combined in one check.

It is well established that federal funds granted the State of Missouri solely for participation in the two programs hereinabove mentioned shall be distributed in accordance with the federal act and state plan approved by the federal government, both of which specifically prohibit said federal funds being used for any other purpose. The federal government keeps a constant check on distribution of all federal funds granted this state to determine that same are properly distributed according to law. Should any federal funds granted the State of Missouri for a particular purpose be used for any other purpose, there is no question but that the federal government will reduce the following grant to this state in an amount equal to the amount of federal funds not properly expended. Therefore, while the State of Missouri has custody of said federal funds, they can only be disbursed for the purposes for which they were allocated, and to permit any part of said federal funds to go into the general revenue fund of the state to be used for another purpose would not comply with the law.

Section 13, page 1980-1981, Laws of Missouri, 1945, reads in part:

"\* \* \* Provided, however, that checks or drafts outstanding, if not presented for payment within one year from the date of issuance, shall be void and the state treasurer shall print or cause to be printed upon all checks, drafts or evidence of payment due, the following:

'If not presented for payment within one year from the date of issuance, this .....(insert draft or check, etc.) shall be void.'

"All outstanding checks or drafts remaining unpaid at the time this act becomes effective, if not presented for payment within one year from the effective date of this act, shall be void.

"All monies set aside to pay any outstanding check or draft which has not been presented for payment as required by this act shall be transferred to the general revenue." (Underscoring ours.)

One of the primary rules of statutory construction is to ascertain the lawmakers intent from words used, if possible, and all other rules of interpretation are to be treated as subordinate to that requiring determination of the legislative intent. See State vs. Ball, 171 S.W. (2d) 787, and Haynes vs. Unemployment Compensation Commission, 183 S.W. (2d) 77, 353 Mo. 540. It is a well established rule of statutory construction that the Legislature is presumed to be familiar with the law in effect at the time they enact any legislation. See Smith vs. Pettis County, 136 S.W. (2d) 282, 345 Mo. 839; also Howlett vs. Social Security Commission, 149 S.W. (2d) 806, 347 Mo. 784.

Unquestionably, the Legislature knew that such federal funds granted the State of Missouri solely for participation in the two programs hereinabove mentioned could be used for no other purpose. This has been called to their attention on numerous occasions. Therefore, Section 13, supra, requiring all monies set aside to pay any outstanding check or draft which has not been presented for payment as required by this act shall be transferred to general revenue, must refer solely to money belonging to the State of Missouri and not

federal funds granted the state to be used for a specific purpose.

CONCLUSION

Therefore, it is the opinion of this department that Section 13, supra, is not applicable to federal money unclaimed by recipients for old age assistance or aid to dependent children and that such federal money should be returned to the federal fund account in the state to be used for the purpose for which it was allocated, and that part of payments participated in by the state and unclaimed should be transferred to the general revenue fund as provided in Section 13, supra.

Respectfully submitted,

AUBREY R. HAMMETT, Jr.  
Assistant Attorney General

APPROVED:

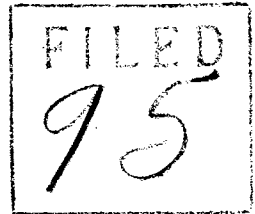
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J. E. TAYLOR  
Attorney General

ARH:VLM



COUNTY: Expense of publishing list of delinquent tax lists shall be paid out of the county treasury, and the cost of same shall be taxed as a part of the costs of the sale.



October 18, 1947

Honorable Joe C. Welborn  
Prosecuting Attorney  
Stoddard County  
Bloomfield, Missouri

Dear Mr. Welborn:

Your opinion request of recent date reads as follows:

"Section 11126, R. S. No. 1939, provides for the publication of a list of delinquent lands and a notice of the time and place of sale of such lands for taxes. It is further provided that: 'The expense of such printing shall be paid out of the County Treasury....which cost of printing.....shall be taxed as part of the costs of the sale of any land or list contained in such list.' Other sections in the same article provide for the lands being sold for such amount as will satisfy the amount of taxes, interests, and costs.

"The question has arisen, whether the publisher, publishing the above lists must take a Fifth Class Warrant for such printing or whether he may be paid from the proceeds of the tax sale. It is apparent that Stoddard County may not be able to meet all its Class Five obligations this year and if this is true, the publisher of the delinquent tax lists may have to go without being paid, although money has been paid to the collector for the publication costs.

"We would appreciate an official opinion from your office on the above matter."

The pertinent part of Section 11126, R. S. No. 1939, referred to in your opinion request reads as follows:

"The county collector shall cause a copy of such list of delinquent lands and lots to be printed in some newspaper of general circulation and published in the county, for three consecutive weeks \* \* \*. The expense of such printing shall be paid out of the county treasury and shall not exceed the rate fixed in the county printing contract, if any, but in no event to exceed one dollar for each description, which cost of printing at the rate paid by the county shall be taxed as part of the costs of the sale of any land or lot contained in such list."

In the construing of statutes some primary rules of interpretation have long been announced by the courts. One of the most elementary rules of construction is that effect is to be given to the legislative intent when construing a statute. *Meyering v. Miller*, 51 S.W. (2d) 65, 330 Mo. 885, and other cases listed under Statutes, Missouri Digest, Volume 26, Key 180, 181(1), too numerous to list here. Another, equally as well established, rule of construction is that in construing statutes, words of common use are to be construed in their natural and ordinary meaning. *Bellerive Inv. Co. v. Kansas City*, 13 S.W. (2d) 628, and other cases under Statutes, Missouri Digest, Volume 26, Key 188.

With these two rules in mind let us reduce the above quoted statute to an ordinary statement, omitting the terminology and phrases which for our purpose may be considered as surplusage. The statement would then read, in its essence, that the county collector must publish a list of the lands and lots upon which the taxes are not paid, and that payment for that publication is to come out of the county treasury, but in order that the county not bear the burden of such cost, the charge of the publication is to be taxed as a part of the sale and the costs attendant thereon. If that statement is true it seems that it was the legislative intent to have the lists of delinquent taxes published and in order that the publisher be paid for his efforts, but in order not to burden the county, the cost of the publication was to be paid as part of the costs. The statute provides a clear and express method of payment for the cost of publishing the list of delinquent taxes against lands and lots. The statute is express when it states that the expense of the publication "shall be paid out of the county treasury." To act otherwise would violate the express terms of the statute.

The confusion, if any exists, seems to come from the fact that within one sentence the Legislature provided the method of payment and the method of providing for the cost. However, it has been repeatedly held that bad grammar, syntax or other language errors will not defeat the plain intent of the statute. When one separates the two items contained in the sentence, that is, the method of payment and the method of providing for the cost, from each other, it is manifest that the Legislature had two separate procedures under consideration.

In counties with a population of 50,000 or less, Sections 10910 to 10917, R. S. Mo. 1939, provide the exact method of a county meeting any indebtedness and the priority of claims against the county's revenue. Strict adherence to this budget law is necessary. The only alternative in the present situation would be the payment of the publication costs where one class of expenditures by the county has a surplus remaining in that class at the end of the fiscal year. This office has often held that the surplus in one class can be transferred to another class, a transfer being authorized by Section 10911, page 650, Laws of Missouri, 1941. This seems to be the only other method by which payment might be made, that is, if there is at the close of the fiscal year any surplus funds from any of the classes such surplus may be used. If there does not remain any surplus at the close of the year it will be necessary to take this item into account for the ensuing year.

#### Conclusion

In answer to your direct question, it is the opinion of this department that the publisher of delinquent tax notices must be paid out of the county treasury by warrant, and that the publisher may not be paid from the proceeds of the tax sale. Furthermore, it is the opinion of this department that where lists of delinquent taxes on lands and lots have been published according to the requirement of the statute, the expense of such printing shall be paid out of the county treasury, and the county shall levy as costs the amount of the charge of such publication.

Respectfully submitted,

APPROVED:

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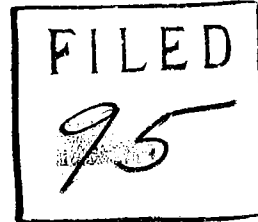
J. E. TAYLOR  
Attorney General

WM. C. BLAIR  
Assistant Attorney General

WCB:CF

MAGISTRATE COURT: Defendant must pay magistrate fee even though  
COURT COSTS: county not required to deposit said fee at  
commencement of suit.

November 24, 1947



Honorable Joe C. Welborn  
Prosecuting Attorney  
Stoddard County  
Bloomfield, Missouri

Dear Mr. Welborn:

This is in reply to your letter of recent date, requesting an opinion from this department, which reads as follows:

"The Magistrate of this County has requested me to request an official opinion from your department on the question of whether or not the Magistrate is to include a \$5.00 filing fee as costs in a judgment for personal taxes. I understand that the fee is not to be paid by the County upon filing such a suit."

In order to rule on the question submitted in your letter, we must first determine whether or not the county is required by Section 23, page 776, Laws of Missouri, 1945, to pay a magistrate fee of \$5.00 upon the commencement of a proceeding to collect personal taxes.

This question has not been presented before, however in an opinion rendered to Honorable G. Logan Marr, Prosecuting Attorney of Morgan County, dated March 26, 1947, this department held that the State of Missouri is not required to deposit said magistrate fee upon commencement of a proceeding in a magistrate court. The conclusion reached in said opinion is based, first, on the fact that the payment of such a fee by the state would amount to an absurd procedure since said fee is paid into the state treasury, and, second, on the rule that costs are not recovered from the state in its own courts unless the state is specifically named in the statute allowing the costs. The same rule, of course, applies in the matter of

security for costs. Since said fee is taxed as costs at the termination of a proceeding, it is, in effect, a deposit for costs. It would be useless to require a deposit from the state for costs for which the state is not liable. Thus, the state and its agencies are not liable for said magistrate fee.

We believe that a county, as a political subdivision of the state, should not be required to pay said magistrate fee. The same reasoning and rules of law should apply with equal force to the counties of the state. "In the absence of express statute, security for costs cannot be required of a state in hereown courts, nor of a county suing as a state agency." 20 C.J.S., Sec. 127, page 368. This is especially true when the county is commencing a proceeding in a magistrate court before a magistrate who has been selected as an additional magistrate and will be maintained by the county under the provisions of Section 1, page 767, Laws of Missouri, 1945. In such a case said magistrate fee is paid into the county treasury. In Walker v. Turner (Ky.), 122 S.W.(2d) 804, the court said at pages 805 and 806:

"A county is not required to give bond for costs in litigation growing out of the exercise of its functions as an arm or agency of the state, such as suits for condemnation of a right of way for a public highway. State Highway Department v. Mitchell's Heirs, 142 Tenn. 58, 69, 216 S.W. 336.

"In acquiring a right of way for highway purposes, the county acts as an arm or agency of the state. Department of Highways and Public Works v. Gamble, 18 Tenn. App. 95, 101, 73 S.W.2d 175.

"And the county is none the less acting as an arm of the Sovereign if it obtains possession of a right of way without instituting a condemnation suit. Carroll County v. Matlock, 7 Tenn. App. 564, 566.

"The Code sections upon which appellee relies (9043, 9044, 9045) do not, in express terms, either include or exclude the state or counties; but such statutes,

couched in general terms, though unqualified, will not apply to the state, nor to counties when acting as an arm or agency of the state. *Henley v. State*, 98 Tenn. 665, 689, 41 S.W. 352, 1104, 39 L.R.A. 126.

"The Arkansas case of *State v. Blackburn*, 61 Ark. 407, 33 S.W. 529, 530, is cited with approval in *Henley v. State*, supra; and in the Arkansas case it is said:

"In the construction of statutes declaring or affecting rights and interests, general words do not include the state, or affect its rights, unless it be especially named, or it be clear, by necessary implication, that the state was intended to be included." and counties have the benefit of the same strict construction of statutes affecting them as has the state in like circumstances."

A proceeding by a county for the collection of delinquent personal taxes contemplates the collection of both county and state taxes. The county is, in a sense, bringing suit on behalf of the state. This is another reason why the county should not be required to pay said magistrate fee in this case. In *Commonwealth v. Allen* (Ky.), 32 S.W. (2d) 42, the court made this statement at page 43:

"Breathitt county is an integral part of the state of Kentucky. The taxes levied by its fiscal court are in legal effect the taxes of the state of Kentucky levied by its authorities. The duty of levying the local taxes is committed to a local tribunal, but they are still state taxes no less than the taxes levied by the Kentucky Legislature, and there is no more authority for making the fiscal court pay in advance for filing a suit to recover these taxes than there would be to require the commonwealth to pay out of the treasury without any statute authorizing the payment. The fiscal court is just as much without obligation to make such a payment as the auditor would be. *Com. v. Hazel*, 155 Ky. 30, 159 S.W. 673, 47 L.R.A. (N.S.) 1078. The actions in question to

recover possession of the land are simply proceedings provided by law to secure the collection of the taxes and impose no liability on the state or the county."

The fact that neither the state nor the county is required to pay said magistrate fee upon commencement of a proceeding for the collection of delinquent personal taxes does not relieve the defendant from paying said fee as taxed as costs when judgment is rendered against him. The magistrate court expense is still present. The defendant is in no different position than in a case where judgment is rendered against him in a suit brought by a private individual. Whether or not the magistrate court fee is deposited at the commencement of the proceeding cannot affect in any way defendant's liability for the payment of said fee if judgment is rendered against him. The court, a tribunal of the state, is entitled to said fee for its services when judgment is rendered against a party other than the state or its political subdivisions.

#### Conclusion

Therefore, it is the opinion of this department that the magistrate fee of \$5.00 as provided by Section 23, page 776, Laws of Missouri, 1945, should be taxed as costs against a defendant when a judgment for personal taxes is rendered against him, even though the county was not required to deposit said fee upon commencement of the proceedings.

Respectfully submitted,

DAVID DONNELLY  
Assistant Attorney General

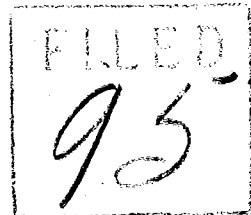
APPROVED:

J. E. TAYLOR  
Attorney General

COUNTY COLLECTOR:  
TOWNSHIP COLLECTOR:  
TAXATION:

In counties under township organization township collector may levy upon property of taxpayer by distraint and sale when taxpayer refuses, upon request, to pay personal taxes. Notice of taxes must be made to taxpayer personally. Goods seized to be sold for taxes may be sold any place collector designates. County treasurer and ex officio collector may proceed by levy, ~~the~~ distraint and sale after tax books have come into his hands.

December 29, 1947



Honorable Joe C. Welborn  
Prosecuting Attorney  
Stoddard County  
Bloomfield, Missouri

Dear Sir:

This is in reply to your letter of recent date, requesting an official opinion of this department, which reads as follows:

"The County Court and the Township Collectors of Stoddard County, have asked me to request an opinion from you on the following matters:

"1. Stoddard County is a county operating under township organization, and has been for some several years. The township collectors now have the tax books for 1947, and are now in the process of collecting taxes. They desire an opinion from you as to when they shall proceed under Section 14010, R. S. Mo., 1939, to levy on the goods and sell the same for delinquent personal taxes. This section says that they shall levy the same by distraint and sale, upon the refusal or neglect of a taxpayer to pay the tax, and apparently means that if a taxpayer refuses on the first request to pay, his goods may be seized.

"2. Can the township collector proceed under 14010, after leaving written notice as provided in section 11086, in the article applicable to counties without township organization?

"3. The third question is, where should the goods be sold? Can the collector assemble



the goods at any place in the township and sell them there?

"4. When may the County Collector, in counties under township organization proceed by levy, distraint and sale?"

Section 14010, R. S. Mo. 1939, provides as follows:

"In case any person shall refuse or neglect to pay the tax imposed, the collector shall levy the same by distraint and sale of the goods and chattels of the person who ought to pay the same."

From the clear and unambiguous words of the statute, the township collector is given the power to levy by distraint and sale of the goods and chattels of a person who refuses to pay his taxes after personal demand.

The demand for payment of taxes necessary before the levy by distraint and sale of the goods of the person refusing to pay the taxes must be made in the manner set out in Section 14009, R. S. Mo. 1939, that is, by personal demand upon the person taxed.

The Springfield Court of Appeals, in construing what is now Section 11086, R. S. Mo. 1939, held in the case of National Lumber & Creosoting Co. v. Burrows, 284 S. W. 153, that the demand for taxes, before levy by distraint and sale of goods is made, must be made only as provided in the statute. The court said, l. c. 154:

"The levying of taxes is a matter solely of statutory creation and no means can be employed to coerce payment other than those pointed out in the statute. City of Carondelet v. Picot, 38 Mo. 125. By section 12932, R. S. 1919, personal taxes constitute a debt, and under that section and the attachment law defendant had ample remedy to enforce collection of the taxes he sought to collect without resorting to summary seizure: also under section 12932 it is provided that the collector shall in no case be liable for costs.

"The demand required by section 12907 can only be made in the manner prescribed, and the difficulty or impossibility of making the

demand cannot justify a reading of something into the statute that would run counter to sound reason. We are constrained to rule that the demand can be made only as the statute prescribes, and, since demand by mail is not prescribed, such a demand is in effect no demand." (Emphasis ours.)

Therefore, the township collector cannot proceed by seizure and sale of the goods and chattels of the person so taxed, and who refuses to pay, after leaving a written or printed notice at the place of abode of the taxpayer with some member of his family over fifteen years of age, as is provided in Section 11086, R. S. Mo. 1939, but may proceed only after personal demand on the person taxed. We believe this to be obvious under the holding in the National Lumber & Creosoting Company case, above quoted, since the treasurer and ex officio county collector may proceed under Section 11086 or under Section 11112, Laws of Missouri, 1945, page 1848.

Since other remedies are provided than the summary seizure and sale by the township collector, the statute authorizing such seizure and sale, Section 14010, R. S. Mo. 1939, must be strictly construed.

Section 14011, R. S. Mo. 1939, provides as follows:

"The collector shall give public notice of the time and place of sale, and of the property to be sold, at least fifteen days previous to the sale, by advertisement to be posted up in at least three public places in the township where such sale is to be made. The sale shall be by public auction."

Under the provisions of such section, the sale may be held at any place the township collector desires, so long as notice is given of the place at which such sale is to be held.

While the duty is placed upon the township collector by Section 14000, R. S. Mo. 1939, to exhaust all remedies required by law for the collection of taxes, still the county collector may levy by distraint and sale of the goods and chattels of the person taxed, when the person so taxed refuses to pay, after the tax books come into the ex officio collector's hands, since Section 11086, R. S. Mo. 1939, provides, in part, as follows:

" \* \* \* Such seizure may be made at any time after the first day of October, and before

said taxes become delinquent, or after they become delinquent: \* \* \*

Since both current and delinquent taxes may be collected by such seizure and sale, the county treasurer and ex officio collector may proceed by this method after the tax books have been delivered to him and such taxes are delinquent.

It is clear from that part of Section 11086 reading:

" \* \* \* Provided further, that when any person owing personal tax removes from one county in this state to another, it shall be the duty of the county collector (or township collector as the case may be) of the county from which such person shall move, to send a tax bill to the sheriff of the county into which such person may be found, and on receipt of the same by said sheriff, it shall be his duty to proceed to collect said tax bill in like manner as provided by law for the collection of personal tax, for which he shall be allowed the same compensation as provided by law in the collection of executions. It shall be the duty of the sheriff in such case to make due return to the collector of the county from whence said tax bill was issued, with the money collected thereon,"

that the procedure in collecting such taxes should be followed by the township collector after the tax books are in his hands, and should be followed by the county treasurer and ex officio collector after the tax books are in his hands. When the township collector has made a personal demand for the taxes and the taxes have not been paid, the ex officio county collector may proceed to levy by distraint and sale after the tax books have come into his hands, since actual demand has been made for the taxes, but if the township collector has not made personal demand for the taxes, the ex officio county collector must make demand for the taxes as provided in Section 11086, that is, he must make the demand in person or by deputy, or by leaving a written or printed notice at the taxpayer's abode with a person over the age of fifteen years.

We are enclosing a copy of an official opinion rendered by this department under date of October 28, 1947, to Robert C. Frith, setting out the proper time for the turning over of the tax books by the township collectors in counties under township organization.

CONCLUSION

(1) The township collector may levy by distraint and sale for personal taxes if a person refuses to pay such taxes after personal demand by the township collector.

(2) The township collector must make personal demand for the taxes before such levy can be made, and the leaving of a written notice at the place of abode of the person taxed with a member of his family over fifteen years of age is not such demand as is required of the township collector.

(3) The goods and chattels seized may be sold at any place designated by the township collector in his notice of such sale.

(4) The county treasurer and ex officio collector in counties under township organization may proceed by levy, distraint and sale after the tax books are in his hands.

Respectfully submitted,

C. B. BURNS, Jr.  
Assistant Attorney General

APPROVED:

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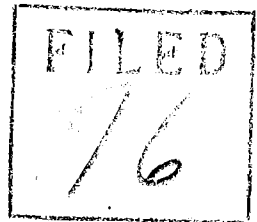
J. E. TAYLOR  
Attorney General

CBB:HR

SCHOOLS: Under Section 10358, Senate Bill No. 208, passed by the 63rd General Assembly, a school district board of education may submit a proposal to the voters of said district for a subsequent increase in the tax levy for the same year or years that an increase has already been voted in excess of the amount authorized by the Constitution without voter approval.

TAX LEVY:

March 20, 1947



Mr. Hubert Wheeler, Commissioner  
Division of Public Schools  
Department of Education  
Jefferson City, Missouri

Dear Sir:

This is in reply to your letter dated February 5, 1947, which reads in part as follows:

"This Department has received inquiries from Boards of Education concerning the laws of this state, authorizing school districts to increase tax rates in excess of the amount authorized by the Constitution that boards may levy without voter approval. Specifically, Boards of Education desire to know the procedure for increasing tax levies beyond the rate previously authorized by the voters of the district. Section 10358, S.B. 208, Laws of 1946, makes provision for increasing the tax rates for school purposes. Last year several of the school districts in this state increased the tax rates according to the provision of this law, but find it necessary because of increased school cost to authorize an additional increase in the tax levies for the ensuing years.

"Section 10358, applicable to all school districts, does not specifically indicate a procedure for authorizing a further increase of tax levies; however, other laws applicable to certain cities or counties make specific provisions for authorizing further increases of taxes, which seem to indicate the proper procedure for any school district to follow for increasing tax levies.

\* \* \* \* \*

"We will appreciate your advice and official opinion in regard to the following question:

"Does the Board of Education have the general power for submitting the proposition for increasing the tax rate, in addition to the rate previously authorized by vote of the school district?

"In other words, in what way is it possible for a district to increase a tax rate which has already been increased for a period of time, for example four (4) years, by a previous vote?"

The question to be determined specifically is: Under Section 10358, Senate Bill No. 208, passed by the 63rd General Assembly, may a school district board of education submit a proposal to the voters of said district for a subsequent increase in the tax levy for the same year or years that an increase has already been voted in excess of the amount authorized by the Constitution without voter approval. Said constitutional provision is found in Section 11(b), Article X, of the 1945 Constitution, and provides in part:

"Any tax imposed upon such property by municipalities, counties or school districts, for their respective purposes, shall not exceed the following annual rates:

\* \* \* \* \*

"For school districts formed of cities and towns--one dollar on the hundred dollars assessed valuation, except that in the City of St. Louis the annual rate shall not exceed eighty-nine cents on the hundred dollars assessed valuation;

"For all other school districts--sixty-five cents on the hundred dollars assessed valuation."

Section 11(c), Article X, of the 1945 Constitution, provides in part:

"In all municipalities, counties and school districts the rates of taxation as herein limited may be increased for their respective purposes for not to exceed four years, when

the rate and purpose of the increase are submitted to a vote and two-thirds of the qualified electors voting thereon shall vote therefor; provided that the rates herein fixed, and the amounts by which they may be increased, may be further limited by law;

\* \* \* \* \*

Section 10358 of Senate Bill No. 208 provides:

"Whenever it shall become necessary, in the judgement of the board of directors or board of education of any school district in this state, to increase the annual rate of taxation, authorized by the constitution for district purposes without voter approval, or when a number of the qualified voters of the district equal to ten per cent or more of the number casting their votes for the directors of the School Board at the last school election in said district shall petition the board, in writing, for an increase of said rate, such board shall determine the rate of taxation necessary to be levied in excess of said authorized rate, and the purpose or purposes for which such increase is required, specifying separately the rate of increase required for each purpose, and the number of years, not in excess of four, for which each proposed excess rate is to be effective, and shall submit to the qualified voters of the district, at the annual school meeting or election, or at a special meeting or election called and held for that purpose, at the usual place or places of holding elections for members of such board, whether the rate of taxation shall be increased as proposed by said board, due notice having been given as required by Section 10418; and if two-thirds of the qualified voters voting thereon shall favor the proposed increase for any purpose, the result of such vote, including the rate of taxation so voted in such district for each purpose, and the number of years said rate is to be

effective, shall be certified by the clerk or secretary of such board or district to the clerk of the county court of the proper county, who shall, on receipt thereof, proceed to assess and carry out the amount so returned on the tax books on all taxable property, real and personal, of such school district, as shown by the last annual assessment for state and county purposes, including all statements of merchants as provided by law."

The wording of said Section 10358 does not specifically make the provision that the subsequent proposal for a further increase in the tax levy may be made. It says that, whenever it shall become necessary, in the judgment of the board, to increase the annual rate of taxation, or when ten per cent or more of the qualified voters of the district shall petition the board, in writing, for an increase of said rate, such board shall determine the rate of taxation necessary to be levied in excess of said authorized rate, and shall submit to the qualified voters of the district whether the rate of taxation shall be increased as proposed by said board. That wording would seem to indicate that the district is not precluded from subsequently increasing the rate, in addition to the rate previously authorized by the board of the school district.

In addition to the wording of Section 10358, we are aided by Section 10688, Senate Bill No. 294 and Section 10586, Senate Bill No. 315, both of which bills were passed by the 63rd General Assembly. Whereas the sections of Senate Bill No. 208 are applicable to all classes of schools, Senate Bill No. 294 relates to increase of tax levy for school purposes and the period of the increase and the method of voting therefor in school districts in cities of over 75,000 and less than 500,000 inhabitants. Section 10688 of said Bill No. 294 is the section analogous to Section 10358 of Senate Bill No. 208, except that Section 10688, in addition to providing for the proposed increase to be submitted to the voters of the district, says: "\* \* \* The acceptance of a proposal to increase the tax levy for any year or years shall not prevent the board from subsequently proposing a further increase in the tax levy for the same year or years.\* \* \*" Section 10586 of Senate Bill No. 315 provides:



"In all counties of the first class, the qualified voters in any first class high school district may, at any annual meeting provided by law, vote a rate of taxation for school purposes in accordance with the provisions of the constitution of this state, and said rate of taxation for school purposes thus voted shall be authorized and established for the next ensuing four years, unless within said period such rate is changed in like manner, provided that such rate may be decreased by the board of education, without calling an election. \* \* \* \* "

(Underscoring ours.)

Thus, from a reading of these two latter bills, we find a specific reference to the fact that a subsequent proposal to further increase the tax levy may be had in the same year or years. Those are provisions analogous to Section 10358 of Senate Bill No. 208, which is applicable to all classes of schools, but which does not specifically indicate a procedure for authorizing a further increase of tax levies. However, other laws similar to Section 10358 but applicable to certain cities or counties make specific provisions for authorizing further increases of taxes, which would seem to indicate the proper procedure for any school district to follow for increasing tax levies. As was stated by the court in *The State v. Summers*, 142 Mo. 586, at l.c. 596:

"\* \* \* Even cognate statutes, though not strictly in pari materia, may be invoked and referred to in order to elucidate the legislative intent. \* \* \* \* "

In the case of *State ex rel. Buchanan County v. Fulks*, 296 Mo. 614, the court said at l.c. 626:

"\* \* \*(36 Cyc. 1149.) Again, on page 1151:

"Where there is one statute dealing with a subject in general and comprehensive terms and another dealing with a part of the same subject in a more minute and definite way, the two should be read together and harmonized, if possible, with a view to giving effect to a consistent legislative policy; but to the extent of any necessary repugnancy between them,

the special will prevail over the general statute. Where the special statute is later, it will be regarded as an exception to, or qualification of, the prior general one; and where the general act is later, the special will be construed as remaining an exception to its terms, unless it is repealed in express words or by necessary implication.' (See Lazonby v. Smitley, 151 Mo. App. 285, 289 and cases cited in State ex rel. Lashley v. Becker, 290 Mo. 1.c. 620.)"

Said Section 10358 says that, whenever it shall become necessary in the judgment of the board, or when a certain number of the qualified voters of the district shall petition the board, the proposal of the increase in excess of the rate authorized by the Constitution shall be submitted to the voters. It is quite probable that conditions might arise after the levy has been once increased which would make it apparent that the tax rate voted by such increased levy would be insufficient to produce enough revenue to maintain the schools, and the Legislature has made provisions to meet such a situation. Reading Senate Bill No. 208, in light of the provisions of Senate Bill No. 294 and Senate Bill No. 315, we are lead to the conclusion that we are permitted to interpret the word "whenever" in Section 10358 as meaning that the voters are permitted to subsequently vote on the proposal to further increase the tax levy for the same year or years, and such proposal may be made to the qualified voters of the district by the board.

#### CONCLUSION

It is, therefore, the opinion of this department that under Section 10358, Senate Bill No. 208, a school district board of education may submit a proposal to voters of said district for a subsequent increase in the tax levy for the same year or years that an increase has already been voted in excess of the amount authorized by the Constitution without voter approval.

Respectfully submitted,

Wm. C. COCKRILL  
Assistant Attorney General

APPROVED:

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J. E. TAYLOR  
Attorney General

WCC:LR

SCHOOLS.

BUILDING FUND TAX LEVY:

The provisions of Senate Bill No. 208, passed by the 63rd General Assembly, make it possible for school districts to authorize and levy a building fund tax for the purpose of purchasing school building sites, buying or erecting school buildings and repairing and furnishing the same.

March 27, 1947

FILED

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Mr. Hubert Wheeler, Commissioner  
Division of Public Schools  
Department of Education  
Jefferson City, Missouri

Dear Sir:

This is in reply to your letter dated January 18, 1947, in which you requested an opinion from this department, and which in part reads as follows:

"Boards of education have asked some specific questions concerning the provisions of the laws of this state and the new constitution for authorizing and levying school taxes and the various purposes for which they may be used.

\*\*\*\*\*

"The provisions of S. B. 208, Laws of 1946, and the laws governing school funds and fund accounting seem to be specific and broad enough to include a special building fund tax for the purposes indicated herein. However, I shall appreciate your advice and official opinion in regard to the following question:

"Do the laws of this state together with the new laws enacted for implementing the new constitution make it possible for school districts to authorize and levy a building fund tax for the purpose of purchasing school building sites, buying or erecting school buildings, and repairing and furnishing such buildings? If not, from what source would funds be secured for such purposes?"

The Constitution of 1875, Section 11, Article X, provides in part:

"Taxes for county, city, town and school purposes may be levied on all subjects and objects of taxation; but the valuation of property therefor shall not exceed the valuation of the same property in such town, city or school district for State and county purposes. \* \* \* \* For school purposes in districts composed of cities which have one hundred thousand inhabitants or more, the annual rate on property shall not exceed sixty cents on the hundred dollars valuation and in other districts forty cents on the hundred dollars valuation: Provided, the aforesaid annual rates for school purposes may be increased, in districts formed of cities and towns, to an amount not to exceed one dollar on the hundred dollars valuation, and in other districts to an amount not to exceed sixty-five cents on the hundred dollars valuation, on the condition that a majority of the voters who are taxpayers, voting at an election held to decide the question, vote for said increase. For the purpose of erecting public buildings in counties, cities or school districts, the rate of taxation herein limited may be increased when the rate of such increase and the purpose for which it is intended shall have been submitted to a vote of the people, and two-thirds of the qualified voters of such county, city or school district, voting at such election, shall vote therefor. \* \* \* \* \*"

In *Peter v. Kaufmann*, 38 S.W. (2d) 1062, the court, in referring to the above mentioned provision of the Constitution, said at l.c. 1066:

"There are manifestly two methods contemplated by the Constitution for raising funds to erect school buildings by school districts. One is by incurring indebtedness in some form, as by issuing bonds or borrowing money in some form. Limitation on this method of raising money is imposed by section 12, art. 10, of the Constitution and also by various statutes. The second method of raising money to build school

houses is by levying annual taxes for that purpose. A school district which does not wish to issue bonds or borrow money to erect a school building may do so by levying a tax for that purpose for one or more years. Section 11, art. 10, of the Constitution places limitations on the annual rates of taxation which can be levied for school purposes, which term is construed to cover all the usual and ordinary expenses of maintaining and operating schools. *Hudgins v. Consolidated School District*, 312 Mo. 1, 12, 278 S.W. 769. But, as we have seen, the only limitation on the rate of taxation for buildings is that such rate and the purpose thereof shall be submitted to a vote of the people of the district and receive the sanction of a two-thirds majority of those voting. Therefore, no building tax, whatever the rate, which has received a two-thirds majority vote of the voters of the district at a legally called election, can be held violative of the Constitution. A limitation of 100 cents per \$100 valuation is fixed by statute. Section 11183, Rev. St. 1919. A levy for building purposes and erection of buildings is a separate and distinct tax not included in the term 'school purposes' and not subject to the limitation as to amount imposed by the Constitution. *Hudgins v. Consolidated School District*, 312 Mo. 1, 12, 278 S. W. 769. It stands on its own foundation, unhampered by other levies, and, being within the limits fixed by statute, it cannot be held to be excessive or violative thereof."

The court continues at l.c. 1067:

"Our present ruling is in accord with *Hudgins v. Consolidated School District*, 312 Mo. 1, 12, 278 S.W. 769, 771, where the court upheld a bond issue 'for the purpose of purchasing a site, erecting a school building, and furnishing the same,' as not being within the term 'school purposes,' as used in the Constitution, but as being within the term 'erecting public buildings.' The court there said:

'The constitutional limitation in section 11, as applied to a levy of taxes by school districts, has reference to the annual rate of such levy for school purposes for that year. By "school purposes," as the term is used in the Constitution, is meant such annual expenditures as are necessary to the conduct or maintenance of the school during the year. C. & A. R. Co. v. People, 163 Ill. loc. cit. 621, 45 N. E. 122. The fixed rate in districts, as at bar, for school purposes, is 40 cents on the \$100 valuation of the property of the district. This rate may be increased for the same purpose, by a majority vote of the people, to 65 cents on the \$100 valuation (100 cents in town districts). These limitations, however, have no application to the creation of a debt for building purposes and the equipment of such buildings as may be erected.'

It is to be noted that the Constitution of 1945 does not carry through the distinction between "school purposes" and "for the purpose of erecting public buildings," as does the Constitution of 1875, Section 11, Article X, supra. The analogous section in the 1945 Constitution is found in Section 11(b) and Section 11(c), Article X. Section 11(b) provides in part:

"Any tax imposed upon such property by municipalities, counties or school districts, for their respective purposes, shall not exceed the following annual rates:

\* \* \* \* \*

"For school districts formed of cities and towns--one dollar on the hundred dollars assessed valuation, except that in the City of St. Louis the annual rate shall not exceed eighty-nine cents on the hundred dollars assessed valuation;

"For all other school districts--sixty-five cents on the hundred dollars assessed valuation."

Section 11(c) provides in part:

"In all municipalities, counties and school districts the rates of taxation as herein limited may be increased for their respective purposes for not to exceed four years, when the rate and purpose of the increase are submitted to a vote and two-thirds of the qualified electors voting thereon shall vote therefor; provided that the rates herein fixed, and the amounts by which they may be increased, may be further limited by law;  
\* \* \* \* \*

Senate Bill No. 208, passed by the 63rd General Assembly, repealed Sections 10347, 10358, 10359, 10360, 10395, and 10460, R.S. Mo. 1939, and enacted in lieu thereof three new sections, known as Sections 10347, 10358 and 10359. This was enacted to implement the new Constitution as it related to school tax levies. Section 10347 of Senate Bill No. 208 is in substance the same as Section 10347, R.S. Mo. 1939, and provides that school boards shall file an estimate each year showing the rate required to produce said amount, specifying by funds the amount and rate necessary to sustain the school and to meet the principal and interest payments on the bonded debt of the district. The estimate shall include such funds as may have been ordered by the qualified voters of the district and other legitimate purposes, including the purchase of school sites, erecting buildings and repairing and furnishing such buildings.

Section 10358, R.S. Mo. 1939, says:

"Whenever it shall become necessary, in the judgment of the board of directors or board of education of any school district in this state, to increase the annual rate of taxation for school purposes, or when any five resident taxpayers of such district shall petition such board, in writing, that they desire an increase on the rate of taxation, such board shall determine the rate of taxation necessary to be levied in such district within the maximum rates prescribed by the Constitution for such purposes, and shall submit to the voters of said school district who are taxpayers of such school district, at an election to be by such board called

and held for that purpose, at the usual place of holding elections for members of such board, whether the rate of taxation be increased as proposed by said board, due notice having been given as required by section 10418; and if a majority of the voters who are taxpayers voting at such election on the proposition to increase levy shall vote in favor of such increase, the result of such vote, and the rate of taxation so voted in such district, shall be certified by the clerk or secretary of such board or district to the clerk of the county court of the proper county, who shall, on the receipt thereof, proceed to assess and carry out the amount so returned on the tax books on all the taxable property, real and personal, of such school district, as shown by the last annual assessment for state and county purposes, including all statements of merchants as provided by law."

Section 10358, Senate Bill No. 208, says:

"Whenever it shall become necessary, in the judgement of the board of directors or board of education of any school district in this state, to increase the annual rate of taxation, authorized by the constitution for district purposes without voter approval, or when a number of the qualified voters of the district equal to ten per cent or more of the number casting their votes for the directors of the School Board at the last school election in said district shall petition the board, in writing, for an increase of said rate, such board shall determine the rate of taxation necessary to be levied in excess of said authorized rate, and the purpose or purposes for which such increase is required, specifying separately the rate of increase required for each purpose, and the number of years, not in excess



of four, for which each proposed excess rate is to be effective, and shall submit to the qualified voters of the district, at the annual school meeting or election, or at a special meeting or election called and held for that purpose, at the usual place or places of holding elections for members of such board, whether the rate of taxation shall be increased as proposed by said board, due notice having been given as required by Section 10418; and if two-thirds of the qualified voters voting thereon shall favor the proposed increase for any purpose, the result of such vote, including the rate of taxation so voted in such district for each purpose, and the number of years said rate is to be effective, shall be certified by the clerk or secretary of such board or district to the clerk of the county court of the proper county, who shall, on receipt thereof, proceed to assess and carry out the amount so returned on the tax books on all taxable property, real and personal, of such school district, as shown by the last annual assessment for state and county purposes, including all statements of merchants as provided by law."

From a comparison of these two sections, it is quite obvious to notice that Senate Bill No. 208 omits the words "for school purposes" and merely says "whenever it shall become necessary \* \* \* \* to increase the annual rate of taxation \* \* \* \*." Senate Bill No. 208 repealed and omitted Section 10359, R.S. Mo. 1939, which provided for the board of education to submit to the voters the proposition of an increase of the tax levy for the purpose of paying for school sites, for repairing or furnishing such buildings, or for building, repairing and maintaining foot bridges over running streams.

Thus, we have then the distinction the courts have made of the terms "school purposes" and "for the purpose of purchasing a site, erecting a school building and furnishing the same" as pointed out in the Kaufmann case, supra. We also have the different wording employed in Section 10358 of Senate Bill No. 208 from that of Section 10358, R.S. Mo. 1939, which Senate

Bill No. 208 repealed, wherein Senate Bill No. 208 omits the words "for school purposes" and merely says "whenever it shall become necessary \* \* \* \* to increase the annual rate of taxation \* \* \* \*." Also to be noted is the difference in the wording in two other places of Section 10358 of the Revised Statutes of Missouri, 1939, as compared to Section 10358, Senate Bill No. 208. In the old Section 10358 (R.S. Mo. 1939) it says:

"Whenever it shall become necessary, in the judgment of the board \* \* \* \* to increase the annual rate of taxation for school purposes, or when any five resident taxpayers of such district shall petition such board, in writing, that they desire an increase on the rate of taxation, such board shall determine the rate of taxation necessary to be levied in such district within the maximum rates prescribed by the Constitution for such purposes, (meaning school purposes) and shall submit to the voters \* \* \* \* whether the rate of taxation be increased as proposed by said board, \* \* \* \* \* " (Emphasis and words in parenthesis ours.)

Section 10358, Senate Bill No. 208, says:

"Whenever it shall become necessary, in the judgement of the board \* \* \* \* to increase the annual rate of taxation, authorized by the Constitution for district purposes without voter approval, or when a number of the qualified voters \* \* \* \* shall petition the board, in writing, for an increase of said rate, such board shall determine the rate of taxation necessary to be levied in excess of said authorized rate, and the purpose or purposes (meaning either school purposes or purchasing a school site, erecting a school building and furnishing the same) for which such increase is required, specifying separately the rate of increase required for each purpose \* \* \* and shall submit to the qualified voters \* \* \* whether the rate of taxation shall be increased as proposed by said board \* \* \* \*." (Emphasis and words in parenthesis ours.)

The remaining comparison is to be found in the later provision of Section 10358, R.S. Mo. 1939, where it says:

"\* \* \* and if a majority of the voters \* \* \* shall vote in favor of such increase, the result of such vote, and the rate of taxation so voted in such district, shall be certified by the clerk or secretary of such board or district to the clerk of the county court of the proper county, \* \* \* \* \*"

and Section 10358, Senate Bill No. 208, where it says:

"\* \* \* and if two-thirds of the qualified voters voting thereon shall favor the proposed increase for any purpose, the result of such vote, including the rate of taxation so voted in such district for each purpose, \* \* \* shall be certified by the clerk or secretary of such board or district to the clerk of the county court of the proper county, \* \* \* \* \* (Emphasis ours.)"

Section 10366, Missouri Laws of 1943, page 893, establishes school funds and prescribes a definite fund accounting of all school moneys; namely, Teachers' Fund, Incidental Fund, Free Textbook Fund, Building Fund, Sinking Fund, and Interest Fund. The provisions of the 1945 Constitution which authorize the levying of school taxes do not, as did the 1875 Constitution, indicate the specific purposes for which taxes may be levied. There appears to be a general broad authorization leaving to the General Assembly the power to indicate the purposes for which taxes may be levied within the limitations prescribed by the Constitution.

In view of these court decisions, the comparisons in the wording of the corresponding sections, and the complete omission of Section 10359, which heretofore had provided for the increase of a tax levy for erecting school houses and for similar purposes, we are led to the conclusion that the Legislature is presumed to have known the law when they provided these new sections of Senate Bill No. 208. Therefore, when they omitted the words "school purposes" and added the words "purpose" and "for each purpose," as we have pointed out above, the Legislature

Mr. Hubert Wheeler

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intended for Section 10358 of Senate Bill No. 208 to include not only a levy for school purposes but also for other purposes, such as purchasing a school site, erecting a school building and furnishing the same.

CONCLUSION

It is, therefore, the opinion of this department that the provisions as set out in Senate Bill No. 208, enacted for implementing the new Constitution, make it possible for school districts to authorize and levy a building fund tax for the purpose of purchasing school building sites, buying or erecting school buildings and repairing and furnishing the same.

Respectfully submitted,

Wm. C. COCKRILL  
Assistant Attorney General

APPROVED:

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J. E. TAYLOR  
Attorney General

WCC:LR

**PENITENTIARY:** transactions between various industries under the control of the Department of Corrections and between the penitentiary and said industries may be handled by a system of debits and credits.

July 18, 1947

FILED

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Hon. Thos. E. Whitecotton  
Director of Department of Corrections  
Jefferson City, Missouri

Dear Sir:

We have your letter of recent date which reads as follows:

"The Missouri State Penitentiary is, as you know, a unit of the Division of Penal Institutions within the Department of Corrections, the other units being the Intermediate Reformatory and the Women's Branch of the State Penitentiary.

The operation of the Missouri State Penitentiary consists of two divisions, one commonly referred to as 'Industries' and consisting of the Workmen's Clothing Company, Parker Boot and Shoe Manufacturing Company, Missouri Wood Products Company, Auto Tag Company, Missouri Shirt Manufacturing Company, Missouri State Twine Company, Missouri Tobacco Company, and Missouri Cleaning Plant; the other is the 'Penitentiary.'

The General Assembly appropriates funds for the Industries as well as the Penitentiary. The Statutes provide a 'Revolving Fund' and from this the Legislature appropriates specific amounts for the operation of Industries as follows: Personal Service, Additions, Repairs and Replacements, and Operations. The Legislature appropriates for the Penitentiary certain funds from General Revenue which are: Personal Service, Additions, Repairs and Replacements, and Operations. They also appropriate from Earnings of the Penitentiary funds for Personal Service, Repairs and Replacements, and Operations.

The Penitentiary furnishes to Industries inmate laborers as required, for which Industries pays to the Penitentiary one dollar per day for the days worked. This money becomes a part of the Penitentiary Earnings and is encumbered and paid out as appropriated. In the daily operations of Industries and the Penitentiary, it is necessary that many additional transactions be made between these two divisions. For instance, I have before me a purchase order from the Penitentiary directed to Workmen's Clothing for 15 yards of Boat Sail Pocketing, total price \$4.50, to be paid from the Penitentiary Earnings Fund. I have another directed to the Plumbing Shop, State Penitentiary, for plumbing supplies to be furnished the Missouri Wood Products Company amounting to \$132.88, to be paid from the Revolving Fund, chargeable to Repairs and Replacements, Industries. I have another directed to the Parker Boot and Shoe Manufacturing Company for 108 pair men's oxfords, total price \$351.00, to be delivered to the Workmen's Clothing Company. Each of these purchases will terminate in the issuance of a check to the vendor by the State Treasurer after having passed through the Comptroller, the Purchasing Agent and the State Auditor. You will note in the first instance that this transaction represents a purchase by the Penitentiary from Industries; in the second instance, a purchase from the Penitentiary by Industries; in the third instance, a purchase from one factory by another factory, both operated on funds appropriated from the Revolving Fund.

It appears that this method of handling such transactions is an outgrowth of the old contract system formerly in use at the Penitentiary. It is cumbersome, expensive, and produces much additional work in our Accounting Office, as well as those previously mentioned.

We propose to inaugurate a system of ledger accounting with debits and credits to show the cost of operation of the various factories and units of the Penitentiary, as is now in

use between the Penitentiary and the Farms. For example, Industries owes the Penitentiary \$500.00 for inmate labor. The Penitentiary purchases \$450.00 worth of clothing from Industries. Instead of handling these transactions through the Comptroller, Purchasing Agent, State Auditor and State Treasurer, they would be entered on the ledger account showing proper debits and credits. In most instances Industries will pay more to the Penitentiary for inmate labor than the Penitentiary will pay to Industries for merchandise. Therefore, Industries would pay the balance due the Penitentiary through the Comptroller, etc., by a State Treasurer's Check which would become Penitentiary Earnings.

You are referred to Sections 8987, 8988, 9095, 9096, 9097 and 9098, R. S. Mo. 1939, which are the only statutes we are able to find relating the the Revolving Fund and Industrial Operations. We ask your official opinion as to whether the law prohibits or will permit the handling of these transactions as proposed."

As stated in your letter, the Missouri State Penitentiary is now the Division of Penal Institutions within the Department of Corrections. S. C. S. S. B. No. 347, enacted by the 1945 Legislature, created this new department. The following provisions of said act are pertinent to the consideration of your question:

Section 1:

"There is hereby created and established as a department of state government a department of corrections, which may hereafter be referred to as the department. The scope and purpose of the department shall be to supervise and manage the penal, correctional and reformatory institutions of the state, together with certain duties in relation to the training schools and the board of probation and parole, hereafter set out. The department of corrections shall be composed of three divisions, namely:

(1) the division of penal institutions,  
(2) the division of educational institutions,  
and (3) the board of probation and parole.  
The board of penal commissioners, as established  
by Article I, Chapter 48, Revised Statutes of  
Missouri, 1939, with amendments thereto, is  
hereby abolished and discontinued and all powers  
and duties over activities and institutions  
pertaining to, controlled by and administered  
through the board of penal commissioners  
shall henceforth be vested in and administered  
through the department of corrections, together  
with any additional powers and duties which  
may herein or hereafter be assigned to the  
department."

Section 9:

"The department of corrections may establish  
such bureaus as research and statistics,  
personnel, finance and other bureaus which  
it may deem necessary and desirable in  
carrying on the work of the department."

Section 10:

"There is hereby created and established within  
the department of corrections a division of  
penal institutions. The division of penal  
institutions shall be the successor to and  
shall possess and exercise all the powers and  
duties of the commission of penal institutions  
with respect to institutions and activities  
pertaining to intermediate and adult offenders,  
including all such powers and duties not  
specifically repealed by this act, in addition  
to possessing other powers and duties estab-  
lished by this act."

Section 11:

"In all laws of Missouri or parts thereof,  
the words 'department of corrections' shall  
be substituted for the words 'commission of  
penal institutions' with respect to institu-  
tions and activities pertaining to inter-  
mediate and adult offenders. Said department  
shall hold and exercise control and juris-  
diction over all intermediate and adult



correctional and penal institutions and activities in this state, except such powers and duties as may be assigned to the board of probation and parole, supported in whole or in part by the direct appropriation of money out of the state treasury, including the state penitentiary, the women's branch of the state penitentiary, the intermediate reformatory for young men at Alcoa, and over any other correctional institution for intermediate and adult offenders as may hereafter be established; and over all the branches of such institutions, and over all the real estate, building, equipment, machinery, facilities and products properly belonging to or used by or in connection with said institutions and branches thereof, and over the activities of these institutions and branches; and the department shall make and enforce such orders and findings as it may from time to time deem necessary and proper in the management of all institutions and persons committed to its control and shall be vested with and possessed with all other powers and duties necessary and proper to enable it to carry out fully and effectively all the purposes of this act."

It will be noticed that the foregoing act does not undertake to legislate as to the details of the management of the institutions under the control of the Department of Corrections, but it merely sets up the organization of the department. Section 1 of the act defines the scope and purpose of the department as being the supervision and management of the penal, correctional and reformatory institutions of the state. Section 9 gives the department authority to establish such bureaus as it may deem desirable in carrying on the work of the department, including a Finance Department. However, the act does not expressly repeal any statutes in existence. By Section 1 it abolishes the Board of Penal Commissioners, but said section also vests all powers and duties over activities and institutions pertaining thereto in the Department of Corrections. Moreover, Section 11 of the act substitutes the words "Department of Corrections" for the words "Commission of Penal Institutions" in all laws of Missouri. It thus appears evident that the legislature by S. B. 347 intended that laws then in force affecting the penal institutions of the state should continue in force but should be carried out by the new Department of Corrections.

Of course, had S. B. 347 made provisions for the details of management of funds, etc, which were directly contrary to the provisions of other laws then in existence, it might be held that the former laws were repealed by implication, but, as pointed out above, said act did not go into details as to the operation of the various institutions.

We must, therefore, look to all statutes which deal with your problem to find the answer to your question. Some of these statutes have been in existence for many years. We shall discuss them as they throw light on your question.

Section 8987 R. S. Mo. 1939, as modified by S. B. 347, Section 11, authorizes the Board of Corrections to acquire lands and erect buildings to be used for the employment of prisoners in the penitentiary. Section 8988 R. S. Mo. 1939 provides in part as follows:

"Said board shall, as soon as practicable, proceed to purchase, lease or otherwise provide suitable plants, machinery and equipment, and to purchase material, for the employment of all able-bodied persons in the Missouri state penitentiary, the Missouri reformatory, the industrial home for girls, the industrial home for negro girls, or any other penal or reformatory institutions hereafter created, for such industries as in the opinion of the board will best occupy such persons, with the view of manufacturing, so far as may be practicable, such articles agreed upon by said board as are needed in any of the institutions hereinabove in this section mentioned or referred to, also such as are required by the state or political subdivisions thereof, in the buildings and offices of the institutions owned, managed, or controlled by the state or political subdivision thereof, also including articles and material to be used in the erection of buildings or other improvements upon, in, or in connection with, any state institutions or state properties, or in the construction, improvement or repairs of any state highways or county highways, including bridges and culverts; including lime to be used for agricultural and other purposes in this state; also including binding twine for use of farmers and others in this state; \* \* \*"

Section 9096, R. S. Mo., 1939, reads as follows:

"Said board shall purchase such raw material as may be required for manufacture of any article in any industry now or hereafter carried on by said board in the penitentiary, on any lands of the state or elsewhere, and shall employ such outside help as may be necessary, and shall be in charge of all articles manufactured by the state, and shall act as distributing agent for the manufacturing enterprises carried on in the institution, with authority to appoint agents or salesmen. It shall have charge of the factories and make such rules and regulations in the operation of the same as it deems best. The superintendent of industries, subject to the rules and regulations of the board, shall be the executive officer of the board, in charge of all industries now or hereafter created or operated by the board, and his salary shall be at the rate of not to exceed five thousand dollars per annum, payable monthly."

It should be noted by the foregoing statutes that the Department of Corrections is in charge of all the industries operated in connection with the penitentiary, with power to make such rules and regulations with respect to the operation of same as it deems best. Each industry is but a unit of the penitentiary and its activities. Under Section 8987, supra, the Department could create more industries or could combine any number or all of such industries into one establishment. In reality, therefore, each industry is but a department of the industrial system of the penitentiary in much the same way that the cutting room would be one department of the shoe factory.

Section 9097 provides for the 'revolving fund' and it reads in part as follows:

"The account or fund heretofore provided for by law, and known as the 'revolving fund,' shall continue to be maintained and known as the 'revolving fund,' which fund, or so much thereof as may be necessary, shall be used only for the purpose of purchasing raw material, machinery or other equipment or in the erection of buildings or making other improvements in plants in connection with the industries carried on or to be carried on in

said penitentiary or on the farm or lands mentioned in section 8987 hereof or elsewhere; and in the manufacturing, handling and marketing of article so produced, until disposed of, according to the provisions of this article; and the money in said 'revolving fund' shall be paid by the treasurer of the state upon warrants issued by the auditor of the state upon verified vouchers of said board."

By the foregoing section the Department of Corrections is required to deposit in the State Treasury the proceeds of any sale of articles manufactured in the industries operated by said department. It is the Department of Corrections that makes the sales and not each individual industry. When one industry requisitions articles manufactured by another industry under the supervision of the department, no sale is in fact made. The manufactured articles have merely been transferred from one department to another department of the industrial system operated by the Department of Corrections. The raw materials purchased for use in manufacturing products by one industry continue to be used by the Department of Corrections even though the finished products are used by another unit of the industries. There has been no sale by the Department of Corrections in such a case, but the materials with which the department is charged are merely transferred from one unit of the industries to another unit of the same industrial system. If a sale for cash is made by the Department of Corrections, then the proceeds of such sale must be deposited in the State Treasury, but where there is merely a transfer of supplies or manufactured articles from one factory to another there has been no transfer of title to such goods, and hence no sale. Money has not actually been spent or received in such a transfer any more than it would be if materials issued to the cutting room of a shoe factory were subsequently assigned to the finishing department of the same factory. We do not believe that transactions between various units of the industrial system operated by the Department of Corrections constitute sales and purchases.

We next consider the other types of transactions mentioned in your letter, that is, the transactions between the penitentiary proper and the industries. As pointed out above, Section 9098 of the statutes requires that all money derived from the sales of articles manufactured in any of the industries shall be deposited in the State Treasury to the credit of the "revolving fund" and the "earning fund". The part

of the money credited to the revolving fund can only be used for the purchase of raw material, machinery and other equipment or in the erection of buildings or making improvements in plants and for outside help in connection with the industries carried on by the Department of Corrections. The "earning fund" is to be used for the operation of the prison.

Section 9099 R. S. Mo. 1939 reads as follows:

"Said commission shall, at the end of each fiscal year, ascertain and determine from the books and records and accounts so kept showing the business operation of the penitentiary, and shall determine what profits, if any, above the actual running and operating expenses of the prison, including the keep of the prisoners, have been made from all business conducted by the state, together with all the revenue received from contracts of such prisoners in accordance with the provisions hereinabove in this article set forth; and if a profit has accrued from all the sources of revenue from the labor of the prisoners in any line and upon any work above the actual running expenses of the prison and the business conducted therein, including the keep of the convicts, then such profits shall be drawn from the 'earnings of the Missouri penitentiary fund' and deposited in the state treasury to the credit of the fund herein created, known and designated as the 'convicts' relief fund,' which said fund shall be under the management of said commission, and from which they shall be authorized from time to time to draw such moneys for the relief of the dependents of any convict as the commission in its judgment may deem meet and proper."

The foregoing section requires that at the end of each fiscal year the Department of Corrections shall audit its records and determine whether a profit has been made from all the operations under its control. To determine that profit there would be deducted from the gross receipts of all sales of manufactured articles, the cost of the raw materials which entered into said articles and the cost of the actual running and operating expenses of the prison. This statute contemplates that the Department of Corrections consider all the prison

activities as a whole, rather than considering the penitentiary as one project and the industries as another.

We see no need for requisitions and warrants being used for each transaction. The Department of Corrections is in charge of all the transactions and a system of debits and credits should be sufficient to enable the department to credit proper funds with receipts as required by Sections 9098 and to determine the net profit of all business operations as required by Section 9099.

#### Conclusion

It is, therefore, the opinion of this office that a system of debits and credits may be used by the Department of Corrections to effect transactions between the various industries operated in connection with the penitentiary and between the penitentiary and said industries and that it is not necessary that each transaction be evidenced by requisitions and the issuance of warrants in payment of requisitioned articles.

Yours very truly,

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Harry H. Kay  
Assistant Attorney General

APPROVED:

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J. E. Taylor  
Attorney General

HJK/vlv

SCHOOLS: School districts may combine temporarily for educational purposes even though districts are not adjacent to each other.

FILED

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8/28

August 25, 1947

Mr. Hubert Wheeler, Commissioner  
Department of Education  
Jefferson City, Missouri

Dear Sir:

This department is in receipt of your request for an official opinion, which reads as follows:

"Inquiry has come to the Department of Education about the laws of this State governing the formation of new school districts and the laws relating to educational facilities that may be provided in other schools outside of the district.

"In St. Louis County the area commonly known as Jefferson Barracks is now a temporary Federal housing unit. This area, together with a small additional adjacent territory is not organized as a school district, therefore no plan is available for providing public school facilities for the pupils now resident of this unorganized territory. Plans are now being made for the organization of said territory into a public school district.

"At this late date it would be difficult to provide adequate housing facilities within the Jefferson Barracks area if it should be formed into a new school district. Therefore at least for the first year, the board for the proposed organized district would find it necessary to arrange with the board of education of a nearby district for school facilities.

"Section 10457, R. S. 1939 provides for the temporary combination of school districts for educational purposes. Because of the large number of pupils,

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approximately 700 of common school age, it would be impossible for this proposed district to make temporary combination with any other adjacent school district on account of limited housing accommodations.

"I am advised that the Board of Education of St. Louis City has indicated their willingness to accept all school age pupils from the Jefferson Barracks area if proper arrangements can be made. The Jefferson Barracks area does not join St. Louis City. There is a narrow strip of another school district extending between this area and the St. Louis City school district. Therefore some question has arisen as to the possibility of the Board of Education of St. Louis City and the school board of the proposed new district of Jefferson Barracks making temporary combination for educational purposes.

"I shall appreciate your advice and official opinion in regard to the following question:

- "1. If the proposed new district in the Jefferson Barracks area should be organized, would the school board of this district have authority to form a temporary combination with the Board of Education of St. Louis City for educational purposes, since there is a narrow strip of territory of another school district lying between Jefferson Barracks and St. Louis City which prevents the two areas from being adjacent? In other words, may school districts form temporary combination under the provisions of Section 10457 when such school districts do not join?"

Section 10457, R. S. Mo. 1939 provides in part as follows:

"Two or more districts may combine temporarily for educational purposes should the school boards of all districts concerned agree to transport the pupils of one or more



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districts to a schoolhouse elsewhere, and such districts shall receive the same apportionment from the state school fund as they would otherwise have received, and may use such funds, or any part thereof, in transporting pupils: \* \* \* \* \*

It is the cardinal rule of statutory construction that in construing a statute the court shall ascertain and give effect to the intention or purpose of the Legislature as expressed in the statute. *Thompson v. City of Lamarr*, 322 Mo. 514, 17 S. W. (2d) 960; *State v. Southwestern Bell Telephone Company*, 316 Mo. 1008, 292 S. W. 1037.

The intention of the Legislature is to be obtained primarily in the language used in the statute. *Grier v. Kansas City Railway Company*, 286 Mo. 523, 228 S. W. 454. It is further the rule in this state that statutes relating to schools and school districts are to be liberally construed. *Hudgins v. Mooresville Consol. School Dist.*, 312 Mo. 1, 278 S. W. 769. As the Supreme Court said in *State v. Morgan*, 268 Mo. 265, 187 S. W. 54, 1. c. 57:

"It has been the policy of this court, in construing the statutes relating to schools and school districts, to give them a liberal construction, \* \* \* \* \*

A reading of Section 10457, *supra*, discloses that there is no requirement that the school districts which combine temporarily for educational purposes should be adjacent or contiguous to each other. There are no restrictions as to location of the school districts, but the question as to temporary combination is left entirely to the discretion of the combining districts. In this respect it will be noted that those statutes referring to annexation and consolidation of school districts provide that the district or districts must be adjacent. (See Sections 10484, 10486, 10487, 10497 R. S. Mo. 1939)

If the Legislature had intended that school districts combining temporarily for educational purposes should be adjacent to each other they could have well said so in Section 10457, *supra*, as they did in the other statutes mentioned above.

Therefore, we believe that the school district organized in the Jefferson Barracks area may form a temporary combination with the

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Board of Education of the City of St. Louis, even though the Jefferson Barracks school district is not adjacent to St. Louis City.

CONCLUSION

It is therefore the opinion of this department that under authority of Section 10457, R. S. Mo. 1939, a school district organized at Jefferson Barracks, Missouri, may combine temporarily for educational purposes with the Board of Education of St. Louis City, even though the Jefferson Barracks school district is not adjacent to the City of St. Louis.

Respectfully submitted

ARTHUR M. O'KEEFE  
Assistant Attorney General

APPROVED

J. E. TAYLOR  
Attorney General

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SCHOOLS: Senate Bill No. 4, 64th General Assembly repeals and supersedes Section 10374 of Senate Bill No. 100, 64th General Assembly. Senate Bill No. 4, does not become operative until July 1, 1948.

August 27, 1947

FILED

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Mr. Hubert Wheeler, Commissioner  
Department of Education  
Jefferson City, Missouri

Dear Sir:

This department is in receipt of your request for an official opinion, which reads as follows:

"The Sixty-fourth General Assembly enacted Senate Bill 4 and Senate Bill 100. Both bills have been signed by the Governor -- Senate Bill 4 June 2 and Senate Bill 100 July 7. Section 10374, R. S. 1939, was included in Senate Bill 4 and Senate Bill 100. Both bills repealed and reenacted the same section but with different subject matter. Neither of these senate bills contained an emergency clause. Since Senate Bill 100 is of later enactment, it would appear that the provisions of Section 10374 in this act would take precedence over the provisions of Section 10374 of Senate Bill 4.

"Senate Bill 4 contains other sections dealing with the same subject matter. Section 10373, R. S. 1939, is changed by Senate Bill 4 to include instruction in American history and the study of American institutions. This section provides that the instruction shall commence with the school year next ensuing after the passage of this act.

"Sections 10374a, 10374b and 10374c are new and provide additional regulations governing the teaching of the Constitutions of the United States and the State of Missouri, with studies in American history and American institutions. Nothing seems to prevent these sections from becoming operative.

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"Section 10374, Senate Bill 100 is in direct conflict with the same section number in Senate Bill 4. The one provides that the instruction shall begin not later than the opening of the eighth grade to an extent to be determined by the State Board of Education. The other provides that the instruction shall begin not later than the opening of the seventh grade to an extent to be determined by the State Commissioner of Education. Also, Senate Bill 100 does not include the instruction of American history and American institutions, also varies in defining what institutions shall offer such instructions.

"I shall appreciate your advice and official opinion for the administration and operation of these laws in regard to the following questions:

"1. Since Section 10374 of Senate Bill 4 does not harmonize with the same section of Senate Bill 100 would it be repealed by implication and the provisions of Section 10374, Senate Bill 100 prevail?

"2. If Section 10374 of Senate Bill 4 is nullified by the same section in the latter enactment Senate Bill 100, would this result in nullifying all other sections enacted in Senate Bill 4 or just the one conflicting section?

"3. Since these laws take effect September 10, 1947 would the provisions in Section 10373, Senate Bill 4, that they shall commence with the school year next ensuing after the passage of this act, mean the school year beginning July 1, 1948."

Senate Bill No. 4 enacted by the 64th General Assembly and approved by the Governor, June 2, 1947, repealed Sections 10373 and 10374, R. S. Mo. 1939 and enacted in lieu thereof five new sections.

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Senate Bill No. 100 enacted by the 64th General Assembly and approved by the Governor, July 7, 1947, repealed twelve sections of Article II, Chapter 72 R. S. Mo. 1939 as amended, which related to all classes of schools and enacted in lieu thereof thirteen new sections. One of the sections repealed and reenacted was Section 10374, the only change made being that the words "state department of education" were substituted for the words "state superintendent of public schools."

In order to present clearly the difference and the changes created by these bills, we will quote Section 10373 and 10374 as they will be if Senate Bill No. 100 repeals Senate Bill No. 4, and Sections 10373, 10374, 10374a, 10374b and 10374c, which will be in effect if Senate Bill No. 4 has not been repealed by implication.

Section 10373, R. S. Mo. 1939 provides:

"In all public and private schools located within the state of Missouri, commencing with the school year next ensuing after the passage of this section, there shall be given regular courses of instruction in the Constitution of the United States and of the state of Missouri."

Section 10374, Senate Bill No. 100, 64th General Assembly reads:

"Such instruction in the Constitution of the United States and of the State of Missouri shall begin not later than the opening of the eighth grade, and shall continue in the high school courses and in the courses in state colleges, universities and the education departments of state and municipal institutions to an extent to be determined by the state board of education."

A comparison of the above sections with Senate Bill No. 4 will disclose various conflicts insofar as Sections 10373 and 10374 are concerned and for your convenience we have underlined where said conflicts occur:

"Section 10373. In all public and private schools located within the State of Missouri, except privately operated trade schools, commencing with the school year next ensuing

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after the passage of this Act, there shall be given regular courses of instruction in the Constitution of the United States and of the State of Missouri, and in American history, including the study of American institutions.

"Section 10374. Such instruction in the Constitution of the United States and of the State of Missouri, and in American history, including the study of American institutions, shall begin not later than the opening of the Seventh Grade, and shall continue in the high school courses and in the courses in state colleges and universities and, to an extent to be determined by the State Commissioner of Education.

"Section 10374a. No pupil shall receive a certificate of graduation from any school described in Section 10373, unless he has satisfactorily passed an examination on the provisions and principles of the Constitution of the United States and of the State of Missouri, and in American history, including the study of American institutions.

"A student of a college or university, who, after having completed a course of instruction prescribed in this article and successfully passed an examination on the provisions and principles of the United States Constitution, and in American history, including the study of American institutions, transfers to another college or university, shall not be required to complete another such course or pass another such examination as a condition precedent to his graduation from such a college or university.

"Section 10374b. The wilful neglect of any superintendent, principal or teacher, to observe and carry out the requirements of this article, shall be sufficient cause for dismissal or removal from his position.

"Section 10374c. The State Commissioner of Education shall make arrangements for carrying

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out the provisions of this article and prescribe a list of suitable texts adapted to the needs of the school and college grades."  
(Underscoring ours)

For the purpose of this opinion we will combine your first two questions in one answer.

I.

Senate Bill No. 4 being a special law repeals Section 10374, Senate Bill No. 100.

The first question to be determined is whether in view of the conflict between Senate Bill No. 4 and Senate Bill No. 100, which section shall prevail? As stated above Section 10374 of Senate Bill No. 100 merely reenacts the old law, but changes the designation as to who shall determine the extent of the instructions in the Constitutions of the United States and Missouri, from the superintendent of public schools to the state department of education. This change was necessitated by the Constitution of 1945, which abolished the office of state superintendent of public schools and vested control of public education in the state board of education.

Senate Bill No. 4, however, changes and broadens the law relating to the teaching of the Constitutions and provides that American history including the study of American institutions shall be taught, which courses of study shall begin a year earlier than provided for in the previous law. It further provides that no pupil shall receive a certificate of graduation unless he has passed an examination in these studies, and exempts any college student who having completed a course and successfully passed an examination in a college or university thereafter transfers to another college or university. The willful neglect to carry out the requirements of the act is made a cause for dismissal or removal, and the state commissioner of education is required to make arrangements to carry out provisions of the act.

From a reading of the above it will be seen that Senate Bill No. 4 goes into detail and particularities as to the teaching of the fundamentals of American principles.

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The rule in this state is that when two acts are passed at the same session of the legislature which deal with the same subject matter, but are in conflict with each other to such an extent that both cannot stand, then the act that deals with the subject matter in a particular way repeals the act which deals with the subject generally. The principle case in this regard is that of *State v. Harris*, 337 Mo. 1052, 87 S. W. (2d) 1026. We quote from this case extensively because the facts are especially apropos and all the authorities are cited therein. The court said at page 1029:

"Sections 4428 and 4061 were enacted at the same session of the Legislature in 1927, Laws 1927, pp. 173, 174. Section 4428 was a new law. Section 4061 repealed the former statute, section 3310, R. S. 1919, which prescribed the punishment for robbery in the first degree, regardless of how committed, at imprisonment in the penitentiary for not less than five years, and substituted therefor the present provision, to bear the same section number, 3310. The two enactments were carried into the 1929 revision of the statutes as sections 4428 and 4061, respectively. The legislative steps culminating in the passage of said section 4428 were completed a few days prior to the completion of the passage of section 4061. Section 4428 was approved by the Governor April 6, 1927, and section 4061 April 8, 1927. Neither had an emergency clause, and both therefore took effect at the same time, ninety days after adjournment of the Legislature. The act approved April 6, 1927, section 1. of which now appears as section 4428, supra, contained a second section repealing 'all acts and parts of acts inconsistent with this act.' (Laws 1927, p. 174). It could not, of course have been the intention of the Legislature thereby to repeal section 4061, which was not then in existence. If either act is to be treated as later than the other, section 4061 would be the later act.

"Assuming for the purpose of this case that section 4428 is a valid enactment, we have, then, two legislative acts passed at the same



session of the Legislature, taking effect at the same time and relating to the same general subject. They should be construed together and if possible harmonized so as to give effect to each. *Gasconade County v. Gordon et al.*, 241 Mo. 569, 581, 145 S.W. 1160. If, however, the statutes are necessarily inconsistent, that which deals with the common subject-matter in a minute and particular way will prevail over one of a more general nature. *Gasconade County v. Gordon et al.*, supra. The rule is thus stated in *State ex rel. County of Buchanan v. Fulks et al.*, 296 Mo. 614, 626, 247 S. W. 129, 132 quoting from 36 Cyc. 1151:

"Where there is one statute dealing with a subject in general and comprehensive terms and another dealing with a part of the same subject in a more minute and definite way, the two should be read together and harmonized, if possible, with a view to giving effect to a consistent legislative policy; but to the extent of any necessary repugnancy between them the special will prevail over the general statute. Where the special statute is later, it will be regarded as an exception to, or qualification of, the prior general one; and where the general act is later, the special will be construed as remaining an exception to its terms, unless it is repealed in express words or by necessary implication."

"See, also, announcing the same rule, *State ex inf. Attorney General v. Dabbs*, 182 Mo. 359, 81 S. W. 1148; *Gilkeson v. Missouri Pac. R. Co.*, 222 Mo. 173, 204, 121 S. W. 138, 24 L. R. A. (N.S.) 844, 17 Ann. Cas. 763; *State ex rel. American Central Ins. Co. v. Gehner*, 315 Mo. 1126, 1132, 280 S. W. 416, 418."

While it is true that the rule in other states is that a later statute, which is in conflict with an earlier statute passed at the same session, will repeal the earlier statute by implication (59 C. J. 1055), still

Mr. Hubert Wheeler

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we believe that the rule as laid down in the Harris case is controlling in Missouri and is the better rule as announced by the courts of other jurisdictions and by text book writers. (See 58 C. J. 1055; 50 American Jurisprudence, page 564.) Therefore, it is our opinion that Section 10374 of Senate Bill No. 100 enacted by the 64th General Assembly has been repealed by Senate Bill No. 4 enacted by the 64th General Assembly.

## II.

Senate Bill No. 4 not applicable until school year beginning July 1948.

Section 10373 provides that the course of instructions therein provided for shall be given, "commencing with the school year next ensuing after the passage of this Act." The school year by Section 10362, R. S. Mo. 1939, runs from July 1st, of one year until July 30th, of the next.

Senate Bill No. 4 was signed and sent to the Governor, May 19, 1947 and was approved by the Governor on June 2, 1947. Since there was no emergency clause, the bill will go into effect September 10, 1947.

Insofar as this point is concerned, it is necessary to determine what is meant by the phrase "after the passage of this act." Does it refer to the date of the original passage by the legislature as opposed to the approval by the executive, or to the date that the act was approved by the Governor, or does it mean the date that the act shall take effect?

132 American Law Reports, page 1049 states:

"Whether such expressions as prior to, or after, or at the time of the 'passage,' or 'passing,' of the act in which such expression appears will be construed literally or given a technical meaning seems to be largely dependent upon such factors as the entire context of the act; the surrounding circumstances of its enactment, that is, the various elements

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indicating the intent of the legislative body in using such language in the act; the relative hardship or inconvenience which each construction would impose upon those affected thereby; and the existence or non-existence of constitutional provisions which would conflict with a literal construction of the enactment. There is noted, however, among the American courts, a pronounced tendency to adopt a technical construction of such statutory provisions, in decided contrast to the literal construction adhered to in England."

In *Ex parte Lucas*, 160 Mo. 218, 61 S. W. 218, the court had before it the construction of a statute which required certain acts to be performed ninety days after "approval of this Act." The court said that the statement in the Act, l. c. 228:

"\* \* \* must therefore be considered technical terms having a peculiar and appropriate meaning in law and must be construed according to their technical import, as is required by section 4160, Revised Statutes 1899, in construing laws. That is, those words must be understood under the Constitution to mean ninety days after the act can and does constitutionally take effect in the absence of a declared emergency."

In the early case of *Andrews v. St. Louis Tunnell R. Co.*, 16 Mo. App. 299 the court had before it a statute which gave a certain lien priority over all mortgages placed upon property "subsequent to the passage of this Act." The court held that the act did not go into effect until ninety days after its approval by the Governor and that word "passage" should be construed as meaning the time that the act took effect.

In *Nichols v. Robinson*, 277 Mo. 483, 211 S. W. 11, it will be noted that the court held that the "passage" referred to in an act included the approval of the Governor, but this case dealt with the time when the act was to go into effect. It is not the same question as is presented in the instant case and the *Lucas* and *Andrews* cases above.

Mr. Hubert Wheeler

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That the act should go into effect the first day of July 1948, was the intent of the legislature is shown by the fact that the course of study should be for the entire school year and since there would be no law requiring such a course until September 10, 1947, such a course could not be given for an entire school year beginning July 1, 1947. Further, Section 10374c, provides that the state commissioner of education shall make arrangements for carrying out the provisions of the act and shall prescribe a list of suitable texts adapted to the needs of the school and college grades. It is common knowledge and a fact of which judicial notice may be taken, that such arrangements will entail a great deal of work and to interpret the act so as to require this work to be done in the space of little more than three weeks would be, "a hardship or inconvenience which \* \* \* \* the construction would impose upon those affected thereby."

Therefore, we believe the provisions of Senate Bill No. 4 shall not take effect until July 1, 1948.

#### CONCLUSION

It is therefore the opinion of this department that Section 10374 of Senate Bill No. 100, 64th General Assembly relating to the teaching of the course of study in the United States Constitution and the Missouri Constitution in the schools of this state is repealed by Senate Bill No. 4, 64th General Assembly relating to the same subject. It is further the opinion of this department that the provisions of Senate Bill No. 4 will not take effect until the school year beginning July 1, 1948.

Yours very truly

ARTHUR M. O'KEEFE  
Assistant Attorney General

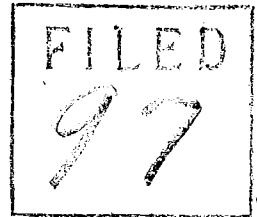
APPROVED

J. E. TAYLOR  
Attorney General

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**AFFIDAVITS:** Army officers above the rank of lieutenant, and Navy officers above the rank of ensign, are authorized to take affidavits to a divorce petition of persons engaged in the military service of the United States outside of this State.

February 5, 1947



2/11

Honorable Sam Wilcox  
Judge of the Circuit Court  
St. Joseph, Missouri

Dear Sir:

This will acknowledge your recent request, based on the following facts:

"A question has arisen with us as to whether or not military officers can take affidavits to divorce petitions of men in military service in foreign countries.

"The only provision we find referable to affidavits and acknowledgments of such military officers are those found in Section 1948, U.S.M. 1939 under the heading of 'Depositions' and Section 3410-3411, Session Acts 1939, under the heading of 'Conveyances.'

"We find that originally in the Session Acts of 191 at page 291 these two provisions were both included in an act entitled 'Depositions.' We are not able to find any direct authority for the taking of affidavits or acknowledgments other than as referred to under these headings of 'Depositions' and 'Conveyances.'

"Thinking perhaps that you had had occasion to consider this matter or know of some provision which would clarify it is the occasion for writing you.

"Would you be kind enough to let us know your opinion as to whether or not these Session Acts are broad enough to permit the taking of affidavits by such military officers other than pertaining to depositions and conveyances.

"If you know of any other authority for the taking of such affidavits in divorce petitions by military officers we would be pleased to have you give it to us. Any opinion, or information, you have in this matter would be greatly appreciated by us."

The only authorization to take affidavits of persons engaged in the military service of the United States when on duty outside of this country is contained in Sections 1948, 3410 and 3411, No. R.S. 1939. The revised statutes place Section 1948 under the general heading of "Depositions," and Sections 3410 and 3411 under "Conveyances." We think this revision has somewhat confused the original intent and purpose of these sections, and for that reason we have examined the original bill, Senate Bill No. 642, as it is set out in the Session Acts of 1919, page 291, same being as follows:

"(S. B. 642.) .

"DEPOSITIONS: Providing for Taking Affidavits and Depositions of Persons Engaged in Military Service.

"AN ACT providing for the taking of affidavits and depositions without this state of persons engaged in military service of the United States.

"SECTION

1. Oath, affirmations and commissions to take depositions of persons in military service.
2. Acknowledgments to deeds by persons in military service.

3. Authority of officers to take affidavits and acknowledgments of persons in military service and certificate of authority.

4. Emergency.

"Be it enacted by the General Assembly of the State of Missouri, as follows:

"Section 1. Oath, affirmations and commissions to take depositions of persons in military service. - Oaths, affirmations and commissions to take the deposition of any person without this state engaged in the military service of the United States may be executed before and by an officer in the said service above the rank of lieutenant; and of any person engaged in the naval service of the United States before any officer in that service above the rank of ensign; and affidavits and depositions of such persons so taken, if otherwise taken in accordance with law, shall be received and may be used in evidence, or for any other purpose, in the same manner as if taken before any officer now authorized by the laws of this state to administer oaths and affirmations or take depositions.

"Sec. 2. Acknowledgments to deeds by persons in military service. - The deed of any person without this state for the conveyance of real estate within this state, or for any other purpose, powers of attorneys, and other instruments requiring acknowledgments, may, if such person is engaged in the military service of the United States, be acknowledged before any officer in said service above the rank of lieutenant, and if such person is engaged in the naval service of the United States before any officer above the rank of ensign; and deeds, powers of attorney, and other instruments so acknowledged may be used and recorded in this state in the

same manner as if taken before any officer now authorized by the laws of this state to take such acknowledgments.

"Sec. 3. Authority of officers to take affidavits and acknowledgments of persons in military service and certificate of authority. - For the purpose aforesaid, the officers above named shall have the same power and authority to administer oaths and affirmations and take depositions, affidavits and acknowledgments of persons in the military or naval service of the United States in accordance with provisions of sections 1 and 2 of this act, as officers now authorized by the laws of this state for like purposes. The certificates of the officers referred to in sections 1 and 2 of their rank shall be prima facie evidence thereof.

"Sec. 4. Emergency. - The fact that a large number of persons from Missouri are now engaged in the military and naval service of the United States creates an emergency within the Constitution, and, therefore, this act shall take effect and be in force from the date of its passage.

"Approved May 26, 1919."

Authority for a consideration of the original act is found in a number of cases in this State, and in the case of State ex rel. Klein v. Hughes et al., 173 S.W. (2d) 877, 1.c. 879, the court said:

"Relator answers that if respondents had looked behind the face of the statute at its underlying history, the fact would be indisputable that the first alternative is the one to be adopted. And it cannot be denied that one of the accepted canons of statutory construction permits and often requires an examination of the historical development of the legislation, including changes



therein and related statutes. Grimes v. Reynolds, 94 Mo. App. 576, 584, 68 S.W. 588, 590, 184 Mo. 679, 688, 83 S.W. 1132; State ex rel. Columbia Nat'l Bank v. Davis, 314 Mo. 373, 388, 284 S.W. 464, 470 (7); Rust v. Missouri Dental Board, 348 Mo. 616, 623 (1), 185 S.W. 2d 80, 83 (1)."

The index and underlined portions of the original act, supra, are not a part of the title to this act, and it is this addition, plus the separation of the sections in the revision of 1919, that brings about the confusion or ambiguity in their intent or meaning. The Missouri Supreme Court has held that in construing an act such additions are to be ignored. In the case of Ex parte Lockhart, 171 S.W. (2d) 660, 1.c. 663, the court said:

"In his reply brief, petitioner says: 'It will be noted that both the index of Chapter 45 and the title of Section 8395 merely entitle it "Local Regulations," yet under Subsection (c) thereof it purports to authorize occupation taxes, etc., which are not expressed in the title,' and, therefore, that Section is unconstitutional because Article IV, Section 28, of the Missouri Constitution, Mo. R.S.A. Const., is violated.

"The petitioner has evidently confused the catch words prefixed by the compiler of our Session Acts, which are not parts of the title in a constitution sense, (State ex inf. Crain v. Moore, 339 Mo. 492, 99 S.W. 2d 17) with the title to the act found in Laws of Missouri, 1935, p. 294, which reads: 'An Act to \* \* \* \*'

The court has also held that the arranging of acts in the statute by the revision session does not operate to change the original intent and meaning. In the case of State ex rel. Sharp v. Knight, 26 S.W. (2d) 1011, 1.c. 1015, the court said:

"The question now to be determined is as to what effect upon the situation was

had when in 1879 the Legislature, for convenience in arrangement and codification, placed the change of venue statute in the chapter dealing with the General Code of Civil Procedure.

"We held in the case of Burrell Collins Brokerage Co. v. New York Cent. Ry. Co. (Mo. App.) 219 S.W. 105, that sections 1754, 1765, 1766 and 1767, covering the bringing of suits against corporations and service thereon, appearing in the General Code of Civil Procedure, which Code does not apply to suits in justice courts but to those in circuit courts, were applicable to suits before justices for the reason that prior to the revision of 1909 these sections appeared under the chapter dealing with private corporations and not in the one dealing with the Code of Civil Procedure, but were placed in the Code in the revision of 1909 as a matter of convenience and codification, citing State ex rel. v. Gantt, 274 Mo. 490, 505, 203 S.W. 964. The holding in that case as well as the Gantt Case is authority for the proposition that the mere arrangement or codification of the statutes by the Legislature, which under our Constitution now takes place every ten years, does not change the applicability of a particular statute as it stood when it was enacted.  
\* \* \* \*"

The true title to the act is, "AN ACT providing for the taking of affidavits and depositions without this state of persons engaged in military service of the United States." This title, we think, is very clear and definitely states that the act was intended to cover all affidavits and all depositions, and not limit the affidavits to those connected with the taking of depositions. In the case of Graves v. Purcell, 85 S.W. (2d) 543, 1.c. 547, the court said:

"In determining the true meaning and scope of constitutional or statutory

provisions, the intent and purpose of the lawmakers is of primary importance. This court has consistently held that the intent and purpose of the framers of our organic law in providing that 'no bill shall contain more than one subject which shall be clearly expressed in its title' was to limit the subject-matter of the bill to one general subject and to afford reasonably definite information to the members of the General Assembly and the people as to the subject-matter dealt with by the bill. *City of Kansas v. Payne*, 71 Mo. 159, loc. cit. 162; *State ex rel. v. Walker*, 326 Mo. 1233, 34 S.W. (2d) 124, loc. cit. 131. \* \* \* \*

In construing the words in Section 1 of the act, wherein it states: "oaths, affirmations and commissions to take the deposition \* \* \* and affidavits and depositions of such persons so taken \* \* \* shall be received and may be used in evidence, or for any other purpose, in the same manner as if taken before any officer now authorized by the laws of this state to administer oaths and affirmations or take depositions," (underscoring ours) we have concluded that they embrace affidavits of any character, except those concerning real estate conveyances and other instruments relating thereto which are provided for in Section 2 of the act.

Section 3 of the act not only refers to Section 2, but as originally enacted refers to both Sections 1 and 2. We think the authorization and powers of a military officer, as provided by Section 3, to take affidavits, oaths, affirmations, acknowledgments and depositions is broad enough to and does include affidavits to divorce petitions. Reading the three sections of the bill as originally enacted together with the title, it seems apparent that the Legislature intended to vest army officers above the rank of lieutenant and navy officers above the rank of ensign with sufficient power to take oaths, affirmations, acknowledgments and affidavits in any case where they are necessary, in addition to the taking of depositions.

The separation of these sections and the addition of explanatory indexes or unofficial titles tends to confuse the real intent of the Legislature and at first blush seems to limit them to depositions and conveyances, but upon a

consideration of the definition of an affidavit, and the distinction between an affidavit and a deposition as stated in 2 C.J.S., Section 1 (Affidavits), the revision session may not have been far wrong in placing Section 1 of the act under the general heading of "Depositions" in the Revised Statutes. 2 C.J.S., Section 1, page 922, provides:

"At common law, generally, an affidavit is defined as being a declaration in writing, under oath, sworn to or affirmed by the person making it before some person who has authority to administer an oath, or in words to the same effect. \* \*

"Ordinarily, in legal terminology, affidavits are distinguished from depositions in that they are taken ex parte, voluntarily, without notice to the adverse party, and without opportunity for cross-examination. So, although ordinarily a deposition may be used in place of an affidavit, the converse of the proposition does not follow unless a statute so provides. However, when and to the extent that affidavits are included in the term 'deposition' used in its generic sense, the terms 'affidavit' and 'deposition' may be employed synonymously. \* \* \*

In 1 Am. Jur., Sections 2 and 3 (Affidavits), page 934, it is stated:

"An affidavit is any voluntary ex parte statement reduced to writing and sworn to or affirmed before some person legally authorized to administer an oath or affirmation. It is made without notice to the adverse party and without opportunity to cross-examine. In fact, the statutes frequently define an affidavit as 'a written declaration under oath, made without notice to the adverse party.'

"In common parlance, the terms 'affidavit' and 'deposition' are often used synonymously; there is, however, a well-defined distinction between them which is generally

recognized. A deposition, in its more technical and appropriate sense, is limited to the written testimony of a witness given in the course of a judicial proceeding, either at law or in equity, in response to interrogatories, oral or written, with an opportunity for cross-examination. An affidavit is a voluntary statement made ex parte, without notice to the adverse party or an opportunity to cross-examine. Depositions, on the other hand, are taken only after notice, whereby the adverse party is given an opportunity to cross-examine the witness concerning the subject-matter. Moreover, the giving of a deposition may be compelled, so that it is not, in all instances at least, a voluntary statement."

Based upon these definitions and distinctions, it seems that a deposition occupies a position of greater import than does an affidavit. As a matter of argument in support of our conclusion, it could be said that a construction of this act denying the power of a military officer to take an affidavit to a divorce petition, but allowing him the power to take depositions or evidence in the case, would seem rather inconsistent.

It will also be noted that Section 1515, R.S. Mo. 1939, requiring the affidavit to a divorce petition, does not order or direct that the affidavit be made before or taken by any particular officer. In this connection Section 1885, R.S. Mo. 1939, provides:

"Whenever any oath or affirmation is required by law to be taken before a particular court or officer, the same may be done before any other court or officer empowered to administer oaths, unless it is expressly prohibited; and when no court or officer is named by whom an oath may be administered or affidavit taken, the same may be done by any court or officer authorized to administer oaths."

We have also considered the case of *Kumpe v. Gee* (Texas), 187 S.W. (2d) 932, in which the court was construing the

application of notarial powers granted army officers under Section 1586, Title 10, U.S.C.A., and naval officers under Section 217a-1, Title 34, U.S.C.A. The court ruled that an affidavit to a divorce proceeding taken under the powers given officers by Congress was insufficient, but Texas did not have statutes granting power to officers to take the affidavits, as does Missouri, and we think that case would not be applicable.

Conclusion.

It is therefore the opinion of this department that Sections 1948, 3410 and 3411, R.S. Mo. 1939, authorize and empower army officers above the rank of lieutenant and navy officers above the rank of ensign to take the affidavit to a divorce petition of persons engaged in the military service of the United States outside of this State.

Respectfully submitted,

W. BRADY DUNCAN  
Assistant Attorney General

APPROVED:

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J. E. TAYLOR  
Attorney General

WDB:ml

TAXATION: 10¢ tax levied under Sec.13763, R.S.Mo. 1939, was valid under  
INDEBTEDNESS: Const. of 1875, and in addition to maximum levy authorized by  
Sec.11, Art.X, Const. of 1875. Such tax levy for 1944, 1945 and  
1946 was a valid and subsisting levy, and taxpayer who refused to  
pay such taxes is liable for taxes and penalties. Repeal of Sec.  
13763 removed authority of county court to levy such tax in  
future. Mere irregularity in appointment of judges of election  
does not invalidate such election.

April 14, 1947

FILED

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4/18

Honorable David W. Wilson  
Prosecuting Attorney  
Lewis County  
La Belle, Missouri

Dear Sir:

This is in reply to your letter of recent date, request-  
ing an official opinion of this department, and reading as fol-  
lows:

"I am writing you in my capacity of Prosecuting Attorney of Lewis County, and as follows:

"(1) The attached inclosure is self-explanatory, and reference to it will be made later on herein.

"(2) Referring to the files of your office you will find a former opinion on this same subject-matter addressed to Mr. W. E. Thompson, County Clerk, Lewis County, Mo., under date of March 23, 1943. However, I am particularly interested in the constitutional question referred to in paragraph two thereof; that is to say, did our election voting this indebtedness, assuming the election was regularly held, legally fall within the provisions of section 12 of Article X, Missouri Constitution, wherein increased indebtedness is permitted by a vote?

"(3) The election carried almost unanimously, and all tax payers have paid this tax each year, 1944, 1945, and 1946, except three tax payers who have refused to pay this particular tax for each of the three years, supra, and have required our County Collector each

year to deduct this particular tax from their tax receipts. We now have from these deductions about \$5000.00 delinquent, and of course the same will increase each year.

"(4) We are unable to advise your office as to just what is these tax-payers position on the law to support their refusal to pay this tax. About all they ever say is at the time of paying the other taxes then due, that this particular tax is unconstitutional. Our county has no bonded indebtedness.

"(5) This tax, as per inclosure, was created by a vote of the qualified voters, over two thirds majority, in 1943; and of course under our former State Constitution, and in compliance with the provisions of section 13763, R. S. Mo., 1939.

"Queries: (a) Is this tax legally collectable under said section 13763, and section 12, of Article X, Missouri Constitution in effect at said date?

"(b) What effect, if any, did the adoption of our new constitution of February 27, 1945, and particularly sections 11(b), and 11 (c), of Article X, have on our tax as voted in 1943?

"(c) You will note, as per inclosure, that citizens of our county volunteered and served at the special election. Would such an irregularity invalidate the election?

"If you wish additional data before making an opinion answer to this letter, please so advise stating what desired."

Your further letter, in reply to our letter of inquiry, reads as follows:

"In reply to your letter of January 23, 1947, concerning the constitutionality of Lewis County's special road tax, Lewis County had a fifty cent levy at the time the ten cent special road tax was voted, and has had a fifty cent levy every year since the vote. The special road tax makes the total sixty cents.



"I was with the judges of the county court when we talked to Mr. W. Brady Duncan recently about this tax. It is my understanding that the utilities refuse to pay this tax on the grounds that the levy is void because of the fact that it makes a total levy in excess of that allowed under the constitution."

The questions to be answered in this opinion are:

- (1) Is Section 13763, R. S. Mo. 1939, a statute which authorizes the incurring of indebtedness as authorized by Section 12 of Article X of the Constitution of 1875?
- (2) Is the tax authorized by Section 13763, R. S. Mo. 1939, in addition to the fifty-cent limit on taxation in Article X, Section 11, of the Constitution of 1875, and Section 11046, R. S. Mo. 1939?
- (3) Does the Constitution of 1945 in any way affect this tax?
- (4) Would the fact that citizens of the county volunteered and served at the election as judges invalidate the election?

While the question of whether or not Section 13763, R. S. Mo. 1939, authorizes the incurring of indebtedness under Section 12 of Article X of the Constitution of 1875 has never been directly ruled by our appellate courts, the validity of a similar statute, under similar constitutional provisions, has been ruled on in Kentucky, and the Court of Appeals there held the section valid and held that such a statute authorizes the incurring of indebtedness.

The Kentucky statute in question, which is now found as Section 178.210, Kentucky Revised Statutes, 1944, reads as follows:

"(1) The fiscal court of any county may submit to the voters at a special election to be held for that purpose, the question of voting a tax of any sum not exceeding twenty cents on the hundred dollars on all property subject by law to local taxation, for the construction of the public roads and bridges of the county, as the fiscal court directs. The order of the fiscal court calling the election shall specify the amount of the tax to be levied each year and the number of years for which the tax may be im-

posed, not exceeding ten years, and shall also provide that no money in excess of the amount that can be raised by the levy in any one year shall be expended in that year.

"(2) The fiscal court may borrow money and issue bonds therefor in advance of the collection of the tax for any year, but the amount borrowed shall not exceed eighty percent of the estimated tax for the year. The amount of the tax shall be estimated according to the assessment and collection of the preceding year. Any money so borrowed shall be paid out of the money raised from the tax in the year in which the money is borrowed."

The Court of Appeals of Kentucky said in *Collier v. Bourbon Fiscal Court*, 188 Ky. 491, 1. c. 492:

" \* \* \* At another election regularly called and held on the same day, there was submitted to the voters the further question: 'Are you for a property tax of 20 cents on each \$100.00 worth of property in the county to be levied each year for ten years, for the purpose of improving or constructing, either or both, roads and bridges of the county?'"

The court further said, 1. c. 493-494:

"Section 157a of the Constitution provides that: 'The credit of the Commonwealth may be given, pledged or loaned to any county of the Commonwealth for public road purposes, and any county may be permitted to incur an indebtedness in any amount fixed by the county, not in excess of five per centum of the value of the taxable property therein, for public road purposes in said county, provided said additional indebtedness is submitted to the voters of the county for their ratification or rejection at a special election held for said purpose, in such manner as may be provided by law and when any such indebtedness is incurred by any county said county may levy, in addition to the tax rate allowed under section 157 of the Constitution of Kentucky, an amount not exceeding twenty cents on the one

hundred dollars of the assessed valuation of said county for the purpose of paying the interest on said indebtedness and providing a sinking fund for the payment of said indebtedness.'

\* \* \* \* \*

"In 1917, the legislature, under the authority of section 157a, of the Constitution, further enacted (see sec. 4307b-1, vol. 3, Kentucky Statutes), that the fiscal court of any county of the state may submit to the voters at a special election to be held for that purpose, the question of voting a tax in any sum not exceeding 20 cents on the \$100.00 for the improvement or construction of the public roads and bridges of the county, and it was pursuant to this section that the voters of Bourbon county voted the 20 cent road tax mentioned in the orders of the fiscal court."

The court further said, l. c. 496-498:

"The remaining question is the validity of section 4307-b. In attacking the constitutionality of this section, which was enacted under the authority of section 157a, of the Constitution, the argument is made that the section of the Constitution only authorizes a levy of the 20 cent tax for the purpose of paying interest on and creating a sinking fund for the liquidation of the indebtedness authorized by the section, and, therefore, no part of the 20 cent tax can be used for any other purpose than the payment of such indebtedness and interest thereon. Assuming this to be true, the argument is further made that section 4307-b, does not contemplate the creation of an indebtedness in the meaning of this section of the Constitution, and so its enactment was not authorized by the section.

"Looking again to section 157a of the Constitution I find that it authorizes counties to create, with the consent of the voters, an indebtedness for road purposes, and further provides that when such indebtedness is incurred, there shall be levied by the fiscal court of the

county, or the levying authority, in addition to the tax rate allowed under section 157 of the Constitution, a property tax not exceeding 20 cents for the purpose of paying the interest on said indebtedness and providing a sinking fund for the payment of the same.

"It will be observed that no where in this section is there any mention of bonds or a bond issue. The word 'indebtedness' is, however, used four times, and this word is broad enough to authorize a bond issue because that is an indebtedness. But a county may create an indebtedness under this section without issuing bonds in the form and manner provided in section 4307; and section 4307-b authorizes the creation of such indebtedness by providing that the county 'may also borrow money in any year in advance of the collection of the tax for that year not exceeding 80% of the estimated tax and issue bonds thereupon. . . . But any money so borrowed shall be paid out of the money raised from the tax in the year in which the money is borrowed. So that all indebtedness created in any one year shall be paid out of the fund raised in that year.'

"Now, I think it quite clear that while section 157a contemplates the creation of an indebtedness and the levy of a tax not exceeding 20 cents for the purpose of discharging the indebtedness, it is not important whether the indebtedness so created is in the form of a bond issue, extending over a number of years, or in the form of an indebtedness that must be paid in the year in which it is created. When the fiscal court, under section 4307-b, creates the indebtedness therein authorized, it is as much an indebtedness as would be bonded indebtedness that need not be paid for twenty-five years.

"The provision in this section that the indebtedness incurred shall not exceed 80% of the estimated tax was inserted for the purpose of making it sure that the county might be able each year to pay in full the indebtedness created under the section in that year. I am,

therefore, of the opinion that the enactment of this section was authorized by section 157a, of the Constitution.

"The legislature, by the enactment of sections 4307 and 4307-b, submitted to the people of each county the right to determine for themselves whether they would create what might be called a regular bonded indebtedness, under section 4307, or what might be called an annual indebtedness under section 4307-b; or they may, if they choose, create in the manner stated in these sections both characters of indebtedness, but the regular bonded indebtedness has priority over the annual indebtedness in the application of the money raised by the 20 cent tax, and if both classes of indebtedness are in effect at the same time, the annual indebtedness cannot exceed 80 per cent of what will remain after taking care of the bonded debt."

The Court of Appeals of Kentucky said in the case of Hughes v. Eison, 228 S. W. 676, 1. c. 676-677:

"On April 6, 1918, the voters of Livingston county had submitted to them by the fiscal court of that county the following question:

"Will we vote a property tax in said county for the period of ten years at the rate of 20 cents on each one hundred dollars worth of property in said county subject to local taxation, the same to be used and applied for the improvement and construction of public roads and bridges of this county.'"

The court further said, 1. c. 678:

"It will be observed that section 157a requires the vote to be taken on the amount of the indebtedness to be incurred and not on the rate of taxation to be levied, while section 4307b1 of the statutes enacted in pursuance thereof required both the rate of taxation and the incurring of the indebtedness to be submitted to the voters for their approval. This does not in any way affect the validity of the statute, for it does not conflict with the constitutional requirements, but only goes one

step farther, and requires the fiscal court to take the people into its full confidence, and let them know the maximum rate of taxation which will be fixed, and the number of years it shall run, to meet the proposed indebtedness, and is a wise provision.

"In the case of Collier v. Bourbon Fiscal Court, 188 Ky. 491, 223 S. W. 149, we held section 4307b constitutional and valid.

"The question submitted to the voters of Livingston county at the special election held April 6, 1918, embraced both the right of the county to incur the indebtedness and to lay a levy of 20 cents on the \$100 valuation for a period of 10 years, thus complying with the constitutional provision and the requirements of the statutes.

\* \* \* \* \*

" \* \* \* Thus, those who insist that a pre-existing indebtedness is necessary to give the right to lay such tax reason in a circle. We, therefore, conclude that the indebtedness contemplated by the Constitution and statute to authorize the levy and collection of the tax is such as the county or its fiscal agents may in good faith propose or contemplate and not an actual existing indebtedness. This construction of the statutes 4307b and its subsections appears well-nigh irresistible. To hold that the indebtedness must be existant at the time of the submission of the question of voting a special road tax would be to render the whole amendment to the Constitution and the statute a nullity, because self-destructive. As there can be no indebtedness under 157 in excess of the income of the county for the current year and the income cannot be increased except by a special road tax vote, it necessarily follows that no actual existing indebtedness is required, but only a good-faith purpose to undertake and accomplish specified road and bridge construction or improvement, in order to warrant the submission of the question of whether a tax shall be levied and the levying of the tax if approved by the

people. We so held, in effect, in the case of Collier v. Bourbon Fiscal Court, supra.  
\* \* \*

The reasoning in the above quoted cases, we believe, is applicable to Section 13763, R. S. Mo. 1939, and under such holding Section 13763 must be construed to be valid and is statutory authority for the incurring of indebtedness by a county.

The Supreme Court of Missouri En Banc said in the case of Kansas City Power & Light Co. v. Carrollton, 142 S. W. (2d) 849, 1. c. 852-853:

"The tax authorized by Section 12, with the requisite assent of the voters, is in addition to the tax authorized by Section 11. Lamar Water & Lt. Co. v. City of Lamar, 128 Mo. 188, 26 S. W. 1025, 31 S. W. 756, 32 L.R.A. 157. Under Section 11 the tax limit for all purposes, without a vote, was 50 cents, but the evidence shows that a levy of more than 60 cents was necessary to pay for hydrant rentals and street lights alone. Therefore, the contracts for hydrant rentals and street lights created a yearly debt in excess of the yearly revenue and it was necessary to, and the Town did, obtain the assent of the voters to levy an additional tax under said Section 12. But under Section 12 the voters could not authorize the creation of such a debt or the levying of such an additional tax for a longer period than twenty years."

Therefore, the fact that the ten-cent tax voted at the election held under authority of Section 13763, R. S. Mo. 1939, results in a total tax levy in Lewis County of sixty cents, which is ten cents in excess of the fifty-cent levy authorized by Article X, Section 11, of the Constitution of 1875 and Section 11046, R. S. Mo. 1939, does not invalidate the ten-cent levy.

That part of Section 12 of Article X of the Constitution of 1875 providing that "any county may be allowed to become indebted to a larger amount for the erection of court house or jail, or for the grading, construction, paving, or maintaining of paved, graveled, macadamized or rock roads and necessary bridges and culverts therein" is omitted from the present Constitution.

Since the above quoted provision is not in the present Constitution, and since Section 13763, R. S. Mo. 1939, provides an increase within the limitation of Section 12 of Article X of the Constitution of 1875, said Section 13763 is inconsistent with the present Constitution.

Section 13763 was repealed by House Bill No. 731, which bill became effective July 1, 1946.

Section 2 of the Schedule of the Constitution of 1945 provides as follows:

"All laws in force at the time of the adoption of this Constitution and consistent therewith shall remain in full force and effect until amended or repealed by the general assembly. All laws inconsistent with this Constitution, unless sooner repealed or amended to conform with this Constitution, shall remain in full force and effect until July 1, 1946."

Since Section 13763 was not repealed before July 1, 1946, by virtue of Section 2 of the Schedule of the Constitution of 1945, it remained in effect until such date.

Since Section 13763 was in effect until July 1, 1946, and since the tax authorized by such section was in addition to the limitation of the tax rate in Section 11 of Article X of the Constitution of 1875, the levy of ten cents by virtue of the election held under authority of Section 13763, in addition to the fifty-cent levy authorized by Section 11 of Article X of the Constitution of 1875, was a valid and subsisting levy for the years 1944 and 1945, and those taxpayers who refused to pay such taxes are liable for the taxes for those years and penalties thereon.

Section 13763 provides, in part, "provided, that if the county court deems it advisable they may issue warrants against said tax in advance of its collection." Under this provision of Section 13763, the county court of Lewis County had the power, during the period of January 1, 1946, to June 30, 1946, to issue warrants against the special ten-cent tax voted in 1943. If the county court of Lewis County did, during such period in 1946, issue warrants against such tax, such warrants became contracts between the county and those to whom the warrants were issued.

The Supreme Court of Missouri said in the case of State ex rel. Clark County v. Hackmann, 280 Mo. 686, 1. c. 696:



" \* \* \* The counties of the State, in anticipation of their yearly revenue, issue warrants against such revenue. The county authorities know from the assessed values and the tax rates just what revenue should come in for the year. They often issue warrants up to the very limit of the anticipated revenue, and these warrants we have held to be valid obligations of the county. This, on the theory that the warrants represent valid contracts made during the year.  
\* \* \* (Emphasis ours.)

Under this holding of the Supreme Court, and since the contracts were valid when made by the county, the power to levy a tax to pay such valid claims of those to whom the warrants were issued was vested in the county court.

If it were held that a valid contract could be entered into by the county, but that the county could not levy a tax to pay such contracts because of the repeal of a taxing statute after such contracts were entered into, such a holding would sanction the impairment of contracts, which is specifically prohibited by Section 10 of Article I of the Constitution of the United States, which provides, in part:

"No State shall \* \* \* pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts, \* \* \*."

Therefore, if the county court did, between January 1 and June 30, 1946, issue warrants in anticipation of the ten-cent tax authorized in the election of 1943, the levy of such tax for 1946 was a valid and subsisting levy for such year, and those taxpayers who refused to pay such tax are liable for the tax for such year and penalties thereon.

The repeal of Section 13763 in 1946 takes away the power of the county court to levy the ten-cent tax in 1947 and subsequent years. By the repeal of Section 13763 in 1946, the power to issue warrants in anticipation of the tax, as well as the power to levy the tax, was rendered null and void, as Section 13763 was the only authority the county court had for such action.

The fact that the judges at the election held in 1943 volunteered for the election will not in any way invalidate the tax levied as a result of such election. It is provided in Section 13763, R. . . No. 1939, that the election shall be held in the same manner that elections are held for state and

county officers. Section 11502, R. S. Mo. 1939, provides that political parties shall submit the names of judges to serve at elections, and that the county court shall select the judges therefrom, but if such names are not presented, the county court shall select such judges.

In this case, an order of record of the county court was made March 1, 1943, which order listed the judges of the special election. This was a sufficient compliance with the statute, and the election cannot be held invalid because of any alleged irregularity in the method of selecting the judges of the election.

The Supreme Court of Missouri, in discussing irregularities that will invalidate an election, in the case of *Breuninger v. Hill*, 277 Mo. 239, 1. c. 252, said:

" \* \* \* the law governing the appointment of judges and clerks is clearly directory, and courts will not nullify the result of votes honestly cast and counted, although the statute has not been strictly complied with, (*Sanders v. Lacks*, 142 Mo. 255.)"

#### CONCLUSION

It is the opinion of this department that the tax of ten cents on the one hundred dollars assessed valuation voted in Lewis County in 1943, under the authority of Section 13763, R. S. Mo. 1939, is a valid tax under the Constitution of 1875 and the Constitution of 1945.

It is further the opinion of this department that such ten-cent levy, in addition to the fifty-cent levy authorized by Section 11 of Article X of the Constitution of 1875, was a valid tax for the years 1944, 1945 and 1946, and any taxpayer who refused to pay such taxes is liable for both the taxes and penalties thereon.

The power of the county court to levy the ten-cent tax, authorized by the election held under Section 13763, has been taken away by the repeal of Section 13763, and such tax cannot be levied in any future year.

It is further the opinion of this department that the manner of selecting the judges for the election held in Lewis

Honorable David W. Wilson - 13

County in 1943 would not invalidate the tax levied under such election.

Respectfully submitted,

C. B. BURNS, Jr.  
Assistant Attorney General

APPROVED:

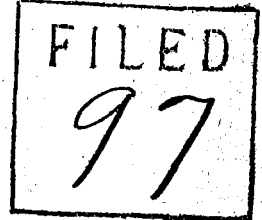
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J. E. TAYLOR  
Attorney General

CBB:HR

MOTOR VEHICLES: Minimum age of taxi drivers as fixed by state law is eighteen. One who is engaged as a motor carrier or contract hauler is not operating a taxi under the definition as set out in subsection (d), Section 5720, Laws of 1941.

April 17, 1947



Honorable Hugh P. Williamson  
Prosecuting Attorney  
Callaway County  
Fulton, Missouri

Dear Sir:

This is in reply to your letter of March 28, 1947, in which you request an opinion on the question of the minimum age requirement for persons who operate taxicabs. Said letter in part reads as follows:

"I would like to have the opinion of your department upon the following fact situation:

"A boy named George Baumgartner lives in Kingdom City, Missouri, an unincorporated village containing perhaps 25 residents, located at the junction of Highways 40 and 54 in Callaway County. This boy is 19 years of age and operates a taxicab in which he conveys paying passengers from Kingdom City to Fulton, Mexico and Columbia. The City of Fulton and the city of Columbia both have ordinances which provide that the operator of a taxicab must be not less than 21 years of age. I would like to know whether this boy can lawfully continue to operate as he is now operating without violating a state law regarding the age of taxi operators or the ordinance of the city of Fulton which provides that a taxi driver must be not less than 21 years of age.

"I call your attention to Section 8447 of the Missouri Statutes which states that no person under 21 shall drive a motor vehicle while in use as a public or common carrier of persons or property. I am informed, however, by one of our State Troopers that this section has been modified by Senate Bill No. 40 and that by virtue of such modification, a person who is 18 years of age can drive a taxicab. I am

also informed by this Trooper that a letter from your office dated February 26, 1947, to Colonel Hugh Wagoner states that such is the case.

"I would like to be fully advised about this matter as quickly as possible."

Section 8447, R.S. Mo. 1939, reads as follows:

"No person who is under the age of twenty-one (21) years shall drive any motor vehicle while in use as a school bus for the transportation of pupils to or from school, nor any motor vehicle while in use as a public or common carrier of persons or property, nor in either event until he has been licensed as a chauffeur or as a registered operator."

It is to be noted that Senate Bill No. 40, passed by the 63rd General Assembly, repealed Section 5730, R.S. Mo. 1939, as amended by Laws of 1941, and enacted in lieu thereof Section 5730, which reads in part as follows:

"Section 5730. The commission, in the exercise of the authority by this act vested in it, to license, supervise and regulate all motor carriers or contract haulers shall promulgate and mail or deliver to each holder of a certificate of convenience and necessity, interstate permit or contract hauler's permit hereunder, such safety rules and regulations as it may deem necessary to govern and control the operation of motor carriers or contract haulers over and along the public highways of this state, and the equipment to be used. Any such safety rules promulgated, in addition to any others deemed necessary by the commission, shall include the following:

"(a) Every motor vehicle and all parts thereof shall be maintained in a safe and sanitary condition at all times.

"(b) Every driver employed by motor carriers or contract haulers shall be at least eighteen years of age, of good moral character, and shall be fully competent to operate the motor vehicle under his charge."

From a reading of the two above quoted sections it can readily be seen that Section 8447, supra, and Section 5730, Senate Bill No. 40, are in conflict as regards the minimum age requirement for a driver of a motor carrier. An opinion rendered by this office under date of July 16, 1946, to Mr. Hinkle Statler, said that these two statutes, as they affect common carriers, are totally inconsistent. The opinion held that it was the intention of the Legislature to change the minimum age requirement as it affected drivers of common carriers from twenty-one to eighteen, and said opinion continued on page 7: "If their attempt is to be of any effect it will be necessary to construe Section 5730, Laws of Missouri, 1945, (Senate Bill No. 40) as repealing, or being an exception to, Section 8447, supra, at least in part." Said opinion then concluded: "Therefore, it is the opinion of this department that the minimum age of drivers of public or common carriers is, eighteen years, with the exception of drivers of school busses, who must be at least twenty-one years of age."

Section 8372, Laws of 1943, page 668, provides for the registration of chauffeurs, and at subsection (c) says:

"(c) The Commissioner shall also furnish to such applicant, without further charge, a suitable metal badge of such size as the commissioner may determine, which shall bear thereon the words 'Registered chauffeur number ....., Missouri motor vehicle law' (with the registry number inserted thereon) and said badge shall be thereafter worn by such chauffeur upon his clothing in a conspicuous place at all times when he is operating a motor vehicle on the highways. No certificate of registration as chauffeur shall be issued to any person under the age of eighteen years, except as herein provided below."

Subsections (d) and (e) of said Section 8372 provides for certain exceptions where a special chauffeur's certificate may be issued to persons 16 and 17 years of age. Subsection (f) provides that

subsections (d) and (e) shall expire June 1, 1945. Therefore, we see that this act as of today now provides that no certificate of registration as chauffeur shall be issued to any person under the age of eighteen years. Section 8367, R.S. Mo. 1939, defines "chauffeur," as used in the above quoted sections, as " \* \* \* An operator (a) who operates a motor vehicle in the transportation of persons or property, and who receives compensation for such service in wages, salary, commission or fare, or (b) who as owner or employee operates a motor vehicle carrying passengers or property for hire. \* \* \*"

We feel that the sections above quoted defining "chauffeur" and setting the age limit for the certification of such at eighteen is the state law as to the minimum age requirement of the driver of a taxicab. As was stated by the Court of Appeal of Louisiana in Day v. Bush, 139 So. 42, 1.c. 44:

"The Legislature, by paragraph (x), section 2, Act No. 296 of 1928, has defined clearly who are chauffeurs within the meaning of that statute; it being as follows: 'Chauffeurs or Operators.' Any person who operates a motor vehicle in the transportation of persons or property and who receives any compensation for such services in wages, commissions or otherwise, paid directly or indirectly or who as owner or employee operates a motor vehicle carrying passengers or property for hire.'

"Of course, it is well known the Legislature had in mind, in adopting this definition, that class of operators who drive jitneys in the cities and towns for hire, and did not have in view the other class of chauffeurs who drive the cars of private persons for a salary or other compensation, and it was to this latter class of chauffeurs that Act No. 86 of 1928 relates.

\* \* \* \* \*

"We have not found that our own courts have had occasion to construe or define the word 'chauffeur' as employed in the 1928 act.

The following quotation from Com. v. Cooper, 37 Pa. Co. Ct. R. 277, 282, 285, cited in footnote, 11 C. J. 747, is apropos of the question, to wit: 'The accepted meaning of the word "Chauffeur" in every state where the term is used in a motor vehicle statute is a paid operator or employee, and includes in it the idea of compensation for the operation of the vehicle. \* \* \* \* \*

Section 5721, R.S. Mo. 1939, was repealed by House Bill No. 137 of the 63rd General Assembly, and a new section was enacted in lieu thereof, to be known as Section 5721, and which provides as follows:

"The provisions of this article shall not apply to any motor vehicle of a carrying capacity of not to exceed five persons, or one ton of freight, when operated under contract with the federal government for carrying the United States mail and when on the trip provided in said contract; nor to any motor vehicle owned, controlled or operated as a school bus; nor taxicab, as herein defined; nor to motor vehicles used in transporting farm machinery, produce, supplies, household goods, or other articles or commodities from farm to farm; nor to motor vehicles used exclusively in transporting farm and dairy products from the farm or dairy to a creamery, warehouse, or other original storage or market, and transporting stocker and feeder livestock from market to farm or from farm to farm nor to motor vehicles used exclusively in the distribution of newspapers from the publisher to subscribers or distributors. No provision of this article shall be so construed as to deprive any county or municipality within this state of the right of police control over the use of its public highways, or the state highway commission of the right of police control over the use of state highways. This article shall not apply to trucks used in work for the state or any civil subdivision thereof."



The above article referred to is Article 8 of Chapter 35, R.S. Mo. 1939, which deals with the powers of the Public Service Commission on transportation of persons by motor vehicle. The definition of "taxicab" as found in subsection (d), Section 5720, Laws of 1941, page 523, is:

"The term 'taxicab,' when used in this article, shall mean every motor vehicle designated and/or constructed to accommodate and transport passengers, not more than five in number, exclusive of the driver, and fitted with taximeters and/or using or having some other device, method or system, to indicate and determine the passenger fare charged for distance traveled, and the principal operations of which taxicabs are confined to the area within the corporate limits of cities of the state and suburban territory as herein defined."

Section 5720 (f), Laws of 1941, page 524, says:

"The term 'suburban territory,' when used in this article, means that territory extending one mile beyond the corporate limits of any municipality in this state and one mile additional for each 50,000 population or portion thereof: Provided, that when more than one municipality is contained within (within) the limits of any such territory so described, motor carriers operating in and out of any such municipalities within said territory shall be permitted to operate anywhere within the limits of the larger territory so described."

We are lead to the conclusion then that the vehicle to which you refer in your case is not a taxicab within the meaning as used in this article, and thus does not come within the exception of Section 5721. Therefore, this vehicle must come within either the term "motor carrier," as defined in subsection (b), or the term "contract hauler," as defined in subsection (c), Section 5720, Laws of 1941, page 523. In either event, whether classified as a motor carrier or a contract hauler, said vehicle would come within the regulations of the Public Service Commission, either by Section 5723, R.S. Mo. 1939, where it is stated that the Public Service Commission is vested with the power and authority to

license, supervise and regulate every motor carrier in this state to fix or approve the rates, fares, charges, classifications and rules and regulations pertaining thereto; or by Section 5727, R.S. Mo. 1939, where it is stated that it is unlawful for any contract hauler, except as provided in Section 5721, to operate or furnish transportation of persons or property, or both, for hire over the highways of this state without first having obtained from the commission a contract hauler's permit.

CONCLUSION

It is, therefore, the opinion of this department that the minimum age of taxicab drivers as provided in subsection (c), Section 8372, Laws of 1943, page 668, is eighteen years of age. The boy in question as presented by your case is not operating a taxi under the definition as set out in subsection (d), Section 5720, Laws of 1941, page 522, but instead is operating either a motor carrier or contract hauler, depending on the circumstances of the case, and as such, in either event, is subject to the rules and regulations of the Public Service Commission. As provided in subsection (b), Section 5730, Senate Bill No. 40, "Every driver employed by motor carriers or contract haulers shall be at least eighteen years of age, of good moral character, and shall be fully competent to operate the motor vehicle under his charge."

Respectfully submitted,

Wm. C. COCKRILL  
Assistant Attorney General

APPROVED:

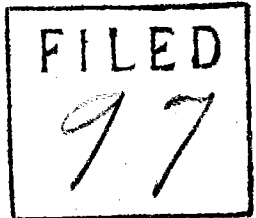
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J. E. TAYLOR  
Attorney General

WCC:LR

ROADS AND BRIDGES: Residents of municipality within the boundaries  
MUNICIPALITIES: of special road districts are not exempt from  
TAXATION: paying road taxes levied on property in such  
districts.

July 16, 1947



Honorable Robert P. C. Wilson, III  
Prosecuting Attorney  
Platte County  
Platte City, Missouri

Dear Sir:

This is in reply to your letter of recent date wherein you request an opinion from this department on the question of whether or not persons residing within the corporate limits of towns and villages, which are located within a special road district, are exempt from paying the road and bridge taxes imposed on the property in the special road district.

From the letter which is attached to your request, and which letter was written by Mr. Stanley G. Patterson of the firm of Patterson, Chastain, Cowherd & Smith, it appears that the residents of a village which is located in a special road district are contending that they are exempted from the payment of the taxes imposed for road and bridge purposes in the special road district in which such village is located. This letter refers to Section 8682, R. S. Mo. 1939. On account of this reference, we will assume that the road district under consideration was created under the provisions of Article 10, Chapter 46, R. S. Mo. 1939.

Section 8673, R. S. Mo. 1939, which is the first section in the foregoing article, was repealed and reenacted, Laws of Missouri 1945, page 1494. This section reads as follows:

"Territory not exceeding eight miles square, wherein is located any city, town or village containing less than one hundred thousand inhabitants, may be organized as hereinafter set forth into a special road district; Provided, however, the provisions of this section shall not apply to counties under township organization or to class one counties."

Section 8691 of the same act, Laws of Missouri 1945, page 1495, provides as follows:

"In all counties in this state where a special road district, or districts, has or have been organized, or where a special road district, or districts, may be organized under this article, and where money shall be collected for road and bridge purposes under the provisions of Section 8527 upon property within such special road district, or districts, or where money shall be collected for pool or billiard table licenses upon any business within such special road district, or districts, the county court shall, as such taxes or licenses are paid and collected, apportion and set aside to the credit of such special road district, or districts, from which said taxes were collected, four-fifths of such part or portion of said road and bridge tax so arising from and collected and paid upon any property lying and being within any such special road district, or districts, and also one-half of the amount collected for pool and billiard table licenses so collected from such business carried on or conducted within the limits of such special road district; and the county court shall, upon application by said commissioners of such special road district, or districts, draw warrants upon the county treasurer, payable to the commissioners of such special road district, or districts, or the treasury thereof, for four-fifths of such part or portion of said road and bridge tax so collected upon property lying and being within such special road district, or districts, and also one-half of the amount collected for pool and billiard table licenses so collected from such business carried on or conducted within the limits of such special road district, or districts."

This section, it will be seen, makes provision for the division and distribution of the taxes collected for road and bridge purposes in such special road districts. It will be noted that this section refers to the taxes collected under Section 8527. The taxes collected under Section 8527

are authorized by House Committee Substitute for House Bill No. 784, Laws of Missouri 1945, page 1479. This section reads as follows:

"In addition to other levies authorized by law, the county court in counties not adopting an alternative form of government and the proper administrative body in counties adopting an alternative form of government, in their discretion may levy an additional tax, not exceeding thirty-five cents on each one hundred dollars assessed valuation, all of such tax to be collected and turned into the county treasury, where it shall be known and designated as 'The Special Road and Bridge Fund' to be used for road and bridge purposes and for no other purpose whatever; provided, however, that all that part or portion of said tax which shall arise from and be collected and paid upon any property lying and being within any special road district shall be paid into the county treasury and four-fifths of such part or portion of said tax so arising from and collected and paid upon any property lying and being within any such special road district shall be placed to the credit of such special road district from which it arose and shall be paid out to such special road district upon warrants of the county court, in favor of the commissioners or treasurer of the district as the case may be; Provided further, that the part of said special road and bridge tax arising from and paid upon property not situated in any special road district and the one-fifth part retained in the county treasury may, in the discretion of the county court, be used in improving or repairing any street in any incorporated city or village in the county, if said street shall form a part of a continuous highway of said county leading through such city or village."

From a reading of these two sections of the statutes, it will be seen that the lawmakers have not exempted the property owners of towns and villages from the payment of the taxes for

the special road and bridge fund which are levied upon the property in the special road district. The provisions of these two sections would seem to be in conflict with the provisions of Section 7252, R. S. Mo. 1939, which reads as follows:

"All persons residing within the corporate limits of such towns shall be exempt from working on roads without the corporate limits of said towns, and from paying tax or fine relating to the same on property within such corporate limits."

This latter section seems to be authority for exempting the residents of a city or village which is situated in a special road district from paying road and bridge taxes on property within such city limits. However, from an examination of the history of said Section 7252, it will be found that this act was in the Laws of 1855, page 1526. At the time this act was in effect in 1855, Chapter 137, R. S. Mo. 1855, was also in effect. This chapter related to roads and bridges. Section 46, R. S. Mo. 1855, at page 1376, required able-bodied male inhabitants of a road district to work on county roads.

Section 47 of the same act imposed a \$2.00 poll tax on such persons and also a road tax of not more than 30 per cent of the state tax. Section 50 of said act authorized such male persons to work out a portion of their poll tax. The poll tax law was amended from time to time and reenacted in the statutes up until 1937, when it was repealed outright, Laws of Missouri 1937, page 440. The provisions of Section 47, supra, providing for the payment of not more than 30 per cent of the state tax for road purposes, has long since been repealed and revenue for road and bridge purposes in special road districts is raised under the provisions of Section 8527, supra. Therefore, since the act authorizing the imposition of the poll tax and the tax of not more than 30 per cent of the state tax has been repealed, then the provisions of Section 7252, supra, would be obsolete and of no force and effect. While this section has not been expressly repealed, we think this is a case in which a repeal of an earlier statute by a later statute by implication would be applicable. A rule of statutory construction which would be applicable here is stated by the Supreme Court in *State ex rel. Wells vs. Walker*, 34 S.W. (2d) 124, at l.c. 129:

"It was properly said in the Rutledge Case that repeals by implication are not favored; \* \* \* \* \* However, repeals by implication occur when there is a total repugnance between the later and the earlier statute. \* \* \* \* "

Applying that rule here, we think there is a total repugnance between the 1945 acts hereinbefore referred to and Section 7252, R. S. Mo. 1939, and that the provisions of said Section 7252, insofar as they are repugnant to the provisions of the 1945 acts are repealed by implication. That being the case, then all of the property owners in a special road district, whether they reside in a city or in a rural section, are subject to the taxes imposed for the special road and bridge fund in such district. It appears from said Section 8527 that the lawmakers have left it to the discretion of the county court as to how much of the one-fifth part of the special road and bridge fund taxes that it will use in improving or repairing the streets in any incorporated city or village in the county.

Section 8683, R. S. Mo. 1939, which relates to the expenditures of road funds by the board of commissioners, reads as follows:

"Said board shall have authority to expend not more than one-fourth of the revenue which may now or which may hereafter be paid into its treasury for the purpose of grading and repairing any roads or streets within the corporate limits of any city within said special road district in conformity with the established grade of said roads and streets in said cities and for the purpose of constructing and maintaining macadam, gravel, rock or paved roads or streets within the corporate limits of any city within the said special road district in conformity with the established grade of said roads and streets in said city: Provided, that no part of the revenue of any special road district in this state be expended outside of the county in which such special road district is situated."

This section and Section 8527, supra, support our conclusion that the lawmakers have intended that all of the property in a special road district be taxed for the special road and bridge fund tax. We make this statement because of the fact that the provisions of these two sections authorize expenditure of some of the tax money for the purpose of grading and repairing roads or streets within the corporate limits within any city in such special road district.

#### CONCLUSION

From the foregoing, it is the opinion of this department that the inhabitants of any town or village which is located within a special road district organized under Article 10, Chapter 46, R. S. Mo. 1939, are liable for the payment of the taxes levied for the special road and bridge fund in the district, and that it is discretionary with the board of commissioners of the special road district as to what portion of such taxes will be spent for grading and repairing the roads in such towns and villages, provided they expend not in excess of one-fourth of the road and bridge fund taxes for that purpose.

Respectfully submitted,

TYRE W. BURTON  
Assistant Attorney General

APPROVED:

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J. E. TAYLOR  
Attorney General

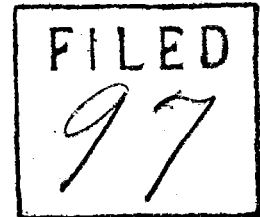
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*Copy to  
J. Smith*

COUNTY CLERK: Cost deposits in cases in which costs are unclaimed should be turned over to the county treasurer by the circuit clerk. Cost deposits in cases in which there is an insufficient amount to fully pay all those entitled thereto should be distributed pro rata.

July 19, 1947



*7/23*

Honorable Robert P. C. Wilson III  
Prosecuting Attorney  
Platte County  
Platte City, Missouri

Dear Sir:

This is in reply to your letter of recent date, requesting an official opinion of this department, and reading as follows:

"I am writing this request for opinion at the instance of Mr. Fred R. Rollins, Circuit Clerk of Platte County, Mo.

"On January 1, 1943, Mr. E. R. Clarke, the predecessor of Mr. Rollins, reported and paid over to Mr. Rollins the amount of \$442.32, representing 'Open Items'. Mr. Rollins still holds that sum. Is it his duty to pay that sum over to the County Treasurer as provided in Section 13446, R. S. Mo. 1939? If not, what shall he do with it?

"Further, on January 1, 1943, Mr. Clarke reported and turned over to Mr. Rollins the sum of \$600.63, representing cost deposits in various cases. Mr. Rollins still holds that sum. Is it his duty to pro rate the costs in each of the reported cases remaining cases and certify same to the County Treasurer to be paid out by him as provided in Sections 13447 and 13448 R. S. Mo. 1939? If not, what shall he do with the sum?"

We are also in receipt of a letter you wrote in answer to our letter of inquiry, in which you state that the \$442.32 "Open Items" represents money deposited as costs in suits in which there is sufficient money to pay the costs of such suits,

and that the \$600.63 represents moneys which were deposited in various cases which have been finally decided and in which there is insufficient money to pay the entire costs of the cases.

Section 13446, R. S. Mo. 1939, provides as follows:

"It shall be the duty of each sheriff, marshal, coroner, clerk of the courts of record, and other officers, on the first day of January and the first day of July in each year, to pay over all fees in their hands belonging to others to the treasurer of the county, with the name and amount belonging to each person, date when collected and in what case, taking from the treasurer duplicate receipts therefor, one of which the officer shall file with the clerk of the county court, who shall immediately charge the treasurer with the same."

Under the provisions of this section, the circuit clerk should pay to the treasurer of the county the \$442.32 which was turned over to him by his predecessor.

With regard to the payment of the \$600.63 which was deposited in the cases and in which there is insufficient money to pay the entire costs of such cases, we are enclosing an excerpt from an official opinion of this department rendered under date of May 22, 1939, to Hon. John E. Short, Circuit Clerk of Ray County. The conclusion reached in that opinion, we believe, is decisive of the disposition to be made of the \$600.63.

#### CONCLUSION

It is the opinion of this department that the sum of \$442.32 turned over to the present circuit clerk by his predecessor in office, which represents cost deposits in cases in which there is sufficient money deposited to pay all costs, should be turned over by the circuit clerk to the treasurer of the county.

The cost deposits amounting to \$600.63, which were deposited in cases which have been fully decided and in which there is an

Honorable Robert P. C. Wilson III      -3-

insufficient amount to pay the entire costs of the cases, should be paid pro rata to the persons entitled thereto.

Respectfully submitted,

C. B. BURNS, Jr.  
Assistant Attorney General

APPROVED:

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J. E. TAYLOR  
Attorney General

CBB:HR

## EXCERPTS

From Opinion rendered to Hon. John E. Short, Circuit  
Clerk of Ray County, Richmond, Missouri, under  
date of May 22, 1939.

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"P.S. Where the Clerk prorates the amount that he has and cannot collect the full amount should the proration include all parties who are entitled to a fee or use the amount collected for officers of the court only."

\* \* \* \* \*

"In your next question you ask whether a clerk when he cannot collect the full amount of costs should pro rate the amount he does have on hand with all of the parties entitled to fees. It is our opinion that the clerk should pro rate such funds among all parties entitled to fees, including yourself, the sheriff, witnesses and jurors. There is no statute in this state which gives any of these persons a prior claim to any of the deposits on hand or amounts collected for the payment of costs. None of the appellate courts, as far as we have been able to determine have ever passed on this question, but since the law does not give any prior claim to any of such parties, it is only equitable and fair that the same should be pro rated.

Respectfully submitted,

J. F. ALLEBACH  
Assistant Attorney General

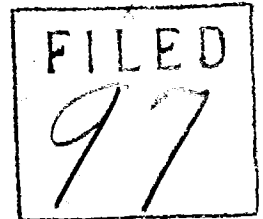
APPROVED:

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W. J. BURKE  
(Acting) Attorney General "

ACCOUNTANCY: Certificate of public accountant may not be  
BOARD OF: issued if application is not made before  
January 1, 1946, or more than one year after  
honorable discharge even if applicant possesses  
all other requirements of Section 14911j.

September 2, 1947



Mr. D. P. Williams, Secretary  
Missouri State Board of Accountancy  
1807 Boatmen's Bank Building  
St. Louis 2, Missouri

Dear Sir:

This department is in receipt of your request for an  
official opinion which reads as follows:

"The Missouri State Board of Accountancy  
desires to have your opinion on the ques-  
tion involving the administration of  
Section 14,911j of the Revised Statutes  
of Missouri. This section provides:

"A certificate as a public accountant  
shall be issued by the Board to each  
individual who

"Makes due application to the Board  
before January 1, 1946 and presents  
satisfactory evidence that he was

"(1) Maintaining an office in this  
State for the practice of public ac-  
countancy on his own account on  
November 23, 1943, and has been in  
continuous practice during the whole  
or major portion of the regular business  
hours of each day as a public accountant  
in the State since that time; or

"(2) That on November 23, 1943, he was in  
responsible charge of accounting engage-  
ments as an employed member of the staff  
of a certified public accountant or ac-  
countants, or of a public accountant or  
accountants, or of a firm or partnership  
of certified public accountants, or of  
a firm or partnership of public account-

September 2, 1947

ants, or of a corporation, including an agricultural, nonprofit association, lawfully engaged in the practice of public accountancy in this State.

"Section 14,911j makes the following provision for filing by individuals who, on November 23, 1943, were in the service with the armed forces:

"Individuals who, on November 23, 1943, were in the service with the armed forces of the United States, or its allies, if otherwise qualified, may file applications under either subparagraphs (a) or (b) hereof, at any time within twelve months after date of honorable discharge from such service . . . . .

"The propositions which we wish to submit to you for ruling are the following:

"1. If the Board receives an application after January 1, 1946, from an individual, and the Board determines that such individual meets all other requirements set out in the section for the issuance of a public accountant certificate, may the Board grant to such person a certificate as a public accountant notwithstanding the fact that due to neglect, excusable or not, such person did not apply for such certificate before January 1, 1946?

"2. If the Board receives an application from an individual who, on November 23, 1943, was in the service of the armed forces, after one year from the date of such individual's honorable discharge from the armed forces, and the Board determines that such individual meets all other requirements set out in the section for the issuance of a public accountant certificate, may the Board grant to such person a certificate as a public accountant notwithstanding the fact that due to neglect, excusable or not, such person did not apply for such certificate within twelve months after date of honorable discharge?

"Your early reply will be appreciated."

Mr. D. P. Williams

September 2, 1947

Section 14911j, Laws of Missouri 1945, page 61, provides as follows:

"A certificate as public accountant shall be issued by the Board to each individual who:

"(a) Makes due application to the Board before January 1, 1946, and presents satisfactory evidence that he was maintaining an office in this State for the practice of public accountancy on his own account on November 23, 1943, and has been in continuous practice during the whole or a major portion of the regular business hours of each day, as a public accountant in the State since that time; or

"(b) Makes due application to the Board before January 1, 1946, and presents satisfactory evidence that on November 23, 1943, he was in responsible charge of accounting engagements as an employed member of the staff of a certified public accountant or accountants, or of a public accountant or accountants, or of a firm or partnership of certified public accountants, or of a firm or partnership of public accountants, or of a corporation, including an agricultural non-profit association, lawfully engaged in the practice of public accountancy in this State.

"The Board shall require the same information from each applicant for a public accountant registration certificate that it requires from an applicant for a certificate as a certified public accountant. Applicants for public accountant registration certificates shall comply with all applicable requirements of this Act and of the rules enacted thereunder.

"Individuals who, on November 23, 1943, were in service with the armed forces of the United States, or its allies, if otherwise qualified,

September 2, 1947

may file applications under either subparagraph (a) or (b) hereof, at any time within twelve months after date of honorable discharge from such service; and their status, at the date of entry into such service, shall be conclusively deemed to be and treated, for the purposes hereof, as the status on November 23, 1943, of all such individuals. As to such individuals, the requirement of continuous practice in sub-paragraph (a) shall not be applicable."

A reading of the above act discloses that an individual who on November 23, 1943 was engaged in the practice as a public accountant may be issued a certificate as a public accountant, if he makes application to the board before January 1, 1946. Further, a person who was in the armed forces of the United States or its allies on November 23, 1943, may file an application at any time within twelve months after date of honorable discharge from such service.

The rule as to statutes which set forth a time limitation for the performance of a duty or the acquisition of a privilege by private individuals is given in 59 Corpus Juris, page 1079 as follows:

" \* \* \* \* \* So under statutes conferring privileges on private individuals for a certain period of time, such privileges cannot be exercised after the lapse of the time allowed."

As was said in Bryant v. Kentucky Lumber Company, 144 Ky. 755, 139 S. W. 1089, 1. c. 1091:

"The rule is that under statutes conferring privileges on private individuals for a certain period of time the privilege cannot be exercised after the time allowed. 36 Cyc. 1160; Black on Interpretation of Laws, 359; 26 Am. & Eng. Ency. of Law, 691, and cases cited."

#### CONCLUSION

It is therefore the opinion of this department that the Missouri State Board of Accountancy under Section 14911j,



Mr. D. P. Williams

September 2, 1947

Laws of Missouri 1945, page 12, may not issue a certificate of public accountant to an individual who makes application after December 31, 1945, even though the individual possesses the requirements set out in said section.

It is further the opinion of this department that the board may not under Section 14911j, Laws of Missouri 1945, page 62, issue a certificate of public accountant to a member of the armed forces who makes application for a certificate more than one year after the date of such individual's honorable discharge even though the applicant possesses the requirements set out in said section.

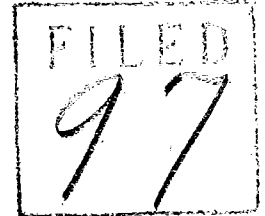
Respectfully submitted

ARTHUR M. O'KEEFE  
Assistant Attorney General

APPROVED:

J. E. TAYLOR  
Attorney General

BOARD OF ACCOUNTANCY: Governor may make recess appointments of members; members qualify on the date the required oath is taken.



October 17, 1947

Mr. D. P. Williams, Secretary  
Missouri State Board of Accountancy  
Jefferson City, Missouri

Dear Mr. Williams:

This is in reply to your letter of October 10, 1947, in which you request an opinion from this department as follows:

"The Missouri State Board of Accountancy desires to have your opinion regarding the conditions to be met to qualify an individual to exercise the functions of a Board member, and thereupon be entitled to receive per diem compensation therefor as provided under Section 14909; Revised Statutes.

\* \* \* \* \*

"It is our understanding that appointments made by the Governor are subject to confirmation by the Senate.

"The propositions which we wish to submit to you for a ruling are as follows:

"(1) If the term of a member of the Board has expired and the Governor has made an appointment of a successor at a time the Missouri Senate is not in session, may such appointee be deemed to have been appointed and qualified as a member of this Board to actively participate in its operation and be entitled to compensation for such services and reimbursement of expenses as set out in Section 14,909?

"(2) Section 14,905 provides that the terms of the Board members (after the

initial appointees) shall be for the unexpired term. Your opinion is requested as to which of the following dates determine the time from which such term commences:

- (a) Date of appointment by the Governor;
- (b) Date of confirmation of appointment by the Senate;
- (c) Date of commission;
- (d) Date required oath taken."

Assuming that the appointments of successor members of the Board are subject to confirmation by the Senate, your inquiry is rather fully answered in a Missouri case, *State ex inf. v. Williams*, 222 Mo. 268, which gives the rule in this State, reaffirming the holding and adopting the language in *State ex rel. v. Stonestreet*, 99 Mo. 361, an early case on this question. Inasmuch as the Court, in the Williams case, adopted the language of the Stonestreet case, we will quote the pertinent parts from the Williams case, l.c. 283 and 284:

"The General Assembly provided for the first appointment to be made at a time when the Senate would not be in session. It must have known that the Senate would not be continuously in session, and would not likely be in session at the time when further appointments were made. The law contemplates that such appointments shall be made at the proper time, and that the Senate will act upon the appointment at the next session thereafter. The law does not contemplate that there can be no occupant of the office until both the Governor and Senate have acted. \* \* \* In the meantime, such appointee, after having otherwise qualified under the act, is entitled to the office until such time as the Senate may pass adversely upon his appointment. Should the Senate refuse to confirm, the Governor would then have to appoint another. This at least has been the uniform course pursued by all prior administrations dealing with legislative enactments of this character."

A second part of your inquiry seeks to determine, for pay purposes, a date on which the appointment takes effect. In *State ex inf. v. Williams*, above, the Court stated, l.c. 277, 279 and 280:

" \* \* \* The power to fix one means a power to fix the other, and it is immaterial at which end of the term this power operates. It can say in the first instance that this term shall begin on a certain date and run so long, or it can say this appointment is made under the law with the understanding that it shall end upon a certain date. In either case the power recognized as having the right to designate the beginning and ending of the term has acted.

\* \* \* \* \*

" \* \* \* But if the Legislature, being possessed of the power, had fixed the date of the commencement of the first appointee's official term, it would not be questioned that such initial point, being once made sure and steadfast, would recur at every corresponding period of two years.

\* \* \*

\* \* \* \* \*

"Under statutory provisions substantially identical with these under discussion, it has been held that the true rule was to construe the word "term" as designating consecutive periods of six years, following each other in regular order, the one commencing where the other ends, and treating the incumbent appointed in any such period as the incumbent in the particular term or period to which his appointment relates, his office expiring with the expiration of his term. (*People ex rel. v. McClare*, 99 N.Y. 83, 93.) \* \* \*

Section 14905, Laws of 1943, page 957, fixes an expiration date for the terms of the appointees, and is as follows:

"The term of one of the initial appointees shall expire with July first of the calendar year immediately succeeding that in which his appointment was made; and the terms of the other initial appointees shall expire, respectively, with the first day of July, one, two, three and four years after the expiration of the shortest term aforesaid. \* \* \*"

Therefore, the Legislature must have meant that the new terms of the successor appointees were to commence on July 1. However, it may take some time for the appointment and qualification of a successor, so provision was made for the incumbent holding over, to wit: "Every member shall, however, hold office until his successor is appointed and qualified."

In 43 Am. Jur., page 137, the rule is stated:

"Sec. 343. Effect of Holding Over. - A public officer entitled to hold over after the expiration of his term until his successor qualifies, may be entitled to the compensation of the office during the time in which he so holds over. \* \* \*"

What qualifies a Board member? Section 14905, above, states:

"To every member appointed by the Governor there shall be issued a commission or certificate of appointment; and every appointee, before entering upon his duties, shall take the oath of office required by the Constitution of all officers under the authority of this State."

In the Williams case, above, these facts were set forth, l.c. 273:

"On May 6, 1907, the Governor sent to the Senate the following communication:

"Office of the Governor.

"State of Missouri, City of Jefferson.

"May 6th, 1907.

"To the Senate:

Mr. D. P. Williams, Secretary -5-

"I have the honor to advise that I have this day, by and with the advice and consent of the Senate, appointed Jesse B. Sikes, of the city of St. Louis, to the office of Factory Inspector, vice J. C. A. Miller, resigned, for a term ending May 13, 1909.

"Respectfully,

"Jos. W. Folk,

'Governor.'

"This appointment was confirmed by the Senate at such extra session. The commission was of date May 11, 1907, and Sikes qualified May 17, 1907. \* \* \*

It will be noted that the Governor appointed Sikes on May 6, 1907, the commission was of date May 11, 1907, and "Sikes qualified" May 17, 1907.

The pertinent provisions of the statute under consideration in the Williams case were as follows:

"Before entering upon his official duties the Inspector shall make oath to support the constitution and faithfully demean himself in office; he shall also execute a bond to the state of Missouri, in such sum as the governor may prescribe, with two or more solvent sureties, to be approved by the governor, conditioned upon his faithful performance of the duties imposed upon him by this act."

Therefore, in order to qualify, it was necessary that Sikes make an oath and give a bond. We have a somewhat similar reading in Section 14905, excluding the bond proviso, of course.

In order for a member to be qualified, it is necessary that the Governor issue a commission and that the member take the oath of office.

In the light of the Williams case, above, we think that the date the oath is taken after the issuance of the commission is the first day for which compensation may be paid the incoming Board member, but that the terms of office commence on July 1 of each year, which is provided for by statute. The terms for the successor appointees are to be for five years. "Upon the expiration of each of said initial terms, the term of office of each member thereafter appointed shall be five years. Vacancies shall be filled by the Governor for the unexpired term."

Conclusion.

It is the opinion of this department that:

(1) The Governor may make recess appointments of members of the Missouri State Board of Accountancy, and said members may participate in its operation and be entitled to compensation for such services and reimbursement of expenses.

(2) The terms of the successor Board members date from July 1 of the year in which they are appointed.

(3) A Board member is not qualified until he takes the oath.

(4) A Board member may not receive compensation for performing the duties of the office until he has qualified, i.e., been issued a commission and taken the oath of office.

Respectfully submitted,

JOHN R. BATY  
Assistant Attorney General

APPROVED:

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J. E. TAYLOR  
Attorney General

JRB:ml

*Copy to  
G. Smith*

MAGISTRATE COURTS: When felony charge dismissed before preliminary  
CRIMINAL COSTS: hearing, neither the state nor county, nor the  
prosecuting attorney are liable for costs.  
When misdemeanor charge dismissed before trial,  
county is liable for costs..

November 12, 1947

FILED

97

Honorable Mark Wilson  
Judge of the Magistrate Court  
Henry County  
Clinton, Missouri

Dear Judge Wilson:

This is in reply to your letter of October 17, 1947, in which you request an opinion from this department, reading as follows:

"Several criminal cases, both felonies and misdemeanors, have been filed in this Court based upon the Prosecuting Attorney's own information and belief and have by him been dismissed before trial.

"If a felony case is filed by the Prosecuting Attorney upon his own information and belief and is dismissed by the Prosecuting Attorney before preliminary hearing who, if anyone, is responsible for the costs of the Sheriff and the Magistrate fees?

"Also if a misdemeanor is filed based upon the information of Prosecuting Attorney and is dismissed by him before hearing who, if anyone, is responsible for the Sheriff's fees and Magistrate fee?"

With reference to the first question presented, your attention is directed to an opinion of this department rendered to you as Prosecuting Attorney of Henry County under date of June 11, 1937, holding that when a person charged with a felony on complaint of the prosecuting attorney is dismissed from said charge at the request of the prosecuting attorney before a preliminary hearing, neither the state nor county, nor the prosecuting attorney are liable for the costs



which have accrued in said case, and, further, that the officers concerned are not entitled to collect any costs in said case. A copy of the opinion is enclosed herewith for your use.

A further question presented concerns the liability for criminal costs in a case where a person is charged with a misdemeanor on information by the prosecuting attorney but said charge is dismissed by the prosecuting attorney before trial.

Prosecutions before magistrates for misdemeanors are by informations made by the prosecuting attorney of the county in which the offense may be prosecuted. Upon the filing of an information by the prosecuting attorney it is the duty of the magistrate to forthwith issue a warrant for the arrest of the defendant. The filing of such an information has the effect of instigating a criminal prosecution. This was recognized by the Supreme Court in *Ex Parte Bedard*, 106 Mo. 616, l.c. 622:

" \* \* \* The determination of the question here hinges upon the scope and meaning of the words 'criminal prosecution,' as used in section 4174, *supra*. We have no doubt they include a criminal information for a misdemeanor, \* \* \*"

If, after the prosecution has commenced, the prosecuting attorney wishes to dismiss the charges brought against the defendant, he must enter a *nolle prosequi*. For the purpose of criminal costs statutes, a *nolle prosequi* is considered the same as if the defendant had been acquitted. We find this rule set out in the case of *The State ex rel. Tudor v. The Platte County Court*, 40 Mo. App. 503, at page 506:

"The sole question that was tried below, and is for trial here, is whether the county of Platte is liable for the costs arising under the above-mentioned indictment.

"The controversy is whether the state or county is liable for relator's costs and the case depends upon a construction of the criminal costs statute; and in passing on the question we shall consider the case as though the defendant had been acquitted. The nolle prosequi amounted to an acquittal in the sense of the statute."

In all misdemeanor cases on information of the prosecuting attorney, where the defendant is acquitted, the costs are paid by the county in which the information was filed, except when they are paid by the prosecutor or as otherwise provided by law. Section 4223, R.S. No. 1939, provides:

"In all capital cases, and those in which imprisonment in the penitentiary is the sole punishment for the offense, if the defendant is acquitted, the costs shall be paid by the state; and in all other trials on indictments or information, if the defendant is acquitted, the costs shall be paid by the county in which the indictment was found or information filed, except when the prosecutor shall be adjudged to pay them or it shall be otherwise provided by law."

The word "prosecutor," as used in the above statute, has reference only to those persons contemplated in Section 3895, R.S. No. 1939, and has no reference to the prosecuting attorney. A reading of Section 3900, R.S. No. 1939, makes this quite clear. Said section provides as follows:

"When the information is based on an affidavit filed with the clerk or delivered to the prosecuting attorney, as provided for in section 3895, the person who made such affidavit shall be deemed the prosecuting witness, and in all cases in which by law an indictment is required to be indorsed by a prosecutor, the person who makes the affidavit upon which the information is based, or who verifies the information, shall be deemed the prosecutor; and in case the prosecution shall fail from any cause, or the defendant shall be acquitted, such prosecuting witness or prosecutor shall be liable for the costs in the case not otherwise adjudged by the court, but the prosecuting attorney shall not be liable for costs in any case."  
(underlining ours.)

The last sentence of said Section 3900 clearly indicates that the prosecuting attorney is not liable for the costs in any case. "

Conclusion.

It is the opinion of this department that when a person charged with a felony or complaint of the prosecuting attorney is dismissed from said charge at the request of the prosecuting attorney before preliminary hearing, neither the state nor county, nor the prosecuting attorney are liable for the costs which have accrued in said case, and that the officers concerned are not entitled to collect any costs in said case. It is further the opinion of this department that when a person charged with a misdemeanor on information of the prosecuting attorney is dismissed before trial from said charge by a nolle prosequi, the county is liable for the costs which have accrued in said case.

Respectfully submitted,

DAVID DOHERTY  
Assistant Attorney General

APPROVED:

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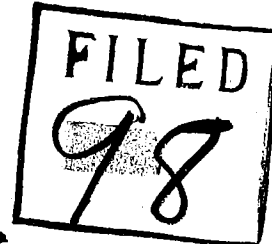
J. E. FAYSON  
Attorney General

DD:ml  
Enc.

QVO WARRANTO: Disposition of fines assessed against fire insurance companies.

Opinion No. 98 (1947)

April 3, 1947



Honorable Robert W. Winn  
State Treasurer  
Jefferson City, Missouri

Dear Sir:

Reference is made to your request for an official opinion of this office, which, for clarity, may be stated thusly:

Into what fund, or funds, should the fines paid by the respondents in the case of State of Missouri ex inf. J. E. Taylor, Attorney General vs. American Insurance Company, a Corporation, et al., Respondents, be paid?

The moneys referred to in your request are to be paid into the treasury of the State of Missouri by the Clerk of the Supreme Court. A portion of the opinion in the case mentioned reads as follows:

" \* \* \* It is further ordered and adjudged that the respondents and each of them shall pay as a penalty for such misuse and abuse of their corporate franchises the fine indicated below, such fine to be paid to the Clerk of this Court within sixty days after the adoption of this opinion, and that respondents pay the costs of this proceeding. The clerk of this court shall pay the amount of the fines collected into the treasury of the state. \* \* \*"

At the outset, it may be well to consider and dispose of any contentions that might be urged to the effect that the disposition of such moneys will be controlled by the provisions of Section 7 of Article IX of the Constitution of 1945. A portion of this constitutional provision reads as follows:

" \* \* \* the clear proceeds of all penalties, forfeitures and fines collected hereafter for any breach of the penal laws of the State, \* \* \* shall be distributed annually to the schools of the several counties according to law." (Emphasis ours.)

It is our thought that this constitutional provision is inapplicable, however, for reasons that will appear subsequently. You will note that the constitutional provision relates only to penalties, forfeitures and fines arising from violation of the penal laws of the state. It is believed that the use of the words emphasized is significant as they are of a restricted and technical import.

It is a rule of constitutional construction, as well as of statutes, that words having a technical meaning are to be so construed. The term "penal laws" has, through long legal usage and by reason of judicial construction, acquired such a meaning. To determine whether or not the technical meaning accorded these words will have the effect of rendering the constitutional provision inapplicable will first require a consideration of the precise nature of a proceeding in the nature of quo warranto.

Although originally one criminal in nature, yet proceedings of this type have now lost, at least in Missouri, all of the characteristics of a criminal action. The general rule is stated thusly in 51 C. J., page 312:

"Except in a few jurisdictions wherein the proceeding is regarded as quasi criminal, it is, and for some time has been, a rule that the remedy of quo warranto, or an action or proceeding in the nature thereof, whether denominated a quo warranto proceeding, an information in the nature of quo warranto, or a statutory remedy, is civil and not criminal. The ancient writ of quo warranto was strictly a civil remedy. Originally the information in the nature of quo warranto, which succeeded the ancient writ, was essentially a criminal prosecution instituted for the purpose of subjecting defendant to punishment by fine, as well as a judgment of ouster, but it has long since lost its character as a criminal proceeding in everything except form, the fine being omitted or limited to a nominal amount.  
\* \* \*

The statement contained in the quoted provision from Corpus Juris with respect to fines being omitted or limited to a nominal amount does not characterize the judgments of the courts of Missouri. This appears in the present instance, as fines totalling some two million dollars have been imposed. This but follows the course taken by the Supreme Court in prior proceedings similar in nature, particularly the case of Standard Oil Co. v. Missouri, 224 U. S. 270, 32 Sup. Ct. 406, 56 L. Ed. 760, affirming 218 Mo. 1.

With this exception, however, the general rule is followed in Missouri in so far as determination of the type of a proceeding in the nature of quo warranto is concerned. This appears from the opinion in State ex inf. Attorney General v. Drainage District, 234 S. W. 344, 1. c. 347, wherein the Supreme Court of Missouri, in Banc, said:

" \* \* \* Quo warranto is one of the most ancient writs known to the common law. Formerly a criminal method of prosecution, it has long since lost its criminal character, and is now a civil proceeding, expressly recognized by statute, and usually employed for trying the title to a corporate franchise or to a corporate or public office.  
\* \* \*"

With this historical background, it now becomes pertinent to determine the technical meaning of the words "penal laws" incorporated in the constitutional provision. Many definitions of this term are found in Words and Phrases, Vol. 31, Perm. Ed., pages 585-587, inclusive, and 1947 Pocket Part, page 145. Probably the most concise of these definitions is the one found on page 145 of the 1947 Pocket Part, which reads as follows:

" 'Penal laws,' strictly and properly, are those imposing punishment for an offense committed against the state, and which by the English and American constitutions, the executive of the state has the power to pardon,  
\* \* \* Salzman v. Boeing, 26 N. E. 2d 696, 699, 304 Ill. App. 405."

It appears throughout the many definitions which appear in the work mentioned that, to constitute a penal law, there must be a penalty imposed for an act detrimental to the state, and as a corollary thereto the punishment for such act must be one to which the executive power of pardon extends.

With this definition in mind, and taking due cognizance of the nature of a proceeding in quo warranto in Missouri as being one of a civil nature, it immediately becomes apparent that the fine, penalty or forfeiture imposed upon the respondent in such actions is not one for the breach of a "penal law." Upon this premise, it therefore seems quite clear that the constitutional provision quoted above, that is to say, Section 7 of Article IX of the Constitution of 1945, is not determinative of the disposition to be made of fines, penalties and forfeitures imposed in proceedings in the nature of quo warranto.

Comes, then, the question of what disposition should be made of the fines assessed in the instant case. As appears from the opinion of the Supreme Court of Missouri, and particularly that portion quoted verbatim above, the fines are to be paid by the Clerk of the Supreme Court into the treasury of the state. This is but in accord with the constitutional provision requiring moneys received by the state to be deposited in the state treasury. Your attention is directed to the provisions of Section 15 of Article IV of the Constitution of 1945, reading, in part, as follows:

"All revenue collected and moneys received by the state from any source whatsoever shall go promptly into the state treasury, and all interest, income and returns therefrom shall belong to the state. Immediately on receipt thereof the state treasurer shall deposit all moneys in the state treasury to the credit of the state in banking institutions selected by him and approved by the governor and state auditor, and he shall hold them for the benefit of the respective funds to which they belong and disburse them as provided by law. \* \* \*

You will note that the State Treasurer is required to hold such moneys for the benefit of the respective funds to which they belong. This, then, squarely presents the question as to what funds the fines assessed in the instant case properly belong. In this regard, your attention is directed to a portion of Section 3(b) of Article IX of the Constitution of 1945, reading as follows:

" \* \* \* but in no case shall there be set apart less than twenty-five per cent of the state revenue, exclusive of interest and

sinking fund, to be applied annually to the support of the free public schools." (Emphasis supplied)

This provision represents a readoption of Section 7 of Article XI of the Constitution of 1875.

At first blush, it might be thought that the moneys being paid into the state treasury and arising from the fines imposed upon the respondents in the instant case would be considered "state revenue" within the meaning of the constitutional provision quoted, and therefore that twenty-five per cent of such moneys should be set apart to the free public school fund. However, we are of the opinion that such moneys are not within the purview of the constitutional provision.

We are persuaded to this view by reason of the opinion of the Supreme Court of Missouri in *State ex rel. v. Gordon*, 266 Mo. 394. This was an action brought by the State Superintendent of Public Schools against the State Auditor for the purpose of determining to what extent the free public school fund was entitled to apportionment with respect to a great many miscellaneous items received into the state treasury. Among such items were the fines paid into the state treasury pursuant to judgments of the Supreme Court of the State of Missouri based upon violations of the state anti-trust law. We think the moneys derived from those sources bear characteristics so similar to the moneys received in the instant case as to compel the view that exactly the same principles should be applied in determining whether or not such moneys are subject to apportionment to the free public school fund.

In the case mentioned, the Supreme Court of Missouri said, 1. c. 418:

"From the rules which we are impelled to formulate from our view of the law, we are of opinion that the fines assessed against the Arkansas Lumber Co. and others in the suit of *State ex inf. v. Arkansas Lumber Co.*, 260 Mo. 212, are not to be taken into account but wholly excluded."

The reasoning which controlled the opinion is discussed at greater length at 1. c. 421-422, and appears in the following language:

" \* \* \* While on first blush an apparently though not really arbitrary rule may seem to



be invoked as to such items as come into the general revenue fund of the State \* \* \* occasionally and adventitiously (e. g., fines accruing from prosecutions of lumber companies, State ex inf. v. Arkansas Lumber Co. et al., 260 Mo. 212), yet upon more careful thought and consideration it will be seen that a crying necessity exists for a general rule to use in setting apart this fund, which will forever dissipate the dark obscurity which has heretofore befogged it, and that no such rule can be logically formulated, which will serve to measure all cases, if these items are to be included. This is the administrative difficulty; if it be wrongly resolved a word from the Legislature can correct it. Besides, it may well be that these rules which we have formulated as the only consistent interpretation of the legislative intent derivable from the language of the appropriation act under discussion, will serve to obviate fat and lean years in public school revenues, and that it was so intended. That those in charge of such schools may confidently rely upon a fairly fixed and stable income, and that they may not be induced to lavish and waste funds this year and be forced to a too lean and scrimping economy next year, is a desideratum to be wished for. The conclusions here reached bring this to pass and are yet, we think, in line with the law both here and elsewhere. The rule allows full latitude for a growth of the State, a condition fully demonstrated by the fact that the amount below set apart from State revenues for the support of the public school system exceeds by many thousands of dollars any appropriation for any one year ever before so devoted, from this source." (Emphasis ours.)

What has been said heretofore applies with equal force to the appropriation act, found as Section 2.120 of House Bill 987 of the 63rd General Assembly, which reads as follows:

"The State Comptroller is hereby authorized and directed to set aside one-third (1/3) of the ordinary general revenue paid into the state treasury for the period beginning July

1, 1946 and ending June 30, 1947, into a fund to be known as the public school moneys fund; the same to be used for the support of the free public schools." (Emphasis ours.)

From the language used in the appropriation act, it is apparent that the General Assembly has accorded to this constitutional provision the interpretation which we have placed thereon. We refer particularly to the incorporation in the appropriation act of the words "ordinary general revenue." In construing the effect of the usage of these words, the Supreme Court of Missouri, in Banc, in *State ex rel. v. Gordon*, 266 Mo. 394, 1. c. 411, gave this definition thereof:

"The regular and usual annual income of the State, however derived, which is subject to appropriation for general public uses."

Such construction placed upon the constitutional provision, as evidenced by the action of the General Assembly, is entitled to great weight in interpreting the constitutional provision in accord with general rules relative to the determination of the meaning of constitutional provisions.

In accord with what has been said previously, and considering the nature of the moneys to be paid into the state treasury in the instant case as being derived from sources which are neither regular nor usual, it becomes clear that the appropriation act will not serve to require the apportionment of any part thereof to the free public school fund.

Having determined that the moneys paid into the state treasury in the instant case are not subject to apportionment in any part to the free public school fund, we reach the conclusion that such moneys are to be held by the State Treasurer for the benefit of the general revenue fund of the state, subject to appropriation by the General Assembly for public uses.

#### CONCLUSION

In the premises, we are of the opinion that the moneys paid into the state treasury by the Clerk of the Supreme Court of Missouri, arising from fines imposed upon fire insurance companies in the proceeding in the nature of quo warranto, entitled "*State of Missouri ex inf. J. E. Taylor, Attorney General v. American*

Honorable Robert W. Winn

-8-

Insurance Company, a Corporation, et al., Respondents," are, under the Constitution of 1945 and the provisions of Section 2.120 of House Bill 987 of the 63rd General Assembly, to be held for the benefit of the general revenue fund of the State of Missouri, subject to appropriation therefrom by the General Assembly for general public uses.

Respectfully submitted,

WILL F. BERRY, JR.  
Assistant Attorney General

APPROVED:

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J. E. TAYLOR  
Attorney General

WFB:HR:BJ

CRIMINAL CONTEMPT: Disposition of fine imposed for criminal contempt.

May 29, 1947



Honorable Robert W. Winn  
State Treasurer  
Jefferson City, Missouri

Dear Sir:

Reference is made to your inquiry of recent date for an official opinion of this office, which read as follows:

"There has been deposited with me as State Treasurer of Missouri the sum of \$25,000 paid by W. D. Koon and Mrs. W. D. Koon in discharge of the fine imposed upon them in the case entitled 'State of Missouri ex inf. Attorney General vs. W. D. Koon and Mrs. W. D. Koon.'

"I request your opinion as to the proper disposition to be made of such money so deposited."

The case mentioned by you was determined by the Supreme Court of Missouri, in banc, at its January Session, 1947. In the proceeding, which was ancillary to a quo warranto action previously had, the respondents, W. D. Koon and Mrs. W. D. Koon, were found guilty of criminal contempt of the Supreme Court of Missouri. A fine of \$25,000 was imposed for such contumacious conduct. The relevant portion of the opinion in the case mentioned reads as follows:

"Their disobedience of our judgment in the quo warranto case is punishable as criminal contempt. \* \* \* In view of our conclusion that respondents are subject to punishment as and for a criminal contempt, we next consider that phase of this proceeding. Sentences for criminal contempt are punitive in nature. Such punishments must vindicate

the court's authority to have its mandates respected. \* \* \* We are of the considered opinion that under the principles of law involved and under the instant facts and circumstances the respondents should pay a fine of \$25,000."

It is the fine mentioned in the quoted portion of the judgment which has now been deposited with you in your official capacity as Treasurer of the State of Missouri.

Generally speaking, moneys coming into the state treasury are to be deposited in the general revenue fund. However, certain constitutional and statutory provisions may vary this ordinary method for the handling of such receipts, and we therefore deem it advisable to consider such of these as may be thought pertinent to a determination of the matter now under consideration.

It is our belief that the disposition of the fine imposed in the proceeding for criminal contempt should be controlled by the provisions of Section 7 of Article IX of the Constitution of 1945. The portion of such constitutional provision considered germane to the matter under consideration reads as follows:

"\* \* \* the clear proceeds of all penalties, forfeitures and fines collected hereafter for any breach of the penal laws of the State, \* \* \* shall be distributed annually to the schools of the several counties according to law."

If the punishment imposed upon the respondents in the cause referred to be considered a "penalty, forfeiture or fine" collected for a breach of the "penal laws" of the state, then the constitutional provision will control its disposition.

In the construction of constitutions, equally as well as in the construction of statutes, words and phrases are to be taken in their usual and ordinary meaning, unless such words and phrases have acquired a technical meaning prior to their incorporation in such constitution. This rule was declared by the Supreme Court of Missouri in *State ex rel. v. Railroad*, 263 Mo. 689, 1. c. 696, wherein it was said:

" \* \* \* It is fundamental that in construing the language of a Constitution the words used, unless they are technical, are to be understood in their usual and ordinary sense. (Cooley's Con. Lims. (7 Ed.) 92.)"

Applying this rule to the constitutional provision quoted supra, we find that the term "penal laws" as used therein is one which has acquired such a technical meaning. We direct your attention to State ex rel. v. Warner, 197 Mo. 650, 1. c. 659, wherein the Supreme Court of Missouri adopted approvingly the definition of this term found in Huntington v. Attrill, 13 Sup. Ct. 224, 146 U. S. 657, 36 L. Ed. 1123, in the following language:

"Penal laws, strictly and properly, are those imposing punishment for an offense committed against the State, and which, by the English and American constitutions, the executive of the State has the power to pardon. Statutes giving a private action against the wrongdoer are sometimes spoken of as penal in their nature, but in such cases it has been pointed out that neither the liability imposed nor the remedy given is strictly penal."

This definition is in accord with the great weight of authority, according the same definition to the term, cited in 31 Words and Phrases, Perm. Ed., pages 585-587, inclusive.

You will note that this definition requires the offense against the public to be one which is subject to the pardoning power of the chief executive. Under the Constitution of Missouri of 1945, the pardoning power is vested in the Governor. It is found as Section 7 of Article IV, reading as follows:

"The governor shall have power to grant reprieves, commutations and pardons, after conviction, for all offenses except treason and cases of impeachment, upon such conditions and with such restrictions and limitations as he may deem proper, subject to provisions of law as to the manner of applying for pardons. The power to pardon shall not include the power to parole."

It appears from this constitutional provision that the pardoning power of the Governor extends to all offenses except those specifically enumerated, that is to say, treason and cases of impeachment.

It has been held by the Supreme Court of Missouri that contempt of court is a criminal offense and that conviction therefor is similar in characteristics to a conviction for any other criminal offense. We quote from *In Re Shull*, 221 Mo. 623, 1. c. 627:

"Contempt of court is 'a specific criminal offense and a fine imposed is a judgment, in a criminal case. The adjudication is a conviction, and the commitment in consequence thereof is execution.' (Church on Habeas Corpus (2 Ed.), sec. 308; Ex parte Kearney, 7 Wheat. 38.) \* \* \*"

From this decision, we are led to the belief that the pardoning power of the Governor extends to convictions for criminal contempt. Such being the case, a fine imposed as punishment upon conviction of criminal contempt is a "penalty, forfeiture and fine" collected for a breach of the "penal laws" of the state.

#### CONCLUSION

In the premises, we are of the opinion that the money now on deposit in the state treasury, arising from the fine imposed upon the respondents in the case of *State ex inf. Attorney General vs. W. D. Koon and Mrs. W. D. Koon*, is to be held by the State Treasurer for distribution to the schools of the several counties as provided by law.

Respectfully submitted,

WILL F. BERRY, Jr.  
Assistant Attorney General

APPROVED:

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J. E. TAYLOR  
Attorney General

WFB:HR

COUNTY CLERK: Salaries.  
COUNTY COURT:

FILED

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January 8, 1947

Honorable Harry V. Woodworth  
County Clerk  
Lewis County  
Monticello, Missouri

Dear Sir:

This is in reply to your letter of recent date, requesting an official opinion of this department, and reading as follows:

"We would like very much to have an opinion regarding the County Clerk's salary for this county. We are in class 3, Group 3 which makes our per capita 11 plus. What we would like to call your attention to is Section 2a of House Bill No. 867 in which it states that a further sum of \$500.00 in addition to the salary is to be added to the County Clerk's salary. We do have 2 court houses in this county in which there are certain county offices.

"Will you please give us your opinion at once in regard to this additional salary for the clerk."

Section 2a of House Bill No. 867, passed by the 63rd General Assembly, provides as follows:

"In all counties of the third class in which there is a court of common pleas having exclusive, original jurisdiction in both civil and criminal cases in certain townships, and in which county there are two court houses in which there are certain county offices, the county clerk in such county shall receive a further sum of \$500.00 in addition to the salary and remunerations provided in Sections 1, 2 and 4 of this act." (Emphasis ours.)



Honorable Harry V. Woodworth - 2

The provision "and in which county there are two court houses," etc., obviously refers only to counties of the third class in which there is a court of common pleas having exclusive, original jurisdiction in both civil and criminal cases in certain townships.

There is no provision in the Constitution or laws of Missouri for a court of common pleas having exclusive, original jurisdiction in both civil and criminal cases in certain townships in Lewis County, Missouri.

Therefore, the provisions of Section 2a of House Bill No. 867 are not to be considered in the determination of the salary of the Clerk of the County Court of Lewis County, Missouri.

#### CONCLUSION

It is the opinion of this department that the provisions of Section 2a of House Bill No. 867, passed by the 63rd General Assembly, do not apply to a determination of the salary of the County Clerk of Lewis County, Missouri.

Respectfully submitted,

C. B. BURNS, Jr.  
Assistant Attorney General

APPROVED:

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J. E. TAYLOR  
Attorney General

CBB:HR